

Brian J. Mankin, Esq. [CSB No. 216228]
brian@lmlfirm.com
Peter J. Carlson, Esq. [CSB No. 295611]
peter@lmlfirm.com
LAUBY, MANKIN & LAUBY LLP
5198 Arlington Avenue, PMB 513
Riverside, CA 92504
Tel: (951) 320-1444 | Fax: (951) 320-1445

Kirk D. Hanson, State Bar No. 167920
LAW OFFICES OF KIRK D. HANSON
2790 Truxtun Rd., Suite 140
San Diego, California 92106
Tel: (619) 523-1992 | Fax (619) 523-9002

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

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

EDUARDO RIVERA, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

PATRIOT PAVING, INC., a California
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CIVSB2210619

*[Assigned to the Hon. Jessica Morgan, Dept.
S26, 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: November 13, 2023

Time: 8:30 a.m.

Dept.: S26

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 13, 2023, at 8:30 a.m., or as soon thereafter
as this matter may be heard by the Honorable Jessica Morgan in Department S26 of the San
Bernardino County Superior Court, located at 247 West Third Street, San Bernardino, CA

1 92415, Plaintiff Eduardo Rivera, individually and on behalf of all others similarly situated, will
2 move this Court for an Order granting final approval of the class action settlement between
3 Plaintiff and Defendant Patriot Paving, Inc, which was preliminarily approved by the Court.
4 This Motion seeks final approval and entry of judgment of a \$299,000 settlement on behalf of
5 the Class Members, and is unopposed by Defendant.

6 Specifically, Plaintiff will and hereby does move the Court to grant final approval of the
7 Class Action and PAGA Settlement Agreement and Release of Claims ("Settlement
8 Agreement"), and enter the proposed order and final judgment filed concurrently herewith:

9 1. Finally certifying the Class, as defined in the Settlement Agreement and the
10 Court's Order Granting Preliminary Approval of the Settlement;

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

12 3. Finally appointing Brian Mankin, Peter Carlson, and Kirk Hanson as Class
13 Counsel for purposes of settlement;

14 4. Finding that the Class Notice was properly provided to the Class in accordance
15 with the Court's Order granting Preliminary Approval;

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

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

20 7. Retaining jurisdiction to enforce the Settlement Agreement.

21 This Motion will be based upon this notice; the attached memorandum of points and
22 authorities; the Declarations of the Settlement Administrator (Taylor Mitzner of Phoenix
23 Settlement Administrators), Class Counsel (Brian Mankin, Peter Carlson, and Kirk Hanson) and
24 Plaintiff (Eduardo Rivera) filed concurrently herewith; the records and files in this action; and
25 any other further evidence or argument that the Court may receive at or before the hearing.

26 Dated: October 19, 2023

LAUBY, MANKIN & LAUBY LLP

27 BY: 

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

TABLE OF CONTENTS

I.	SUMMARY OF ARGUMENT AND ESSENTIAL POINTS	1
II.	PERTINENT BACKGROUND AND SETTLEMENT TERMS	1
III.	THE NOTICE PROCESS	3
A.	Notice to the Class Members	3
B.	There are Zero Objections and One Opt-Out, Resulting In An Impressive 98.6% of the Class Participating in the Settlement	4
V.	EVALUATION OF THE SETTLEMENT	4
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	6
VI.	THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE	7
A.	Plaintiff is Entitled to Recover Reasonable Attorney's 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	8
1.	<i>The Attorneys' Fees Requested Here Fall Within the Reasonable Range Awarded in Similar Cases Under the Well-established Common Fund Method</i>	<i>9</i>
2.	<i>The High Quality of Work and Excellent Result Obtained Support the Award</i>	<i>10</i>
3.	<i>Class Members Had Sufficient Notice of the Requested Fees</i>	<i>10</i>
4.	<i>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</i>	<i>11</i>
5.	<i>A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award</i>	<i>12</i>
VII.	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	14
VIII.	OTHERS MATTERS RE: FINAL APPROVAL	15
A.	Settlement Administration Costs	15
B.	Notice of Final Judgment to the Class	16
C.	Uncashed Checks	16
D.	Final Report	16
E.	Submission to the LWDA	16
IX.	CONCLUSION	17

