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Attorneys for Plaintiffs

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 Hon. Robert T. Waters, Dept. 11B*]

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

FINAL APPROVAL HEARING
Date: April 24, 2024
Time: 9:00 a.m.
Dept.: 11B

Complaint filed: October 29, 2021
FAC filed: December 16, 2022
Trial date: Not set

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 24, 2024 at 9:00 a.m., in Department 11B of the San Joaquin County Superior Court, located at 180 E Weber Avenue, Stockton, CA 95202, Plaintiff Kenneth Wilburn ("Plaintiff") will, and hereby do, move for an order as follows:

1. Certifying the Class for settlement purposes;
2. Approving the settlement as fair and reasonable and finding that class members were given notice of the settlement, and advised of their rights to participate in the settlement, object to the settlement, or exclude themselves from the settlement, in a reasonable manner;
3. Appointing Plaintiff Kenneth Wilburn as Class Representatives for settlement purposes, and approving a Class Representative Service Award of $10,000.00 to Plaintiff;
4. Appointing Plaintiffs' Counsel, Wilshire Law Firm, PLC, as Class Counsel for settlement purposes, and approving payment of $178,333.33 in attorney's fees, which is 33 1/3% of the Gross Settlement Amount;
5. Approving costs in the amount of $20,000.00 for litigating this action to Class Counsel;
6. Approving payment of administrative expenses to CPT Group, Inc. as the Settlement Administrator in the amount of $9,500;
7. Directing that the clerk of the Court to enter the Court's order as a final judgment; and,
8. Without affecting the finality of the final judgment, reserving continuing jurisdiction over the parties for the purposes of implementing, enforcing and/or administering the Settlement or enforcing the terms of the judgment.

This motion will be based on the accompanying Memorandum of Points and Authorities, the Declarations of Justin F. Marquez and Tarus Dancy, and such oral argument as may be heard by the Court, and all other papers on file in this action, including but not limited to the

Declarations of Plaintiff previously submitted in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

Dated: April 1, 2024

Respectfully submitted,

WILSHIRE LAW FIRM, PLC

By: ______________________

Justin F. Marquez
Erik Dos Santos
Zachary D. Greenberg

Attorneys for Plaintiffs and Putative Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Kenneth Wilburn ("Plaintiff") seeks final approval of a proposed $535,000.00 non-reversionary, class and representative action settlement with Defendants Concrete, Inc., d/b/a Knife River Construction, MDU Resources Group, Inc., d/b/a Knife River Construction, and Knife River Construction (collectively, "Defendants", and collectively with the Plaintiff, the "Parties"). The Settlement will provide substantial monetary payments to approximately 225 class members.

The proposed settlement satisfies all the criteria for settlement approval under California law. A presumption of fairness exists as the Settlement was reached through extensive, mediated arm's-length negotiations, and after sufficient investigation and discovery, which allowed Class Counsel to act intelligently. Class Counsel is also experienced in similar wage-and-hour litigation. Upon the Court's approval of the settlement, participating class members will receive an ***average estimated individual <u>net</u> settlement payment of approximately $1,298.52***, with the ***highest individual <u>net</u> settlement payment to be paid of approximately $2,699.70***. (Declaration of Tarus Dancy on Behalf of CPT Group, Inc. ["Dancy Decl."], ¶ 15.) As of filing this Motion, there are **no objections to the settlement** and **no requests for exclusion**. (*Id.* at ¶¶ 10-12.) Thus, the proposed Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class Members.

Final approval of the settlement is warranted as it satisfies all the criteria for approval under California law. As demonstrated in the motion for preliminary approval the proposed Settlement provides excellent benefits to the class, particularly considering the complexities and risks of the case. Accordingly, Plaintiff requests that the Court grant final approval of the proposed Settlement.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff's Claims

This is a wage and hour class action and PAGA representative action. Plaintiff and putative Class Members worked in California as hourly-paid or non-exempt employees for

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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 other things. Defendants operate multiple job sites throughout the state of California. (Declaration of Justin F. Marquez in Support of Plaintiff's Motion for Final 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 failed to provide employees with legally compliant meal and rest periods, and Defendants have failed to reimburse business expenses. Based on these allegations, Plaintiff asserts related claims for failure to provide accurate wage statements, failure to pay all final wages at termination, unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.)

