

Brian J. Mankin, Esq. [CSB No. 216228]
brian@lmlfirm.com
Misty M. Lauby, Esq. [CSB No. 243009]
misty@lmlfirm.com
LAUBY, MANKIN & LAUBY LLP
5198 Arlington Avenue, PMB 513
Riverside, CA 92504
Tel: (951) 320-1444 | Fax: (951) 320-1445

Attorneys for Plaintiff, on a representative basis and on behalf of all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

DANIEL LOPEZ, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

MARTINEZ CONCRETE, INC., a California
Corporation, ROBERTO MARTINEZ, an
Individual, and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CIVSB2208282
*[Assigned to Hon. Joseph Ortiz, Dept S17, for
all purposes]*

**NOTICE OF MOTION AND MOTION
FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT;
DECLARATIONS IN SUPPORT
THEREOF; AND [PROPOSED] FINAL
ORDER AND JUDGMENT**

Hearing
Date: February 27, 2024
Time: 1:30 p.m.
Dept: S17

Complaint filed: April 21, 2022

TO THE COURT AND PARTIES OF RECORD:

PLEASE TAKE NOTICE THAT on February 27, 2024, at 1:30 p.m., or as soon
thereafter as this matter may be heard by the Honorable Joseph Ortiz in Department S17 of the
San Bernardino County Superior Court, located at 247 West Third Street San Bernardino CA
92415, Plaintiff Daniel Lopez will respectfully move this Court for an Order granting final
approval of the class action settlement between Plaintiff and Defendants Martinez Concrete, Inc.,
and Roberto Martinez, which was preliminarily approved by the Court. This Motion, which is
supported and unopposed by Defendants, seeks final approval and entry of judgment of a

1 \$350,977.22 settlement on behalf of the Class Members.

2 Specifically, Plaintiff will and hereby does move the Court to grant final approval of the
3 Class Action Settlement Agreement and Release of Claims (the “Settlement Agreement”), and
4 enter the proposed order and final judgment filed concurrently herewith:

5 1. Finally certifying the Class, as defined in the Settlement Agreement and the
6 Court’s Order Granting Preliminary Approval of the Settlement;

7 2. Finally appointing Plaintiff as Class Representative for purposes of settlement;

8 3. Finally appointing Brian Mankin and Misty Lauby of Lauby Mankin Lauby LLP
9 as Class Counsel for purposes of settlement;

10 4. Finding that the Class Notice was properly provided to the Class in accordance
11 with the Court’s Order granting Preliminary Approval;

12 5. Finally approving the settlement as fair, adequate, and reasonable, based upon the
13 terms set forth in the Settlement Agreement;

14 6. Binding participating Class Members to the terms of the Settlement Agreement,
15 including the Release specified therein; and

16 7. Retaining jurisdiction to enforce the Settlement Agreement.

17 This Motion will be based upon this notice; the attached memorandum of points and
18 authorities; the Declarations of the Settlement Administrator (Tracy Dante of ILYM Group),
19 Class Counsel (Brian Mankin and Misty Lauby) and Plaintiff filed concurrently herewith; the
20 records and files in this action; and any other further evidence or argument that the Court may
21 receive at or before the hearing.

22 Dated: February 1, 2024

LAUBY, MANKIN & LAUBY LLP

23
24 BY:



25 Brian J. Mankin, Esq.
26 Attorneys for Plaintiff and the Class
27
28

TABLE OF CONTENTS

I.	SUMMARY OF ARGUMENT AND ESSENTIAL POINTS	1
II.	PERTINENT BACKGROUND AND SETTLEMENT TERMS	2
III.	THE NOTICE PROCESS	3
A.	Notice to the Class Members	3
B.	There are Zero Objections and Zero Opt-Outs, Resulting in an Impressive 100% Class Participation in the Settlement	4
IV.	EVALUATION OF THE SETTLEMENT	5
A.	The Settlement was Reached through Informed Arms-Length Negotiation	5
B.	Plaintiff's Investigation was Sufficient	6
C.	Class Counsel are Experienced in Similar Litigation and Endorse the Settlement	6
D.	Reasonable Estimate of the Nature and Amount of Recovery	7
V.	THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE	8
A.	Plaintiff is Entitled to Recover Reasonable Attorneys' Fees Under the Labor Code	8
B.	Class Counsel's Request for Fees is Reasonable and Properly Calculated as a Percentage of the Common Fund	9
1.	The Attorneys' Fees Requested Here Fall Within the Reasonable Range Awarded in Similar Cases Under the Well-established Common Fund Method	9
2.	The High Quality of Work and Excellent Result Obtained Support the Award ...	10
3.	Class Members Had Sufficient Notice of the Requested Fees	11
4.	The Contingent Nature of Class Counsel's Representation of Plaintiff and the Class Further Supports the Fee Award at 1/3 of the Common Fund	11
5.	A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award	12
VI.	THE REQUESTED COSTS AND SERVICE AWARDS ARE REASONABLE	14
A.	The Requested Costs are Reasonable and Merit Approval	14
B.	The Requested Service Award is Reasonable and Merits Approval	15
VII.	OTHER MATTERS FOR FINAL APPROVAL	16
A.	Settlement Administration Costs	16
B.	Uncashed Checks	16
C.	Final Report	16
D.	Submission to the LWDA	16
VIII.	CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i> (2000) 85 Cal.App.4th 1135	6
<i>Bell v. Am. Title Ins. Co.</i> (1991) 226 Cal.App.3d 1589	5
<i>Bell v. Farmers Insurance Exchange</i> (2004) 115 Cal.App.4th 715.....	15
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472	10
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	8
<i>Ferguson v. Lieff, Cabraser, Heimann & Bernstein</i> (2003) 30 Cal.4th 1037.....	5
<i>Horsford v. Board of Trustees of California State University</i> , 132 Cal.App.4th 359 (2005). 11, 12	
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....	7
<i>Laffitte v. Robert Half International, Inc.</i> (2016) 1 Cal.5th 480.....	8, 9
<i>Litwin v. iRenew Bio Energy Solutions, LLC</i> (2014) 226 Cal.App.4th 877	11
<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> (2010) 186 Cal.App.4th 399	7
<i>PLCM Group, Inc. v. Drexler</i> (2000) 22 Cal.4 th 1084.....	13
<i>Press v. Lucky Stores, Inc.</i> (1983) 34 Cal.3d 311	13
<i>Serrano III v. Priest</i> (1977) 20 Cal.3d 25	10
<i>Wershba v. Apple Computers, Inc.</i> (2001) 91 Cal.App.4th 246	7
<i>Williams v. MGM-Pathe Communs. Co.</i> (9th Cir. 1997) 129 F.3d 1026.....	10