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	4
<i>Bell v. Farmers Insurance Exchange</i> (2004) 115 Cal.App.4th 715.....	15
<i>Boeing Co. v. Van Gemert</i> (1980) 444 U.S. 472.....	9
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	7
<i>Ferguson v. Lieff, Cabraser, Heimann & Bernstein</i> (2003) 30 Cal.4th 1037.....	4
<i>Franklin v. Kaypro Corp.</i> (9th Cir. 1989) 884 F.2d 1222	4
<i>Horsford v. Board of Trustees of California State University</i> , 132 Cal.App.4th 359 (2005). 11, 12	
<i>In re American Bank Note Holographics, Inc.</i> (SDNY 2001) 127 F.Supp.2d 418	4
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....	6
<i>Laffitte v. Robert Half International, Inc.</i> (2016) 1 Cal.5 th 480.....	8
<i>Litwin v. iRenew Bio Energy Solutions, LLC</i> , 226 Cal.App.4th at p. 883	10
<i>Mandujano v. Basic Vegetable Prods., Inc.</i> , (9th Cir. 1976) 541 F.2d 672.....	4
<i>PLCM Group, Inc. v. Drexler</i> (2000) 22 Cal.4 th 1084.....	12
<i>Press v. Lucky Stores, Inc.</i> (1983) 34 Cal.3d 311	12
<i>Rodriguez v. West Publishing</i> (9th Cir. 2009) 563 F.3d 948	15
<i>Serrano III v. Priest</i> (1977) 20 Cal.3d 25	9
<i>Stambaugh v. Super. Ct.</i> (1976) 62 Cal.App.3d 231.....	4
<i>Vizcaino v. Microsoft Corp</i> (9th Cir. 2002) 290 F.3d 1043.....	11
<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
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

I. SUMMARY OF ARGUMENT AND ESSENTIAL POINTS

Pursuant to California Rules of Court, Rule 3.769(d) and (e), Plaintiff Eduardo Rivera respectfully requests that this Court grant final approval of the Class Action and PAGA Settlement Agreement and Release of Claims (“Settlement Agreement”), and enter the proposed order and final judgment in this matter. This Motion is supported and unopposed by Defendant Patriot Paving, Inc. (“Defendant”).

There are several essential reasons why this settlement should be approved, and judgment entered accordingly, as follows:

- After extensive work, the Parties reached a \$299,000 settlement with the assistance of mediator Gail Glick, which is tailored to a limited release of the claims alleged on behalf of the Participating Class Members;
- The Class Members were deemed to participate in the Settlement, and were not required to submit a Claim Form to receive funds;
- There is no reversion to Defendant;
- There have been zero objections and only one opt-out to the Settlement, meaning that 98.6% of the Class is participating in the Settlement.

In accordance with the analysis and law set forth herein as well the preliminary approval motion, 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; ¶¶ 13, 33 (“Mankin Decl.”).)

II. PERTINENT BACKGROUND AND SETTLEMENT TERMS

Plaintiff and the Class Members include current and former nonexempt employees employed by Defendant in California at any time during the Class Period of May 27, 2018, through April 10, 2023. The primary claims, which Defendant disputes, include allegations that the Class Members did not receive all minimum, regular and overtime wages owed, did not receive accurate itemized wage statements, were not provided compliant meal and rest breaks, were not reimbursed for all business expenses, as well as claims for waiting time penalties and

PAGA penalties.

The Settlement includes 73 Participating Class Members. The following is a breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration of Administrator, Taylor Mitzner (“Mitzner Decl.”), ¶ 13):

<i>Gross Settlement Amount</i>	\$ 299,000.00
Attorneys’ Fees (1/3)	\$ 99,666.66
Litigation Costs	\$ 10,401.28
Administrator Costs	\$ 6,000.00
PAGA Penalties	\$ 10,000.00
Class Representative Service Award	\$ 7,500.00
<i>Net Settlement Amount</i>	\$ 165,432.05

In terms of the payments, all Class Members were deemed to participate and did not need to submit a Claim Form to receive payment. (Settlement Agreement or “S.A.” ¶ 28). Each Participating Class Member will receive a pro rata share of the Net Settlement Amount according to the percentage of Workweeks worked during the Class Period, such that the amount actually distributed to Participating Class Members will equal 100% of the Net Settlement Amount. (Settlement Agreement ¶ 47(c)).