On October 29, 2021 Plaintiff filed a putative wage-and-hour class action complaint against Defendants for: (1) failure to pay minimum and straight time wages (Labor Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Labor Code §§ 1194 and 1198); (3) failure to provide meal periods (Labor Code §§ 226.7 and 512); (4) failure to authorize and permit rest periods (Labor Code §§ 226.7); (5) failure to pay final wages at termination (Labor Code § 201-203); (6) failure to provide accurate itemized wage statements (Labor Code § 226); and (7) unfair business practices (Business and Professions Code § 17200 *et seq*.). Plaintiff sent a notice to Defendants and the California Labor & Workforce Development Agency ("LWDA") alleging similar wage and hour violations pursuant to the PAGA (Labor Code §§ 2699, *et seq.*) on November 2, 2021. (Marquez Decl., ¶ 4.) On April 19, 2022, Plaintiff sent an amended PAGA notice to Defendants and the LWDA further detailed the wage-and-hour violations that he and other aggrieved employees experienced while employed by Defendants. (*Id.*)

On March 30, 2022, Plaintiff filed a separate complaint to assert his PAGA claims. (*Id.* at ¶ 5.) Pursuant to a stipulation filed by the Parties to consolidate the Class and PAGA Actions, on December 16, 2022, the Court ordered the two matters consolidated, with the Class Action designated as the lead case. (*Id.*)

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B. Discovery and Investigation

Following the filing of the Complaint, the Parties exchanged documents and information before mediating this action. Defendants produced a sample of time and pay records for Class Members. Defendants also provided documents of its wage and hour policies and practices during the Class Period, and information regarding the total number of current and former employees in its informal discovery responses. (*Id.* at ¶ 6.)

After reviewing documents regarding Defendants' wage and hour policies and practices, analyzing Defendants' timekeeping and payroll records, and interviewing Class Members, Class Counsel was able to evaluate the probability of class certification, success on the merits, and Defendants' maximum monetary exposure for all claims. (*Id.* at ¶ 7.) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id.*) Class Counsel reviewed these records and utilized an expert to prepare a damage analysis prior to mediation. (*Id.*)

C. Settlement Negotiations and Agreement

On October 31, 2022, the parties participated in private mediation with experienced class action mediator Lisa Klerman, Esq. (*Id.* at ¶ 8.) The mediation was conducted via Zoom. The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. 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 position through trial and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiff's claims and Defendants' defenses, the Parties reached a settlement the material terms of which are encompassed within the Settlement. (*Id.* at 8, **Ex. 1** [Class Action and PAGA Settlement Agreement and Class Notice].)

Class Counsel has conducted a thorough investigation into the facts of this case. (*Id.* at ¶ 9.) Based on the foregoing discovery and their own independent investigation and evaluation, Class Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class Members in light of all known facts and circumstances,

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the risk of significant delay, the defenses that could be asserted by Defendants both to certification and on the merits, trial risk, and appellate risk. (*Id.*)

D. <u>Preliminary Approval and Overwhelming Support for the Settlement</u>

The Court granted Plaintiff's Motion for Preliminary Approval of the Settlement on September 8, 2023. (*Id.* at ¶ 10.) The deadline for class members to opt out or object to the Settlement was February 9, 2024. (*Id.*) The reaction of the Class to the settlement has been overwhelmingly positive. Indeed, as of the filing of this Motion, no Class Member has opted out of the settlement, and no Class Member has objected to the settlement. (*Id.*)

E. <u>Key Terms of the Proposed Settlement</u>

Under the Settlement Agreement, Defendant will pay $535,000 to resolve this litigation. The key terms include:

1. <u>Settlement Class</u>: For purposes of this Settlement Agreement only, Class is defined as "all persons employed by Defendants in California and classified as an hourly-paid, non-exempt employee during the Class Period." (Marquez Decl., Exhibit 1, Class Action and PAGA Settlement Agreement and Class Notice [the "Settlement"], ¶ 1.4.)

2. <u>Class Period</u>: "means the period that starts on May 4, 2017 and shall end on January 31, 2023 . . . ." (Settlement, ¶ 1.11.)

3. <u>PAGA Period:</u> "means the period that starts on May 4, 2020 and shall end on January 31, 2023 . . . ." (Settlement, ¶ 1.30.)

4. <u>Participating Class Members:</u> "means a Class Member who does not submit a valid and timely Request for Exclusion from the Settlement." (Settlement, ¶ 1.34.)