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. SUMMARY OF ARGUMENT AND ESSENTIAL POINTS**

3 Pursuant to California Rules of Court, Rule 3.769 (d) and (e), Plaintiff respectfully
4 requests that this Court grant final approval of the Class Action Settlement Agreement and
5 Release of Claims (the “Settlement Agreement” or “S.A.”) already on file in this action, which is
6 supported and unopposed by Defendants Martinez Concrete, Inc., and Roberto Martinez, and
7 enter the proposed order and final judgment in this matter.

8 There are several essential reasons why this settlement should be approved. First, after
9 considerable work, preparation, exchange of data and mediation, the Parties reached a \$320,000
10 settlement on behalf of the Class Members and Aggrieved Employees (the “Gross Settlement
11 Amount”), subject to an Escalator Clause that Class Counsel negotiated on behalf of the Class
12 that would increase the Gross Settlement Amount by \$33.06 for each Workweek that the Class
13 Members worked above 8,800 total Workweeks. After Defendants provided the final Class Data
14 to the Settlement Administrator, it was determined that the Escalator Clause was triggered
15 because the Class collectively worked a total of 9,737 Workweeks (937 Worweeks more than
16 cap). This resulted in an upward adjustment of \$30,977.22 to the Gross Settlement Amount,
17 bringing the new Gross Settlement Amount to \$350,977.22 (plus Defendant will separately pay
18 its share of payroll taxes on the wage portion of the Individual Class Payments). (See
19 Declaration of Settlement Administrator, Tracy Dante (“Dante Decl.”), ¶ 5). The Class was
20 informed of the updated Gross Settlement Amount in the Class Notice. (See Exhibit A to the
21 Dante Decl. for a true and correct version of the Class Notice that was mailed to the Class
22 Members.)

23 Second, the Class Members were deemed to participate in the Settlement, and were not
24 required to submit a Claim Form to receive funds. Plus, there is no reversion to Defendants, so
25 all funds will be distributed to the Class.

26 Third, there were no objections and no opt-outs from the 75 Class Members, meaning
27 that **100%** of the Class elected to participate in the settlement.
28

Finally, the release language (that was approved by the Court at Preliminary Approval) is narrowly tailored to the claims alleged.

In accordance with the analysis and law set forth herein, the Settlement should be approved, and judgment entered based on the determination that the Settlement is fair, reasonable, adequate, and in the best interests of the Class. (Declaration of Class Counsel, Brian J. Mankin [“Mankin Decl.”] ¶¶ 13, 33).

II. PERTINENT BACKGROUND AND SETTLEMENT TERMS

Plaintiff and the Class Members include all current and former nonexempt employees employed by Defendant Martinez Concrete, Inc., in California at any time during the Class Period of April 21, 2018, through September 17, 2023 (the “Class Members”). Plaintiff and the putative class alleged claims for: (a) failure to pay minimum wages, (b) failure to pay overtime wages, (c) failure to provide meal periods, (d) failure to provide rest breaks, (e) failure to failure to timely pay wages upon separation of employment, (f) failure to provide accurate itemized wage statements, (g) unfair and unlawful competition pursuant to California Business and Professions Code §§ 17200 *et seq.*, and (h) related claims under PAGA.