Assuming all of the amounts in the Settlement are approved by the Court, the *average* Individual Class Payment is estimated to be \$2,266.19 and the *highest* individual settlement payment is approximately \$6,527.18. (Mitzner Decl. ¶ 14). The Participating Class Members collectively worked 6,463 weeks during the Class Period, resulting in a net Workweek value of approximately \$25.60. (Mitzner Decl. ¶ 12).

In addition, 41 PAGA Members will each receive an Individual PAGA Payment based on their share of the \$2,500 in PAGA Penalties (25% of the total \$10,000 PAGA allocation), calculated pro-rata based on the number of Weeks Worked during the PAGA Period. (S.A. ¶ 47(h)). The PAGA Members collectively worked 1,999 Workweeks, and their average Individual PAGA Payment is \$60.98. (Mitzner Decl. ¶ 15).

Twenty percent (20%) of each Individual Settlement Amount shall constitute wages (for which each Participating Class Member will be issued an IRS Form W-2 for such payment), and the remaining eighty percent (80%) shall constitute interest and penalties (each for which each

1 participating Class Member will be issued an IRS Form 1099). (S.A. ¶ 47(d)). The Settlement
2 Agreement provides that Defendant shall deposit the Settlement Amount within 15 days after the
3 “Effective Date” (S.A. ¶ 69), which will be the date that the Final Order is entered since there
4 were no objections or motions to intervene filed. Additionally, Defendant will separately fund
5 its share of payroll taxes. Within 10 days of receipt, the Settlement Administrator shall issue
6 payments to cover all court-approved payments. (S.A. ¶ 70).

7 Class Members will have 180 days to cash the settlement check. If a Class Member fails
8 to cash a check by the deadline, the Settlement Administrator shall issue unclaimed funds to the
9 California State Controller in the name of the Class Member. (S.A. ¶ 71).

10 **III. THE NOTICE PROCESS**

11 **A. Notice to the Class Members**

12 Pursuant to the Court’s Order and the Settlement Agreement, the Parties directed the
13 Settlement Administrator to review and update the Class Members’ addresses, mail the Court-
14 approved Notice Packet, and process their responses. The Administrator also posted the relevant
15 documents on its website for the Class Members to access.

16 Prior to the mailing, the Settlement Administrator performed a National Change of
17 Address search on all Class Members to determine if any had moved. (Mitzner Decl., ¶ 4). On
18 August 7, 2023, the Class Notice was sent via first-class mail to 72 Class Members. (Mitzner
19 Decl., ¶ 5). Ultimately, all 72 Class Notices were determined to be deliverable. (Mitzner Decl.,
20 ¶ 6). However, during the response period, Phoenix was contacted by two (2) individuals who
21 were not included in the Class List but believed they were eligible to participate in the
22 settlement. Phoenix submitted their information to Defense Counsel for further review and it was
23 determined that these two (2) individuals qualified to be Class Members, bringing the total to 74
24 Class Members. (Mitzner Decl., ¶ 10).

25 In accordance with California Rules of Court, rules 3.766 (d) and 3.769 (f), the Notice
26 provided Class Members with (1) a brief explanation of the case; (2) an explanation of each
27 Class Member’s right to opt out of the settlement class; (3) an explanation of the process (and
28 relevant deadlines) through which a Class Member could opt out of the settlement class; (4)

1 notice about the binding nature of the Judgment for Class Members who do not opt out; (5) an
2 explanation of each Class Member's right to appear through counsel; (6) an explanation of each
3 Class Member's right to appear at the fairness hearing and express views on the settlement, i.e.,
4 object or otherwise respond; and (7) an explanation of each Class Member's right to participate
5 in the Settlement and receive payment accordingly. (See **Exhibit A** to the Mitzner Decl.)

6 **B. There are Zero Objections and One Opt-Out, Resulting In An Impressive**
7 **98.6% of the Class Participating in the Settlement**

8 California law makes clear that the percentage of objectors and opt-outs is an important
9 factor in the Court's consideration of a proposed class action settlement. (See *Dunk v. Ford*
10 *Motor Co.* (1186) 48 Cal.App.4th 1794 at 1802.) Indeed, the Ninth Circuit and other federal
11 courts recognize that in the final fairness analysis, the number or percentage of class members
12 who object to the settlement is a significant factor. (See *Mandujano v. Basic Vegetable Prods.,*
13 *Inc.*, (9th Cir. 1976) 541 F.2d 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY
14 2001) 127 F.Supp.2d 418, 425 ["[i]t is well settled that the reaction of the class to the settlement
15 is perhaps the most significant factor to be weighed in considering its adequacy."])