5. <u>Aggrieved Employees</u>: "means a person employed by Defendants in California and classified as an hourly-paid, non-exempt employee who worked for Defendants during the PAGA Period." (Settlement, ¶ 1.3.)

6. <u>Gross Settlement Amount:</u> This amount is $535,000, for all claims, including wages, interest, the Class Counsel Award, Litigation costs, Settlement Administration Costs, payment to the LWDA for the alleged PAGA penalties, all other penalties, Defendants' share of employer payroll taxes on the portion of Individual Class Member payments allocated to

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wages, and the Class Representative Service Award. (Settlement, ¶ 1.21.)

7. Uncashed Checks: If a settlement check is returned to the Settlement 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 to 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. Release by Non-Participating Class Members Who Are Aggrieved Employees: "All Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint, and the PAGA Notice and ascertained in

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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; and (6) failure to provide accurate itemized wage statements." (Settlement, ¶ 6.3.)

10. No Reversion: "None of the Gross Settlement Amount will revert to Defendants." (Settlement, ¶ 3.1.)

11. PAGA Allocation: The settlement includes $25,000 allocated to Plaintiff's claims under PAGA, with 75% ($18,750.00) being paid to the LWDA and 25% ($6,250.00) being paid to the Aggrieved Employees. (Settlement, ¶ 3.2.5.) Class Counsel submitted the proposed settlement to the LWDA before filing the Motion for Preliminary Approval. (Marquez Decl., ¶ 10.)

12. Net Settlement Amount: The "Net Settlement Amount" is the amount that remains and that shall be paid to Settlement Class Members after the following amounts are subtracted: Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment. The remainder is to be paid to Participating Class Members as Individual Class Payments. (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 Members' 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 (6,250.00) 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

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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. (Settlement, ¶ 3.2.2.)

16. Notice of Proposed Class Action Settlement: The Notice set forth in plain terms, a statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees, costs, and service awards being sought, and an explanation of how the settlement allocations are calculated. (Dancy Decl., Ex. A.) Class Members were notified by first-class mail of the Settlement. (*Id.,* at ¶ 7.) The Settlement Administrator also undertook its best efforts to ensure that the Notice was provided to the current addresses of Class Members, including conducting a national change of address search and re-mailing notices to updated addresses when needed. (*Id*., at ¶¶ 7-9.)

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III. THE SETTLEMENT MERITS FINAL APPROVAL

The law favors the settlement of lawsuits, particularly in class actions and other complex cases. (*See e.g., Neary v. Regents of Univ. of California* (1992) 3 Cal.4th 272, 277-81.) Factors to be considered in evaluating a class action settlement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through proceedings, the experience and views of counsel, the presence of a government participant, and the reaction of the class members to the proposed settlement." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) A presumption that a settlement is fair and reasonable exists where, as here, the following four factors are present: "(l) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 245.)

Whether a class action settlement should be approved is a question committed to the trial court's broad discretion. (*Id.* at pp. 234-35.) In exercising its discretion, the Court should give "[d]ue regard . . . to what is otherwise a private consensual agreement between the parties." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) "The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Id*. [internal citations omitted].)

A. <u>The Settlement Reflects a Reasonable Compromise</u>

A settlement is not judged against what the plaintiff might recover had she prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. (*Wershba, supra,* 91 Cal.App.4th at pp. 246, 250 ["Compromise is inherent and necessary in the settlement process . . . even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation."].)

The settlement obviates the significant risk that this Court may deny certification of all or some of Plaintiff's claims. (Marquez Decl., ¶ 12.) While Plaintiff is confident in the merits of his claims, a legitimate controversy exists as to each cause of action. (*Id.*) Plaintiff also recognizes that proving the amount of wages due to each class member would be an expensive, time-consuming, and uncertain proposition. (*Id.*) Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued litigation would be expensive, involving a trial and possible appeals, and would substantially delay and reduce any recovery by the class. (*Id.*)

Because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment. When considering the risks of litigation, the uncertainties involved in achieving class certification, the burdens of proof necessary to establish liability, the probability of appeal of a favorable judgment, it is clear that the settlement amount of

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$535,000 is within the "ballpark" of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed, each Settlement Class Member is eligible to receive an average benefit of approximately $1,298.52, and the highest estimated net payout is expected to be approximately $2,699.70.*** (Dancy Decl., ¶ 15.)