The Settlement includes 75 Participating Class Members. The following is a breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Tracy Dante (“Dante Decl.”), ¶ 14):

Gross Settlement Amount	\$ 350,977.22
Attorneys’ Fees (1/3)	\$ 116,992.41
Litigation Costs	\$ 13,191.19
Administrator Costs	\$ 5,600.00
PAGA Penalties	\$ 50,000.00
Class Representative Service Award	\$ 7,500.00
Net Settlement Amount	\$ 175,693.62

The Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. Assuming all of the amounts are approved by the Court, the highest payment to Participating Class Members is estimated at \$5,304.91, and the average payment is \$2,342.58. Of course, the actual payments will be calculated on a pro-rata basis according to the number of Workweeks worked by each Class Member. The Participating Class collectively

1 worked 9,737 Workweeks during the Class Period, so each Patient Visit will have a value of
2 approximately \$18.04. (Dante Decl. ¶ 15).

3 Additionally, 25% of the PAGA Penalties will be allocated to the Aggrieved Employees.
4 In this case, 53 Aggrieved Employees will share in the \$12,500 award (accounting for 25% of
5 the total \$50,000 allocation). The highest Individual PAGA Payment to be paid is approximately
6 \$218.80, and the average Individual PAGA Payment to be paid is approximately \$150.94.
7 (Dante Decl. ¶ 16).

8 The Parties agree that one-third (1/3) of the Individual Settlement Payments will be
9 allocated as wages subject to withholding of all applicable local, state and federal taxes and the
10 remaining two-thirds (2/3) will be allocated for interest and penalties (pursuant to, *e.g.*,
11 California Labor Code sections 203, 210, 226, etc.) from which no taxes will be withheld. (S.A.
12 ¶ 47(d)). Additionally, the PAGA Penalties payable to the Aggrieved Employees will be
13 classified entirely as civil penalties and shall be reported as required on an IRS Form 1099.
14 (S.A. ¶¶ 47(h)). Defendants will separately pay its share of employer payroll taxes on the sum
15 allocated to wages. (S.A. ¶ 47(a)).

16 Defendants are required to fund the Gross Settlement Amount within 15 days of the
17 Effective Date, which is the date that Final Approval is entered since there were no objectors or
18 intervenors. (S.A. ¶ 69). Within 10 days after the Court's approval of the Settlement, the
19 Settlement Administrator shall issue payments to cover all court-approved payments. (S.A. ¶
20 70).

21 Class Members will have 180 days to cash his/her settlement check. If a Class Member
22 fails to cash a check by the deadline, then the Settlement Administrator shall issue the unclaimed
23 funds to the California State Controller in the name of the Class Member. (S.A. ¶ 71).

24 **III. THE NOTICE PROCESS**

25 **A. NOTICE TO THE CLASS MEMBERS**

26 Pursuant to the Court's Order and the Settlement Agreement, the Parties directed the
27 Settlement Administrator to review and update the Class Members' addresses, mail the Court-
28 approved Notice Packet, and process their responses. (Dante Decl. ¶ 3).

1 Prior to mailing the Notice Packet, the Settlement Administrator performed a National
2 Change of Address search on all Class Members to determine if any had moved. (*Id.* ¶ 6). Then,
3 on November 30, 2023, the Notice Packet was sent via first-class mail to all 75 Class Members
4 to advise each about the suit and settlement. (*Id.* ¶ 7). Ultimately, it was determined that all
5 Notice Packets were deliverable, meaning that there was a 100% success rate in mailing the
6 Notice Packets. (*Id.* ¶ 8-9).

7 In accordance with California Rules of Court, Rules 3.766(d) and 3.769(f), the Notice
8 Packet provided Class Members with (1) a brief explanation of the case; (2) an explanation of
9 each Class Member’s right to opt out of the settlement class; (3) an explanation of the process
10 (and relevant deadlines) through which a Class Member could opt out of the settlement class; (4)
11 notice about the binding nature of the Judgment for Class Members who do not opt out; (5) an
12 explanation of each Class Member’s right to appear through counsel; (6) an explanation of each
13 Class Member’s right to appear at the fairness hearing and express views on the settlement, i.e.,
14 object or otherwise respond; and (7) an explanation of each Class Member’s right to participate
15 in the Settlement and receive payment accordingly. (*See Exhibit A* to the Dante Decl.).

16 **B. THERE ARE ZERO OBJECTIONS AND ZERO OPT-OUTS, RESULTING IN AN**
17 **IMPRESSIVE 100% CLASS PARTICIPATION IN THE SETTLEMENT**

18 California law makes clear that the percentage of objectors and opt-outs is an important
19 factor in the Court’s consideration of a proposed class action settlement. *See Dunk, supra*, 48
20 Cal.App.4th at 1802. Indeed, the Ninth Circuit and other federal courts recognize that in the
21 final fairness analysis, the number or percentage of class members who object to the settlement is
22 a significant factor. *See Mandujano v. Basic Vegetable Prods., Inc.* (9th Cir. 1976) 541 F.2d
23 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY 2001) 127 F.Supp.2d 418, 425
24 (“[i]t is well settled that the reaction of the class to the settlement is perhaps the most significant
25 factor to be weighed in considering its adequacy.”).

26 Here, there are zero objections and zero opt-outs to the Settlement, meaning that 100% of
27 the Class Members will receive a share of the Settlement (Dante Decl. ¶¶ 10-12). Thus, the
28 Class fully viewed this as a fair and reasonable settlement.