16 In this case, as noted above, there are zero objections and only one opt-out to the
17 Settlement -- meaning that 98.6% of the Class Members elected to participate in the Settlement.
18 (Mitzner Decl., ¶ 7-9).

19 **V. EVALUATION OF THE SETTLEMENT**

20 It is axiomatic that California law strongly favors and encourages settlements. (See
21 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236.) This presumption in favor of
22 settlement applies with particular force in the context of class actions. (See *Ferguson v. Lieff,*
23 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037 ["[p]ublic policy favoring settlement is
24 especially weighty for class actions"]; *Bell v. Am. Title Ins. Co.* (1991) 226 Cal.App.3d 1589,
25 1607-1608 [affirming the trial court's approval of a class settlement and implicitly endorsing its
26 citation of federal precedent for the notion that there is a "strong public policy in favor of
27 settlement of class actions"]; see also *Franklin v. Kaypro Corp.* (9th Cir. 11869) 884 F.2d 1222,
28 1229, quoting *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950 ["it hardly

1 seems necessary to point out that there is an overriding public interest in settling and quieting
2 litigation. This is particularly true in class action suits”].)

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

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

13 **A. The Settlement Was Reached Through Informed Arms-Length Negotiation**

14 Courts presume the absence of fraud or collusion in the negotiation of a settlement,
15 unless evidence to the contrary is offered. Thus, there is a presumption here that the negotiations
16 were conducted in good faith. (See, 3 Alba Conte & Newberg, *supra*, at § 11.51.) The proposed
17 settlement here was the product of arm’s-length negotiation before a highly experienced and
18 reputable class action mediator to reach a settlement, which was finally consummated in the
19 months after mediation.

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

25 As the Settlement Agreement itself reveals, there is no preferential treatment for any
26 segment of the class, as the Settlement is designed to compensate all Class Members fairly and
27 adequately. And pursuant to California Rules of Court Rule 3.769(b), the parties have disclosed
28 the agreed upon and proposed attorney fee award, which is well within the range of

1 reasonableness for matters of this nature.

2 **B. Plaintiff's Investigation Was Sufficient**

3 As set forth at the time of preliminary approval, Class Counsel's investigation into the
4 facts and merits of the wage and hour claims alleged included substantial written discovery,
5 analyzing substantial amounts of information, correspondence, documents, policies and
6 procedures, pay data and timekeeping records, and evidence relating to the class size and the
7 commonality of the claims. During this process, Plaintiff and Class Counsel conducted
8 investigations into the potential claims of the similarly situated employees, as well as researching
9 and investigating Defendant's defenses. Finally, Class Counsel synthesized and analyzed
10 information provided by Defendant as to the total Class Members, the number of current and
11 former employees, the number of employees who worked during various time periods, and
12 prepared comprehensive damages calculations regarding the claims at issue.

13 **C. Class Counsel Are Experienced in Similar Litigation and Endorse the**
14 **Settlement**

15 Class Counsel are experienced in this type of litigation, and they have represented (and
16 hereby do represent) that this Settlement is fair and reasonable. (Mankin Decl., ¶¶ 13, 33;
17 Carlson Decl., ¶¶ 2-6; see *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
18 Cal.App.4th 1135, 1152 [Final approval of settlement affirmed where counsel were all
19 experienced litigators with class-action experience and had recommended settlement based on
20 the negotiated terms].)

21 **D. Reasonable Estimate of the Nature and Amount of Recovery**

22 Plaintiff's Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
23 (which sufficiently provided the Court with "basic information about the nature and magnitude
24 of the claims in question and the basis for concluding that the consideration being paid for the
25 release of those claims represents a reasonable compromise." (*Kullar v. Foot Locker Retail,*
26 *Inc.* (2008) 168 Cal.App.4th 116, 133.) Of course, a settlement is not judged against what
27 might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to
28 provide 100% of the damages sought to be fair and reasonable. (*Wershba v. Apple Computers,*

1 *Inc.* (2001) 91 Cal.App.4th 246, 250.) (“Compromise is inherent and necessary in the settlement
2 process ... even if the relief afforded by the proposed settlement is substantially narrower than it
3 would be if the suits were to be successfully litigated, this is no bar to a class settlement because
4 the public interest may indeed be served by a voluntary settlement in which each side gives
5 ground in the interest of avoiding litigation.”)