B. <u>The Settlement was Reached After Arms-Length Negotiations Following Formal and Informal Discovery</u>

The Settlement was reached over the course of a full-day mediation with experienced employment mediator, Lisa Klerman, Esq. (Marquez Decl. ¶ 8.) 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 a sample of 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 ¶¶ 6-7.) 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 negotiating the proposed Settlement. (*Id.*)

C. <u>Plaintiff's Counsel Has Substantial Class Action Experience</u>

Class Counsel also has considerable experience and has demonstrated competence with litigating wage and hour class actions. (Marquez Decl. at ¶¶ 28-43.) Class Counsel has substantial experience in all facets of litigation in state and federal court, including discovery, law and motion, trial, appeals, arbitration and mediation. Class Counsel has litigated numerous class actions on behalf of plaintiffs and have been lead counsel or otherwise exercised significant case handling

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responsibilities in numerous cases resulting in millions of dollars in class action settlements. (*Id*.)

Based on Class Counsel's experience as employment and class action attorneys, Class Counsel is eminently qualified to evaluate the strength of Plaintiff's claims, the strength of Defendants' defenses against certification, the strength of Defendants' defenses on the merits, and the fairness of the Settlement. Their opinion that final approval of the Settlement would be in the best interests of class members in light of the significant risks of litigation is entitled to great weight. (*See Kullar, supra,* 168 Cal.App.4th at 129 ["The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arms' length transaction entered without self-dealing or other potential misconduct"].)

D. <u>There Were No Objections to the Settlement</u>

No class member has objected to the Settlement and no class member has requested exclusion from the Settlement. (Dancy Decl., ¶ 11-12.) The overwhelmingly positive response of the class strongly supports final approval of the Settlement. (*See, e.g., In re Lifelock, Inc. Marketing and Sales Practices Litigation* (D. Ariz. 2010) 2010 WL 3715138, *6 [relatively few objections and requests for exclusion support approval].)

Factors to be considered in evaluating a class action settlement include "the reaction of the class members to the proposed settlement." (*Kullar, supra,* 168 Cal.App.4th at p. 128.) The reaction here has been overwhelmingly positive. Courts have approved class action settlements in lesser circumstances. (*See, e.g., Hughes v. Microsoft Corp.* (W.D.Wash. 2001) 2001 U.S. Dist. LEXIS 5976, 2001 WL 34089697, *8 [court found that the "class members overwhelmingly support[ed] the settlement" where there were over 37,000 notices sent out, 2,745 class members participated in the settlement, "only nine objections were submitted", and there were 86 timely opt-outs and over 20 additional defective or untimely opt-outs, "these indicia of the approval of the class of the terms of the settlement support a finding of fairness under Rule 23"], *citing Hanlon v. Chrysler Corp.* (9th Cir.1998) 150 F.3d 1011, 1027 [despite vigorous objections and appeal by objectors, the "fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness," and the

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court did not abuse its discretion in approving settlement].)

IV. THE COURT SHOULD AWARD PLAINTIFF THE REQUESTED AMOUNTS OF FEES, COSTS AND ENHANCEMENT PAYMENTS.

Under the Settlement, subject to the Court's approval, Defendants have agreed to pay Class Counsel reasonable attorneys' fees in the amount of $178,333.33, which is 33 1/3% of the Gross Settlement Amount, costs up to $20,000.00 for litigating this Action, and an enhancement award of $10,000.00 to Plaintiff. Defendants have also agreed that they would not oppose an application for these payments addressed above, and no class member has objected to these amounts.

In common fund cases like this one, the primary method California courts use for calculating attorney's fees is the percentage of the common fund method, which may be followed by a lodestar cross-check. In *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal. 5th 480, the California Supreme Court affirmed an award of 33 1/3% of a $19 million wage-and-hour class action settlement with a 2.03 to 2.13 multiplier. (*Id.* at p. 506.) In doing so, the California Supreme Court explained:

> As to the incentives a lodestar cross-check might create for class counsel, we emphasize the lodestar calculation, when used in this manner, ***does not override the trial court's primary determination of the fee as a percentage of the common fund*** and thus ***does not impose an absolute maximum or minimum on the potential fee award***. If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment. Courts using the percentage method have generally weighed the time counsel spent on the case as an important factor in choosing a reasonable percentage to apply.

(*Id.* at p. 505, emphasis added; *see also Beaver v. Tarsadia Hotels* (S.D. Cal. Sept. 28, 2017) 2017 WL 4310707, at *9 [applying *Laffitte* standard to fee request for 33 1/3% of common fund].)