1 **IV. EVALUATION OF THE SETTLEMENT**

2 It is axiomatic that California law strongly favors and encourages settlements. *See*
3 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236. This presumption in favor of
4 settlement applies with particular force in the context of class actions. *See Ferguson v. Lieff,*
5 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 (Kennard, J., concurring and dissenting)
6 (“[p]ublic policy favoring settlement is especially weighty for class actions”); *Bell v. Am. Title*
7 *Ins. Co.* (1991) 226 Cal.App.3d 1589, 1607-1608 (affirming approval of a class settlement and
8 implicitly endorsing its citation of federal precedent for the notion that there is a “strong public
9 policy in favor of settlement of class actions”); *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976)
10 529 F.2d 943, 950 (“it hardly seems necessary to point out that there is an overriding public
11 interest in settling and quieting litigation. This is particularly true in class action suits”).

12 When entertaining a request for final approval of a class action settlement, a court’s
13 fundamental consideration is whether the settlement is fair, adequate and reasonable. *See Dunk,*
14 *supra*, 48 Cal.App.4th at 1801, fn. 7 (noting that state courts look to federal authority concerning
15 the approval of class settlements); California Rules of Court, Rule 3.769 (g).

16 Fairness is presumed when: (1) the settlement is reached through arm’s-length
17 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
18 intelligently; (3) counsel is experienced in similar litigation; (4) the percentage of objectors and
19 opt outs is small, and (5) the range of reasonableness of the settlement fund to a possible
20 recovery in light of all attendant risks of litigation.” *Dunk, supra*, 48 Cal.App.4th at 1802. All
21 five of these factors are discussed in detail below.

22 **A. THE SETTLEMENT WAS REACHED THROUGH INFORMED ARMS-LENGTH**
23 **NEGOTIATION**

24 Courts presume the absence of fraud or collusion in the negotiation of a settlement,
25 unless evidence to the contrary is offered. Thus, there is a presumption here that the negotiations
26 were conducted in good faith. *See 3 Alba Conte & Newberg, supra*, at § 11.51. The proposed
27 settlement here was the product of arm’s-length negotiation before a highly experienced and
28 reputable class action mediator to reach a settlement.

1 Here, Plaintiff and Class Counsel have diligently investigated the claims raised in this
2 litigation and, after taking into account the disputed factual and legal issues involved in this
3 action, the risks attending further prosecution, and the benefits to be received pursuant to the
4 compromise and settlement of the action as set forth in the Settlement, concluded that the
5 settlement terms are fair, reasonable, and in the best interest of the Settlement Class.

6 As the Settlement Agreement itself reveals, there is no preferential treatment for any
7 segment of the class, as the Settlement is designed to fairly and adequately compensate all Class
8 Members. And, pursuant to California Rules of Court Rule 3.769 (b), the parties have disclosed
9 the agreed upon and proposed attorney fee award, which is well within the range of
10 reasonableness for matters of this nature.

11 **B. PLAINTIFF’S INVESTIGATION WAS SUFFICIENT**

12 As set forth at the time of preliminary approval, Class Counsel’s investigation into the
13 facts and merits of the wage and hour claims alleged included analyzing substantial amounts of
14 information, correspondence, documents, pay data, policies and procedures, and evidence
15 relating to the class size and the commonality of the claims. During this process, Plaintiff and
16 Class Counsel conducted investigations into the potential claims of the similarly situated
17 employees, as well as researching and investigating Defendants’ defenses. Finally, Class
18 Counsel synthesized and analyzed information provided by Defendants as to the total Class
19 Members, the number of current and former employees, the number of employees who worked
20 during various time periods, and prepared comprehensive damages calculations regarding the
21 claims at issue.

22 **C. CLASS COUNSEL ARE EXPERIENCED IN SIMILAR LITIGATION AND ENDORSE THE**
23 **SETTLEMENT**

24 Class Counsel are experienced in this type of litigation, and they have (and hereby do)
25 represent that this Settlement is fair and reasonable. (Mankin Decl. ¶¶ 13, 33); *see 7-Eleven*
26 *Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152 (Final
27 approval of settlement affirmed where counsel were all experienced litigators with class-action
28 experience and had recommended settlement based on the negotiated terms).

1 **D. REASONABLE ESTIMATE OF THE NATURE AND AMOUNT OF RECOVERY**

2 Plaintiff’s Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
3 which sufficiently provided the Court with “basic information about the nature and magnitude
4 of the claims in question and the basis for concluding that the consideration being paid for the
5 release of those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail,*
6 *Inc.* (2008) 168 Cal.App.4th 116, 133. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
7 (2010) 186 Cal.App.4th 399, later clarified *Kullar* by noting that an explicit statement of the
8 maximum theoretical amount that the class could recover was not part of the “basic
9 information” that counsel was required to produce:

10 Greenwell misunderstands *Kullar*, apparently interpreting it to
11 require the record in all cases to contain evidence in the form of an
12 explicit statement of the maximum amount the plaintiff class could
13 recover if it prevailed on all its claims – a number which appears
14 nowhere in the record of the case. But *Kullar* does not, as
15 Greenwell claims, require any such explicit statement of value; it
 requires a record which allows “an understanding of the amount
 that is in controversy and the realistic range of outcomes of the
 litigation.