6 In light of the uncertainties of protracted litigation, this negotiated settlement reflects the
7 best practicable recovery for the Class. While the total settlement amount is, of course, a
8 compromise figure, the potential risks and opportunities of both parties were effectively weighed
9 and considered by the parties, resulting in a fair and equitable settlement. Based upon detailed
10 data obtained through discovery and information exchanges, and factoring in claim certification
11 probabilities and liability probabilities, Class Counsel formulated detailed damages models to
12 evaluate the claims in preparation for mediation and in order to reach a realistic and reasonable
13 resolution.

14 Defendant denies that any damages should be assessed and denies all of the value
15 assessed by Plaintiff. Notwithstanding these arguments, in light of the uncertainties and
16 expense associated with protracted litigation, the Settlement commits Defendant to pay
17 \$299,000 to settle the litigation.

18 **VI. THE REQUESTED ATTORNEYS’ FEES ARE FAIR AND REASONABLE**

19 For their efforts in creating a common fund for the benefit of the Class, the Settlement
20 Agreement provided that Class Counsel may seek reasonable fees of \$99,666.66 (one-third of the
21 Settlement Amount). This amount will be paid from the settlement amount, as provided by the
22 Settlement Agreement. These fees are warranted under the law and within the range of fees
23 commonly awarded in similar cases.

24 As shown herein, the requested percentage of one-third of the settlement fund as payment
25 for attorneys’ fees should be granted for several reasons, including one-third is the standard
26 bench mark in California for class action settlements (see e.g., *Chavez v. Netflix, Inc.* (2008) 162
27 Cal.App.4th 43, 66 n. 11 (“Empirical studies show that, regardless whether the percentage
28 method or the lodestar method is used, fee awards in class actions average around one-third of

1 the recovery”), that the California Supreme Court held that the percentage of the fund method
2 survives in California class action cases (*Laffitte v. Robert Half International, Inc.* (2016) 1
3 Cal.5th 480, and through the prism of a lodestar cross-check. Accordingly, this request should
4 receive final approval.

5 **A. Plaintiff is Entitled to Recover Reasonable Attorney’s Fees Under the**
6 **Labor Code**

7 Plaintiff and the Class in this action are entitled to recover reasonable attorneys’ fees,
8 expenses and costs under section 218.5 of the California Labor Code, which provides that, “[i]n
9 any action brought for the nonpayment of wages ... the Court shall award reasonable attorneys’
10 fees and costs to the prevailing party.” In addition, Plaintiff and the Class are entitled to recover
11 reasonable attorneys’ fees pursuant to section 1194.2 of the Labor Code, which provides that,
12 “... any employee receiving less than the legal minimum wage ... applicable to the employee is
13 entitled to recover in a civil action the unpaid balance of the full amount of this minimum
14 wage... including ... reasonable attorney’s fees, and costs of suit.” Plaintiff is also entitled to
15 fees and costs under section 226(e) of the Labor Code (employee who prevails on claim for
16 itemized wage statement violation “is entitled to an award of costs and reasonable attorneys’
17 fees”); under PAGA (Labor Code § 2699(g), which provides “Any employee who prevails in any
18 action shall be entitled to an award of reasonable attorney’s fees and costs, including any filing
19 fee paid”); and, potentially, section 1021.5 of the California Code of Civil Procedure.

20 **B. Class Counsel’s Request for Fees Is Reasonable and Properly Calculated as**
21 **a Percentage of the Common Fund**

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

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

4 The California Supreme Court has approved trial courts’ usage of the common fund
5 method of awarding attorneys’ fees in wage and hour class actions, like this one, upholding a fee
6 awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte*, 1 Cal.5th at
7 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 552 (“fee awards in class actions average
8 around one-third of the recovery”). Specifically, in *Laffitte*, the Court wrote: “[w]e join the
9 overwhelming majority of federal and state courts in holding that when class action litigation
10 establishes a monetary fund for the benefit of the class members, and the trial court in its
11 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
12 of a reasonable fee by choosing an appropriate percentage of the fund created”). *Id.* at 506. The
13 California Supreme Court also noted that trial courts have the discretion to award fees as a
14 percentage of the common fund, with or without the necessity to conduct a lodestar cross-check.
15 *Id.* (“...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
16 evaluate the reasonableness of a requested percentage fee.”)