A. A Fee Award Based on One-Third of the Common Fund is Standard.

According to a leading treatise on class actions, "No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented." (*See* Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 14.03.) Attorneys' fees at fifty percent of the fund are typically considered the upper limit, with ***thirty to forty percent*** commonly awarded in cases where the settlement is relatively small. (*See Id.*; *see also, Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F. Supp. 294 [stating that most cases where 30-50% was awarded involved "smaller" settlement funds of under $10 million].)

The settled-for 33 1/3% fee award is consistent with the average fee award in class actions. Indeed, the custom and practice in class actions is to award approximately one-third of a fund as a fee award. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."].) Thus, Plaintiff's fee request is in line with the prevailing guidelines established in California case law and academic literature and is consistent with awards in California. Accordingly, the Court should approve the attorneys' fees requested herein.

B. <u>While the Lodestar Method is Not Necessary in Common Fund Cases, Courts May Perform a Cross-Check to Award Fees.</u>

Although California supports the common fund doctrine, the lodestar method can be used to cross-check fee awards. "It may be appropriate in some cases, assuming the class benefit can be monetized with a reasonable degree of certainty, to "cross-check" or adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation." (*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.)

Applying the lodestar method requires a two-step process. The first step is to multiply the number of hours reasonably expended by a reasonable hourly rate. The second step is to apply a multiplier to the lodestar to take into account various factors. "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate

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for such services." (*Id.* at pp. 556-57.) "Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis." (*Id.* at p. 557.)

Detailed timesheets are not necessary to a lodestar cross-check. "The law is clear … that an award of attorney fees may be based on counsel's declarations, without production of detailed time records." (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375.) As the California Supreme Court explained in *Laffitte*:

> With regard to expenditure of judicial resources, we note that trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to "focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." (5 Newberg on Class Actions, *supra*, § 15:86, p. 331; *see, e.g., Goldberger v. Integrated Resources, Inc., supra*, 209 F.3d at p. 50 [2d Cir.; "where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court"]; *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions* (3d Cir.1998) 148 F.3d 283, 342 [agreeing with district court that "detailed time summaries were unnecessary where, as here, it was merely using the lodestar calculation to double check its fee award."]; *Barbosa v. Cargill Meat Solutions Corp.* (E.D.Cal.2013) 297 F.R.D. 431, 451 ["Where the lodestar method is used as a cross-check to the percentage method, it can be performed with a less exhaustive cataloguing and review of counsel's hours."].)

(*Laffitte, supra,* 1 Cal.5th at p. 505.)

Class Counsel's lodestar is at least $170,940.00.00 based on at least 202.4 hours of work performed thus far. (Marquez Decl., ¶ 19.) Accordingly, the requested fee of $178,333.33 is reasonable and fair as it is based on an approximate multiplier of 1.04. To be sure, trial courts have substantial discretion in adjusting the lodestar to account for various factors. (*See Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26, 39-45; *see also Serrano*, *supra,* 20 Cal.3d at p. 49.) In addition, it has been held that "[m]ultipliers can range from 2 to 4 or even higher." (*See Wershba*, 91 Cal.App.4th at p. 255; *see also Van Vranken*, *supra,* 901 F. Supp. At p. 298 ["[m]ultipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation."] Similar multipliers have been found to be reasonable for Class Counsel. (*See, e.g., Moreno v. Pretium Packaging, L.L.C.* (C.D. Cal. Aug. 6, 2021) No. 8:19-cv-02500-SB, 2021 WL 3673845, *3 [finding Wilshire Law Firm's multiplier of 2.57 reasonable "in light of the contingent nature of recovery, the complexity of the issues, and the result obtained"].)

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1. Class Counsel's Rates Have Been Approved by Several Courts.

Class Counsel provides a declaration to support their lodestar hourly rates. "Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F.2d 403, 407.) These rates are not opposed or challenged.

Class Counsel has received final approval of their hourly rates in other wage and hour class action settlements. For example, Mr. Marquez' hourly rate was recently approved in *Suarez v. Bank of America, N.A.* (N.D. Cal. Jan. 11, 2024), No. 18-cv-01202-LB, 2024 WL150721. There, the court held that "[a]s for the lodestar cross-check, the billing rates are normal and customary for timekeepers with similar qualifications and experience in the relevant market." (*Id.* at p. *3.)