16 Of course, a settlement is not judged against what might have been recovered had a
17 plaintiff prevailed at trial, nor does the settlement have to provide 99% of the damages sought to
18 be fair and reasonable. *Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 246, 250
19 (“Compromise is inherent and necessary in the settlement process ... even if the relief afforded
20 by the proposed settlement is substantially narrower than it would be if the suits were to be
21 successfully litigated, this is no bar to a class settlement because the public interest may indeed
22 be served by a voluntary settlement in which each side gives ground in the interest of avoiding
23 litigation”).

24 In light of the uncertainties of protracted litigation, this negotiated settlement reflects the
25 best practicable recovery for the Class. While the total settlement amount is, of course, a
26 compromise figure, the potential risks and opportunities of both parties were effectively weighed
27 and considered by the parties, resulting in a fair and equitable settlement. Based upon detailed
28 data obtained through discovery and information exchanges, and factoring in claim certification

probabilities and liability probabilities, Class Counsel formulated detailed damages models to evaluate the claims for mediation in order to reach a realistic and reasonable resolution.

V. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE

For their efforts in creating a common fund for the benefit of the class, the Settlement Agreement provided that Class Counsel seek reasonable fees of one-third of the Gross Settlement Amount, which is \$116,992.41. Not only did Class Counsel negotiate a fair and reasonable settlement, but also negotiated an Escalator Clause that resulted in the total Gross Settlement Amount increasing by \$350,977.22. These fees are warranted under the law and within the range of fees commonly awarded in similar cases.

As shown herein, the requested percentage of one-third of the settlement fund as payment for attorneys' fees should be granted for several reasons. First, one-third is the standard benchmark in California for class action settlements. *See, e.g., 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"). Second, the California Supreme Court recently held that the percentage of the fund method survives in California class action cases. *See Laffitte v. Robert Half International, Inc.* (2016) 1 Cal.5th 480. Third, the requested amount is eminently reasonable through the prism of a lodestar cross-check. Accordingly, this request should receive final approval.

A. PLAINTIFF IS ENTITLED TO RECOVER REASONABLE ATTORNEYS' FEES UNDER THE LABOR CODE

Plaintiff and the Class are entitled to recover reasonable attorneys' fees, expenses and costs under section 218.5 of the California Labor Code, which provides that, "[i]n any action brought for the nonpayment of wages ... the Court shall award reasonable attorneys' fees and costs to the prevailing party." In addition, Plaintiff and the Class are entitled to recover reasonable attorneys' fees pursuant to section 1194.2 of the Labor Code, which provides that, "... any employee receiving less than the legal minimum wage ... applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage... including ... reasonable attorney's fees, and costs of suit." Plaintiff and the Class are

1 also entitled to fees and costs under section 226(e) of the Labor Code (employee who prevails on
2 claim for itemized wage statement violation “is entitled to an award of costs and reasonable
3 attorneys’ fees”), under PAGA (Labor Code § 2699(g), which provides “Any employee who
4 prevails in any action shall be entitled to an award of reasonable attorney’s fees and costs,
5 including any filing fee paid”), and, potentially, CCP section 1021.5.

6 **B. CLASS COUNSEL’S REQUEST FOR FEES IS REASONABLE AND PROPERLY**
7 **CALCULATED AS A PERCENTAGE OF THE COMMON FUND**

8 Under the “common fund” doctrine, the request for attorneys’ fees in the amount of 1/3
9 of the common fund is reasonable and appropriate, because (1) it is within the approved range
10 for percentages awarded as attorneys’ fees in similar cases; (2) it is supported by the high quality
11 of Class Counsel’s work on this case and the results obtained for the Class; (3) the Class had
12 sufficient notice of the fee request; (4) it is supported by the fact that this case was handled on a
13 contingency basis and was undertaken despite various risks and expenses; and (5) the lodestar
14 cross-check supports the fee request.

15 ***1. The Attorneys’ Fees Requested Here Fall Within the Reasonable Range***
16 ***Awarded in Similar Cases Under the Well-established Common Fund***
17 ***Method***

18 The California Supreme Court approved trial courts’ usage of the common fund method
19 of awarding attorneys’ fees in wage and hour class actions, like this one, and upheld a fee
20 awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte, supra*, 1 Cal.5th
21 at 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 51 (“fee awards in class actions average
22 around one-third of the recovery”). Specifically, in *Laffitte*, the Court wrote: “[w]e join the
23 overwhelming majority of federal and state courts in holding that when class action litigation
24 establishes a monetary fund for the benefit of the class members, and the trial court in its
25 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
26 of a reasonable fee by choosing an appropriate percentage of the fund created”). *Id.* at 506. The
27 California Supreme Court also noted that trial courts have the discretion to award fees as a
28 percentage of the common fund, with or without the necessity to conduct a lodestar cross-check.

1 *Id.* (“...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
2 evaluate the reasonableness of a requested percentage fee.”).