17 The California Supreme Court’s *Laffitte* decision was consistent with its prior rulings
18 recognizing that “when a number of persons are entitled in common to a specific fund, and an
19 action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that
20 fund, such ... plaintiffs may be awarded attorneys’ fees out of the fund.” *Serrano III v. Priest*
21 (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (“[A] lawyer who
22 recovers a common fund . . . is entitled to reasonable attorneys’ fees from the fund as a whole”).
23 Notably, when fees are calculated as a percentage of the common fund, they should be calculated
24 based on the amount that was available to be claimed, rather than as a percentage of the actual
25 amount claimed. *See Id.* at 475-6, 480-1 (the SCOTUS held that attorneys for a successful class
26 may recover a fee based on the fund created for the class, even if some class members make no
27 claims against the fund, so that money remains in it that will be returned to the defendant,
28 explaining: “[t]heir [class members’] right to share the harvest of the lawsuit upon proof of their

1 identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class
2 representatives and their counsel.” *See also Williams v. MGM-Pathe Communs. Co.* (9th Cir.
3 1997) 129 F.3d 1026, 1027 (trial court “abused its discretion by basing the fee on the class
4 members’ claims against the fund rather than on a percentage of the entire fund or on the
5 lodestar”).

6 **2. The High Quality of Work and Excellent Result Obtained Support**
7 **the Award**

8 In addition to the fact that a Class benefit was created with a \$299,000 non-reversionary
9 common fund settlement, the fairness of the requested fee award of 1/3 of the Settlement
10 Amount is supported by the high quality of work performed by Class Counsel and the positive
11 result obtained for the Class. This result occurred because Class Counsel diligently, efficiently,
12 and creatively pursued this case and reached a successful settlement for the benefit of the entire
13 Class. In fact, some Class Members will receive over **\$6,500, which is an excellent result.**
14 Moreover, the fact that the settlement was embraced and supported by the Class, as evidenced by
15 a 98.6% participation rate thus far, demonstrates that Class Counsel obtained a favorable result
16 for the Class.

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

18 Rule 3.769 of the California Rules of Court requires that the Class Members be given
19 notice of any agreement regarding an application for attorneys’ fees. Here, the Notice
20 preliminarily approved by the Court and distributed to the Class Members apprised them of the
21 requested attorneys fees, which was consistent with the Notice.

22 The Class Notice also advised the class members of the procedures for objecting to the
23 proposed settlement and appearing at the settlement hearing, where they could present their
24 objections to any aspect of the settlement, including the amount of attorneys’ fees to be awarded
25 to class counsel. (*Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883
26 “[p]rocedural due process requires that affected parties be provided with ‘the right to be heard at
27 a meaningful time and in a meaningful manner’”].) In accordance with the foregoing, it is
28 respectfully submitted that the instant notice complied with Rule 3.769 and, as a result, the Class

1 Members' due process rights were fulfilled.

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

5 An additional factor in favor of the granting of the requested fee award is the fact that this
6 case was both legally and financially risky for Class Counsel. (*See Vizcaino v. Microsoft Corp*
7 (9th Cir. 2002) 290 F.3d 1043, 1048-49.) Class Counsel have been representing the Class in this
8 matter on a strictly contingency basis, and as such, incurred the risk of non-recovery after a
9 substantial investment of time, money, and resources, and have done so since the inception of
10 this case without any payment or compensation. Specifically, there was the prospect of
11 enormous cost inherent in class action litigation; the risk that Defendant could prevail on its
12 argument that the class should not be certified; and the risk that Defendant could prevail on the
13 merits of some or all of the claims.

14 If Plaintiff had lost this case, Class Counsel would have recovered nothing, and would
15 have lost its out-of-pocket costs. This is not an easy burden for Plaintiff's Counsel, which are
16 small firms. (Mankin Decl. ¶ 20).

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

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

1 *Id.* at 399-400.