2. Applying a Positive Multiplier Is Appropriate.

Once this lodestar figure has been determined, the Court may take into account other "enhancement" factors to adjust the lodestar award. While Plaintiff seeks a modest multiplier of 1.1 here, the overall reasonableness of Plaintiff's request is underscored by the fact that a significantly higher multiplier would be justified under applicable law.

Contingency fees should be higher than fees for the same legal services paid concurrently with the provision of the services. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33.) "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (*Id.* at p. 1133.) Application of that rule is particularly appropriate where the case is brought to redress important rights of vulnerable persons. (*Id.*) A risk enhancement is "earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather it is intended to approximate market-level compensation for such services which typically pay a premium for the risk of nonpayment or delay in payment of attorney's fees." (*Id*. at p. 1138.)

"Multipliers can range from 2 to 4 or even higher." (*Wershba*, *supra,* 91 Cal.App.4th at p. 255; *see also Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 512

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[applying a 2.52 multiplier on a cross-check in an antitrust class action]; *Chavez, supra,* 162 Cal. App. 4th at p. 60 [applying a 2.5 multiplier on a lodestar cross-check]; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 n.6 ["most" common fund cases apply a multiplier of 1.0-4.0]; *Been v. O.K. Industries Inc.* (E.D. Okla. 2011) 2011 WL 4478766, *11 [citing a study "reporting [an] average multiplier of 3.89 in survey of 1,120 class action cases" and finding that a multiplier of 2.43 would be "per se reasonable"].) The intermediate court in *Laffitte*, after finding that "2 to 4" is a reasonable range for multipliers on a cross-check, affirmed a 2.13 multiplier. (*Laffitte v. Robert Half Int'l* (2014) 231 Cal. App. 4th 860, 881-82.) The intermediate court opinion was affirmed in full by the California Supreme Court in its new decision guiding lower courts on assessing fees.

Factors considered in determining whether a lodestar multiplier is appropriate generally include: (1) the risks presented by the contingent nature of the case; (2) the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; (3) the nature of the opposition; (4) the preclusion of other employment by the attorney due to acceptance of the case; and (5) the result obtained and the importance of the lawsuit to the public. (*Serrano, supra,* 20 Cal. 3d at pp. 48-49.) All of these factors favor approval of a multiplier along the lines of those approved in the cases above.

The major consideration in determining the necessity of a multiplier is the contingent nature of the award. (*Ketchum, supra,* 24 Cal.4th at pp. 1132-33.) Further, the possibility of no recovery is only one of the uncertainties involved in taking on such a case. Other uncertainties are the amount that will be recovered, uncertainty as to the cost, both in effort and expenses, and uncertainty about how much time will pass before the recovery is obtained. (*Id.* at pp. 1132-1133, 1138.) Here, Class Counsel have been the only counsel to represent Class Members in this matter and have borne the entire risk and costs of litigation purely on a contingency basis. Class Counsel's outlay of time and money in this case has been significant.

The other factors are also present here. Class Counsel are skilled attorneys who have had success in wage-and-hour class actions. This case required experienced and competent lawyers and expertise in the issues presented herein. Defendant's contentions underscore the

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risk of prevailing at class certification and trial, and any of these obstacles could have prevented recovery completely. Further, proceeding to trial would have added years to the resolution of this case because of the difficult legal and factual issues raised and the likelihood of appeals. Despite these risks, Class Counsel took this case on a contingency basis. Yet, there are only so many cases that Class Counsel can take at any one time. Consequently, there were other meritorious cases presented to Class Counsel that would have generated substantial fees, but were declined, during the pendency of this action in order to devote the attention necessary to achieve favorable results. (Marquez Decl., ¶ 26.) Considered against the risks of continued litigation, and the importance of the employment rights and a speedy recovery, the relief provided under the Settlement represents a very strong result for the Class.

C. <u>**Costs Are Reasonable.**</u>

As of the date of filing this Motion, Class Counsel has incurred around $18,010.69 in costs, and they anticipate incurring at least $300 in combined additional costs up to the time the Court enters a judgment in this action and schedules a hearing on distribution. (Marquez Decl., ¶¶ 27.) Accordingly, Class Counsel respectfully requests reimbursement of up to $18,310.69 in costs. Notably, Defendant has agreed that it will not oppose any cost award request up to $20,000.00. The categories of costs are set forth in the accompanying Declaration of Justin Marquez, and these costs are easily seen to be both reasonable and necessary.