3 The California Supreme Court’s *Laffitte* decision was consistent with its prior rulings
4 recognizing that “when a number of persons are entitled in common to a specific fund, and an
5 action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that
6 fund, such ... plaintiffs may be awarded attorneys’ fees out of the fund.” *Serrano III v. Priest*
7 (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (“[A] lawyer who
8 recovers a common fund . . . is entitled to reasonable attorneys’ fees from the fund as a whole”).
9 Notably, when fees are calculated as a percentage of the common fund, they should be calculated
10 based on the amount that was available to be claimed, rather than as a percentage of the actual
11 amount claimed. *See Boeing Co.*, 444 U.S. at 475-6, 480-1 (the SCOTUS held that attorneys for
12 a successful class may recover a fee based on the fund created for the class, even if some class
13 members make no claims against the fund, so that money remains in it that will be returned to
14 the defendant, explaining: “[t]heir [class members’] right to share the harvest of the lawsuit upon
15 proof of their identity, whether or not they exercise it, is a benefit in the fund created by the
16 efforts of the class representatives and their counsel.” *See also Williams v. MGM-Pathe*
17 *Communs. Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (trial court “abused its discretion by basing
18 the fee on the class members’ claims against the fund rather than on a percentage of the entire
19 fund or on the lodestar”).

20 **2. The High Quality of Work and Excellent Result Obtained Support the**
21 **Award**

22 In addition to the fact that a Class benefit was created under the common fund settlement,
23 the fairness of the requested fee award of 1/3 of the Settlement Amount is supported by the high
24 quality of work performed by Class Counsel and the positive result obtained for the Class. This
25 result occurred because Class Counsel diligently, efficiently, and creatively pursued this case and
26 reached a settlement for the benefit of the entire Class. The fact that the settlement was embraced
27 and supported by the Class, as evidenced by a 100% participation rate, demonstrates that Class
28 Counsel obtained a favorable result for the Class.

1 **3. Class Members Had Sufficient Notice of the Requested Fees**

2 Rule 3.769 of the California Rules of Court requires that the Class Members be given
3 notice of any agreement regarding an application for attorneys' fees. Here, the Notice
4 preliminarily approved by the Court and distributed to the Class Members apprised them of the
5 one-third fee request and costs up to \$20,000. (Dante Decl., Exh. A.)

6 The Class Notice also advised the class members of the procedures for objecting to the
7 proposed settlement and appearing at the settlement hearing, including the amount of attorneys'
8 fees to be awarded to class counsel. *Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226
9 Cal.App.4th 877, 883 ("Procedural due process requires that affected parties be provided with
10 'the right to be heard at a meaningful time and in a meaningful manner'"). In accordance with
11 the foregoing, it is respectfully submitted that the instant notice complied with Rule 3.769 and, as
12 a result, the Class Members' due process rights were fulfilled.

13 **4. The Contingent Nature of Class Counsel's Representation of Plaintiff**
14 **and the Class Further Supports the Fee Award at 1/3 of the Common**
15 **Fund**

16 An additional factor militating in favor of the granting of the requested fee award is the
17 fact that this case was both legally and financially risky for Class Counsel. *See Vizcaino v.*
18 *Microsoft Corp* (9th Cir. 2002) 290 F.3d 1043, 1048-49. Class Counsel have been representing
19 the Class in this matter on a strictly contingency basis, and as such, incurred the risk of non-
20 recovery after a substantial investment of time, money, and resources, and have done so since the
21 inception of this case without any payment or compensation. Specifically, there was the prospect
22 of enormous cost inherent in class action litigation; the risk that Defendant could prevail on its
23 argument that the class should not be certified; and the risk that Defendant could prevail on the
24 merits of some or all of the claims.

25 The court in *Horsford v. Board of Trustees of California State University*, 132
26 Cal.App.4th 359 (2005) analyzed this issue and held that, when determining the market-level
27 compensation to award to contingent fee attorneys, the analysis must take into account the large
28 risk inherent in such situations:

1 The market value of the services provided by plaintiffs' counsel in a case
2 of this magnitude must take into consideration that any compensation has
3 been deferred for up to four years from the time an hourly fee attorney
4 would begin collecting fees from his or her client; that the demands of the
5 present case substantially precluded other work during that extended
6 period, which makes the ultimate risk of not obtaining fees all the greater
7 (since the attorneys must use savings or incur debt to keep their offices
8 afloat and their families fed during the years-long litigation); and that a
9 failure to fully compensate for the enormous risk in bringing even a
10 wholly meritorious case would effectively immunize large or politically
11 powerful defendants from being held to answer for constitutional
12 deprivations, resulting in harm to the public."

13 *Id.* at 399-400.

14 Indeed, as Plaintiff's Counsel can attest, not all class/PAGA cases are successful. Many
15 cases end with no fees or a greatly reduced fee that is far less than lodestar, often due to no fault
16 of counsel (i.e., bankruptcy, change in the law, consolidation or coordination or preemption,
17 being top filed, etc.). According to Mayer Brown LLP's study entitled, An Empirical Analysis
18 of Class Actions, cited in *Laguna v. Coverall North America, Inc.* (9th Cir. 2014) 753 F.3d 918,
19 found that only one-third of class actions are successful, compared to two-thirds that are defeated
20 and result in no payment to the class members.¹

21 For all of these reasons, the contingent nature of this case and the availability of a
22 lodestar multiplier supports a fee of one-third of the common fund and granting of fee request.