2 Indeed, as Class Counsel can attest, not all class/PAGA cases are successful. Many cases
3 end with no fees or a greatly reduced fee that is far less than lodestar, often due to no fault of
4 counsel (i.e., bankruptcy, change in the law, consolidation/coordination/preemption, being top
5 filed, etc.). According to Mayer Brown LLP's study entitled, An Empirical Analysis of Class
6 Actions, cited in *Laguna v. Coverall North America, Inc.*, No. 12-55479 (9th Circuit 2014), found
7 that only one-third of class actions are successful, compared to two-thirds that are defeated and
8 result in no payment to the class members.¹

9 Thus, the contingent nature of this case supports a fee of one-third of the common fund.

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

12 Despite recognized limitations of the so-called lodestar method, some California and
13 federal courts acknowledge the utility of a lodestar "cross-check."² (*Lealao, supra*, 82
14 Cal.App.4th at 46-47.) Under the "lodestar multiplier" method of cross-checking the
15 reasonableness of attorneys' fees in class actions, the court ascertains Class counsel's total
16 "lodestar" amount by multiplying the number of hours reasonably expended by each attorney or
17 legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a
18 "multiplier" to account for a range of factors, such as the novelty or difficulty of the case, its
19 contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22
20 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322; *Lealao, supra*, 82
21 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the "fee awarded is
22 within the range of fees freely negotiated in the legal marketplace in comparable litigation"].)

23
24
25 _____
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.

The actual aggregated lodestar between the Plaintiff's attorneys that worked on this case is approximately \$151,788. This results in a *negative* multiplier, as summarized in the following table, and in the submitted declaration of Plaintiff's counsel:

Attorney/Timekeeper	Role	Yrs Experience	Rate	Hours	Fee
Brian J. Mankin (Partner – LML)	Trial Counsel	22	\$775	42³	\$32,550
Peter Carlson (Senior Associate – LML)	Handling Attorney	9	\$575	107.4	\$61,755
Kirk Hanson (Principal – Hanson Law Firm)	Trial Counsel	29	\$900	63.8	\$57,483
Grand Total for All Attorneys					\$151,788

(See Mankin Decl. ¶ 25; Carlson Decl. ¶ 8-9; Hanson Decl. ¶ 14-15).

Class Counsel's requested rates are reasonable under the Laffey Matrix (www.laffeymatrix.com) which indicates that the benchmark rate for an attorney with 20+ years of experience (such as Mr. Mankin and Mr. Hanson) is \$914, while the rate for attorneys with 8-10 years of experience (such as Ms. Carlson) is \$672. Moreover, the Wolters Kluwer 2017 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: 25.8 million billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from 4,620 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer's ELM Solutions, Inc., 2017 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide the hourly rates for partners and associates in major metropolitan areas. For the southern California area, which is based on billing entries for 1,125 partners and 1,566 associates, the Real Rate Report states that: (a) the rates for partners in Los Angeles is between \$640 and \$869.75 per hour for the middle and upper quartiles, and (b) the rates for associates in Los Angeles is between \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most importantly, the information provided in the Real Rate Report is not based on self-reported

³ Includes an estimated 20 hours that will be expended in finalizing the motion, attending the hearing, working with the parties and administrator regarding the notice and payment process, and filing any post judgment paperwork.

1 numbers, surveys, sampling, or reviews or other publications – instead, the Real Rate Report is
2 based on the actual hours and fees billed by law firms. These numbers are not surprising given
3 that a 4-year-old article in the National Law Journal stated that in **2014** partners in Los Angeles
4 charge an average of \$665, while the average associate rate is \$401. (Sloan, \$1,000 Per Hour
5 Isn't Rare Anymore; Nominal Billing Levels Rise, But Discounts Ease Blow (2014) Nat. Law
6 Journal.)⁴. (Mankin Decl., ¶ 24.)

7 Thus, not only are Plaintiff's Counsel's rates reasonable and typical, but the attorneys'
8 fees requested far less than Plaintiff's Counsel's lodestar, all of which confirms that the fee
9 request is fair and reasonable.

10 Class Counsel are also highly experienced in Class/PAGA litigation. (Mankin Decl. ¶¶
11 2-6; Hanson Decl. ¶¶ 2-6). Indeed, Class Counsel's rates are typical of the rates charged by
12 defense counsel with similar experience doing similar employment law work in this region.

13 **VII. THE REQUESTED COSTS AND SERVICE AWARDS ARE REASONABLE**

14 **A. The Requested Costs Are Reasonable and Merit Approval**

15 The Settlement Agreement authorized litigation expenses up to \$20,000. (Settlement
16 Agreement ¶ 47(f)). However, Class Counsel's actual combined costs through the final
17 approval hearing are estimated to be \$10,401.28, including \$7,738.78 by Lauby Mankin Lauby
18 LLP and \$2,662.50 by Law Offices of Kirk Hanson. (Mankin Decl. ¶ 27; Hanson Decl. ¶ 15.)
19 Since Class Counsel's actual costs were less than the amount allocated, the saving will be
20 placed in the Net Settlement Amount. These costs include mediation fees, filing fees,
21 CourtCall charges, and court filing fees, and process server fees.