Counsel can recover "out-of-pocket expenses that 'would normally be charged to a fee paying client'" including costs for "service of summons and complaint, service of trial subpoenas, fee for defense expert at deposition, postage, investigator, copying costs, hotel bills, meals, messenger service and employment record reproduction." (*Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.) Such costs are properly recoverable on motions for settlement approval. (*See Nunez v. BAE Sys. San Diego Ship Repair Inc.* (S.D. Cal. 2017) 292 F. Supp. 3d 1018, 1057; *Rutti v. Lojack Corp.* (C.D. Cal. July 31, 2012) No. CV 06–00350 DOC, 2012 WL 3151077, at *12 ["Expenses such as reimbursement for travel, meals, lodging, photocopying, long-distance telephone calls, computer legal research, postage, courier service, mediation, exhibits, documents scanning, and visual equipment are typically recoverable."].)

D. <u>The Enhancement Payment to the Plaintiff Is Reasonable.</u>

Named plaintiffs in class action lawsuits "are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412.) Courts routinely grant approval of class action settlement agreements containing enhancements for the class representatives, which are necessary to provide incentive to represent the class, and are appropriate given the benefit the class representatives help to bring about for the class. (*See Rodriguez v. W. Publ'g Corp*. (9th Cir. 2009) 563 F.3d 948, 958-59.) The California Supreme Court has also noted that "retaliation against employees for asserting statutory rights under the Labor Code is widespread," despite anti-retaliation statutes designed to protect employees. (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) Plaintiffs should therefore be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

Under the settlement agreement, subject to the Court's approval, Defendants agreed to pay a Service Award in the amount of $10,000.00 to Plaintiff. This amount is also in exchange for Plaintiff's general release of all claims against Defendants. Plaintiff has submitted declarations demonstrating their devotion to this case, including their efforts assisting counsel in the case, communicating with counsel frequently for litigation, preparing for mediation, and reviewing case-related documents. (*See, generally,* Declarations of Plaintiff previously submitted with Plaintiff's Motion for Preliminary Approval.)

When compared with the amounts awarded in typical class action cases, the amount requested here is particularly reasonable. Indeed, a **<u>2006</u>** study examining the average incentive award given to class action plaintiffs from **<u>1993 to 2002</u>** found that the "average award per class representative was $15,992 and the median award per class representative was $4,357." (Theodore Eisenberg & Jeffrey P. Miller, "Incentive Awards to Class Action Plaintiffs: An Empirical Study", 53 UCLA L. Rev. 1303, 1308 (2006).) Courts routinely approve a $10,000 enhancement award for plaintiffs represented by Class Counsel. (*See, e.g., Moreno v. Pretium Packaging, L.L.C.* (C.D. Cal. Aug. 6, 2021) 2021 WL 3673845, *3 ["The Court concludes a $10,000 incentive award is

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appropriate."]; *Suarez, supra,* 2024 WL 150721 at p. *4 ["The court approves awards of $10,000 for each class representative."].)

"Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit." (*Clark v. Am. Residential Services LLC* (2009) 175 Cal. App. 4th 785, 804.) "[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Id*. at 806.) "An incentive award is appropriate 'if it is necessary to induce an individual to participate in the suit."' (*Cellphone Term. Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394, quoting *Clark*, *supra*, 175 Cal. App. 4th at 804.) The "criteria courts may consider in determining whether to make an incentive award include: (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." (*Id.* at pp. 1394–95.) Plaintiff's declaration describes how each of the five *Cellphone Termination* factors are present here.

E. <u>Administration Expenses Should be Approved.</u>

CPT Group, Inc., the Settlement Administrator, estimates that it will incur a total of $9,500 in costs associated with the administration of this Settlement. (Dancy Decl., ¶ 17.) These expenses are reasonable, based upon the size of the class, claim and exclusion tracking, and Class Member payment processing.

V. <u>CONCLUSION</u>

For the foregoing reasons, Plaintiff respectfully requests that the Court grant final approval of the proposed settlement.

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Dated: April 1, 2024

Respectfully submitted,

WILSHIRE LAW FIRM, PLC

By: ______________________

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PROOF OF SERVICE

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

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

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.

On **April 1, 2024**, I served the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES,** on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

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Attorneys for Defendants
Concrete, Inc., d/b/a Knife River and MDU Resources Group, Inc.

(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.

(X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.

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

Executed on April 1, 2024, at Los Angeles, California.

Sandy S. Sespene