23 **5. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award**

24 Despite recognized limitations of the so-called lodestar method, some California and
25 federal courts acknowledge the utility of a lodestar "cross-check."² (*Lealao, supra*, 82

26 ¹ www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf

27 ² In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and
28 capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient
hours have been expended. Herr, David F., *Manual for Complex Litigation*, § 14.121 (1988); *See also In re*
Activision (N.D. Cal 1989) 723 F.Supp 1373.

Cal.App.4th at 46-47.) Under the “lodestar multiplier” method of cross-checking the reasonableness of attorneys’ fees in class actions, the court ascertains Class counsel’s total “lodestar” amount by multiplying the number of hours reasonably expended by each attorney or legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation”].)

The actual aggregated lodestar between the Plaintiff’s attorneys that worked on this case is approximately \$137,185. This results in a *negative* multiplier, as summarized in the following table, and in the submitted declarations of Plaintiff’s counsel:

Attorney/Timekeeper	Rate	Hours	Fee
Brian J. Mankin <i>Trial Counsel / Partner</i> (23 Years)	\$775	84³	\$65,100
Misty Lauby <i>Handling Attorney</i> (16 Years)	\$650	110.9	\$72,085
Grand Total for All Attorneys			\$137,185

(See Mankin Decl., ¶ 25; Lauby Decl. ¶ 11.)

The hourly rates above are comparable to those of other attorneys with equal or similar experience, if not somewhat lower (*i.e.*, the Laffey Matrix at www.laffeymatrix.com indicates that the benchmark rates are: \$676/hour for an 8–10-year attorney, \$764/hour for a 11-19 year attorney, and \$919/hour for a 20+ year attorney). Moreover, the Wolters Kluwer 2023 Real Rate Report (“Real Rate Report”) provides directly applicable information in this regard. The Real Rate Report is based on an enormous and statistically significant compilation of data,

³ Includes an estimated 15 hours of additional work preparing for and attending the hearing, as well as 15 hours in anticipated work to be performed after the final approval, particularly in light of the payment plan, as it will require considerable more work with counsel, administrator, and Class Members.

1 comprising millions billing entries from a hundred thousand individual timekeepers who worked
2 at thousands of law firms. The Real Rate Report then compiles and analyzes this data to provide
3 the hourly rates for partners and associates in major metropolitan areas. For the southern
4 California area: (a) the rates for partners in Los Angeles is between \$840 and \$1,159 per hour for
5 the middle and upper quartiles, and (b) the rates for associates with seven or more years of
6 experience, the median rate is \$674 per hour, and the upper quartile rate is \$888 per hour. And,
7 perhaps most importantly, the information provided in the Real Rate Report is not based on self-
8 reported numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate
9 Report is based on the actual hours and fees billed by law firms. (Mankin Decl., ¶ 24.)

10 Class Counsel are also highly experienced in Class/PAGA litigation, including having
11 been named by the LA Times as one “Southern California Leading Lawyers” in the May 2023
12 issue of Consumer Attorney’s of Southern California (a recognition given to 17
13 employment/labor law attorneys in 2023), having been selected as “Super Lawyer” in
14 employment litigation over the last 5 consecutive years, having achieved large settlements,
15 having prevailed at trial in PAGA-only actions and Class Action jury trials. (Mankin Decl. ¶¶ 2-
16 6). Indeed, Class Counsel’s rates are typical of the rates charged by defense counsel with similar
17 experience doing similar employment law work in this region.

18 Thus, Plaintiff’s Counsel’s rates reasonable and typical, and the attorneys’ fees requested
19 confirm that the fee request is fair and reasonable under the lodestar multiplier cross-check.

20 **VI. THE REQUESTED COSTS AND SERVICE AWARDS ARE REASONABLE**

21 **A. THE REQUESTED COSTS ARE REASONABLE AND MERIT APPROVAL**

22 The Settlement Agreement authorized litigation costs of up to \$20,000. (S.A. ¶ 47(f)).
23 However, Class Counsel’s actual costs through the final approval hearing were \$13,191.19, so
24 this is the amount requested. The saving will be placed in the Net Settlement Amount for
25 payment to the Class Members. (Mankin Decl. ¶ 27). These costs include mediation fees,
26 filing fees, expert data analysis costs, CourtCall charges, and process server fees.

27 ///

28 ///

1 **B. THE REQUESTED SERVICE AWARD IS REASONABLE AND MERITS APPROVAL**

2 A named plaintiff is an essential ingredient of any class action and an incentive award
3 is appropriate to induce individuals to step forward and assume the burdens and obligations of
4 representing the Class. Courts regularly approve a service payment to compensate named
5 plaintiff for his service to the class and the risks he incurred during the course of the litigation.
6 *See, e.g. Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726 (upholding
7 “service payments” to named Plaintiff for their efforts in bringing class action); *Rodriguez v.*
8 *West Publishing* (9th Cir. 2009) 563 F.3d 948, 959 (stating that incentive awards are “intended
9 to compensate class representatives for work done on behalf of the class, to make up for
10 financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize
11 their willingness to act as a private attorney general.”).

12 Under the Settlement, Defendant agreed to pay a Service Award of \$7,500 to Plaintiff
13 in recognition of his contribution as a Class Representative.

14 His efforts included providing factual background for the Class and PAGA complaint;
15 providing documents and information about Defendant’s compensation plan; participating in
16 phone calls to discuss litigation and settlement strategy; making himself available throughout
17 the litigation to assist with analyzing the claims and defenses; helping Class Counsel prepare
18 for the mediation; and reviewing the settlement documents. The Class Representative also
19 assumed significant risk in bringing this litigation – namely, had he lost, he could have been
20 ordered to pay Defendant’s costs. This factor is a significant one for a wage earner, and the
21 potential risk is very real. *See Whiteway v. FedEx Kinkos Office & Print Svcs., Inc.* (N.D. Cal.
22 Dec. 17, 2007) 2007 WL 4531783, at *3 (“the few courts to consider this ‘class
23 representatives’ dilemma’ have not found it inequitable to assess costs upon the lead or named
24 plaintiff in a class action.”)

25 Plaintiff also committed a significant number of hours to assist with the
26 litigation/settlement processes of this case and entered into a general release of all claims
27 against Defendant, whereas the Class Members only released the claims alleged. The
28 requested Service Award is reasonable, particularly in light of the substantial benefits Plaintiff

1 generated for the Class Members, the risks he undertook, and the general release he gave in
2 order to benefit the class. (*See* Pla Decl. ¶¶ 3-9).

3 The Notice sent to each Class Member detailed the proposed service award. No Class
4 Member objected to the proposed payment to Plaintiff. Thus, Plaintiff request that the Court
5 approve the awards because it is both reasonable and appropriate.

6 **VII. OTHER MATTERS FOR FINAL APPROVAL**

7 **A. SETTLEMENT ADMINISTRATION COSTS**

8 The Administrator's flat-fee bid to administrator this case is \$5,600.00. (Dante Decl. ¶
9 17). As such, the Parties request that the Administrator's fee be approved.

10 **B. UNCASHED CHECKS**

11 The Settlement Agreement and Final Order provides that uncashed checks will be
12 issued to the California State Controller in the name of the Class Member.

13 **C. FINAL REPORT**

14 As set forth above and in the Final Order, Defendant's payment is due 15 days after the
15 Final Approval order is signed, which could occur on February 27, 2024. As a result, the 180-
16 day check cashing deadline is projected to occur on about September 21, 2024. As such, the
17 Parties propose submitting a final report in the form of a declaration from the Administrator
18 (setting forth the money that was actually paid to the class members and will be paid to the
19 State Controller) on approximately October 15, 2024.

20 **D. SUBMISSION TO THE LWDA**

21 As set forth in the Mankin Declaration at ¶ 29, the settlement and this motion are
22 concurrently being submitted to the LWDA in accordance with Labor Code § 2699(1)(2).

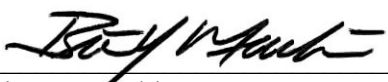
23 **VIII. CONCLUSION**

24 Plaintiff respectfully submits that the Settlement is fair, adequate, and reasonable, and
25 merits approval. This motion is unopposed by Defendant.

26 Dated: February 1, 2024

LAUBY, MANKIN & LAUBY LLP

27 BY:



Brian J. Mankin, Esq.

28 Attorneys for Plaintiff and the Class

PROOF OF SERVICE
(Pursuant to CCP §§ 1013(a)(1) and 2015.5)

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 5198 Arlington Avenue, PMB 513, Riverside, California 92504.

On February 1, 2024, I caused to be served the foregoing document(s) described as follows:

**NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; DECLARATIONS IN SUPPORT THEREOF; AND [PROPOSED] FINAL
ORDER AND JUDGMENT**

I declare that I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **By Mail** I deposited such envelope in the mail at Riverside, California. The envelope was mailed with postage thereon fully prepaid.

☐ **By Facsimile** I sent this document via fax to all parties as listed on attached service list, on

☐ **By Overnight Service** I deposited such envelope in a facility regularly maintained by the United Parcel Service for receipt of items for overnight delivery, with overnight delivery expenses prepaid, addressed to the person to be served.

☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

☐ **By Certified Mail-Return Receipt Requested** I caused such envelope with postage fully prepaid thereon, to be placed in the United States mail at Riverside, California

☐ **By Personal Service** I caused said document(s) to be personally served by hand on the parties listed on the attached service list.

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 1, 2024, Riverside, California.

☐ **Federal** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Tracie Chiarito, Declarant

SERVICE LIST

Tyler H. Brown, Esq.
BROWN & BROWN
10681 Foothill Blvd., #490
Rancho Cucamonga, CA 91730
909-982-5086
tylerbrown@brownandbrownllp.com
Attorneys for Defendants MARTINEZ CONCRETE, INC. and T. ROBERTO MARTINEZ