22 **B. The Requested Service Award is Reasonable and Merits Approval**

23 A named plaintiff is an essential ingredient of any class action and an incentive award
24 is appropriate to induce individuals to step forward and assume the burdens and obligations of
25 representing the Class. Courts regularly approve service payments to compensate named
26 Plaintiffs for their service to the class and the risks they incurred during the course of the

27
28 ⁴ The article notes that at Irell & Manella, the average partner rate is \$890/hr; Mannatt, Phelps & Phillips is \$740/hr; O'Melveny & Meyers is \$715/hr; and Jeffer Mangels Butler & Mitchell is \$690/hr. *Id.*

1 litigation. (*See, e.g. Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726
2 (upholding “service payments” to named Plaintiff for their efforts in bringing class action);
3 *Rodriguez v. West Publishing* (9th Cir. 2009) 563 F.3d 948, 959 (stating that incentive awards
4 are “intended to compensate class representatives for work done on behalf of the class, to make
5 up for financial or reputational risk undertaken in bringing the action, and, sometimes, to
6 recognize their willingness to act as a private attorney general.”).

7 Under the Settlement, Defendant agreed to pay Service Awards in the amount of \$7,500
8 to Plaintiff Eduardo Rivera in recognition of his contribution as the Class Representative and
9 the fact that he agreed to a general release of all claims. In addition, Plaintiff also undertook
10 significant risks, including the risk of being blackballed in the industry and the risk that he
11 could have been liable for Defendant’s costs if he lost. This factor is a significant one for a
12 wage earner, and the potential risk is very real. (*See Whiteway v. FedEx Kinkos Office & Print*
13 *Svcs., Inc.* (N.D. Cal. Dec. 17, 2007) No. C 05-2320 SBA, 2007 WL 4531783, at *3 (“the few
14 courts to consider this ‘class representatives’ dilemma’ have not found it inequitable to assess
15 costs upon the lead or named plaintiff in a class action.”).)

16 Plaintiff also committed a significant number of hours to assist with the
17 litigation/settlement processes of this case. The requested Service Payment is reasonable,
18 particularly in light of the substantial benefits Plaintiff generated for the Class Members, the
19 risks he undertook, and in exchange for executing a general release against Defendant. (See
20 Rivera’s Declaration ¶¶ 3-9.)

21 The Notice sent to each Class Member detailed the proposed service award. No Class
22 Member has objected to the proposed payment to Plaintiff. Thus, Plaintiff’s request that the
23 Court approve the award because it is both reasonable and appropriate.

24 **VIII. OTHERS MATTERS RE: FINAL APPROVAL**

25 **A. Settlement Administration Costs**

26 The parties agreed that the Administrator, Phoenix Settlement Administrators, would be
27 compensated for services performed. The Administrator’s flat fee is \$6,000.00, which
28 included considerable work performed by the administrator in resolving the data issues and

1 paying for the newspaper ad. (Mitzner Decl., ¶ 17; Exhibit B thereto.)

2 **B. Notice of Final Judgment to the Class**

3 The Proposed Final Approval Order directs the Settlement Administrator to give notice
4 of entry of judgment by including a postcard to the Class Members at the same time the checks
5 are mailed.

6 **C. Uncashed Checks**

7 The Settlement Agreement provides that unclaimed funds will be submitted to the
8 California State Controller's Unclaimed Property Fund in the name of the Class Member
9 thereby leaving no "unpaid residue" subject to the requirements of California Code of Civil
10 Procedure Section 384, subd. (b). (S.A. ¶ 71.)

11 **D. Final Report**

12 Defendant's payment is due 15 days after the Effective Date, which will occur the date
13 that the Final Order is entered since there were no objections or motions to intervene. The
14 Administrator then has 10 days thereafter process the funds and issue checks to the Class
15 Members, who will then have 180 days to cash their checks. Accordingly, the Parties project
16 that the check cashing deadline will occur on approximately June 5, 2024. Thereafter, the
17 Parties propose submitting a final report in the form of a declaration from the Administrator on
18 approximately July 8, 2024 and then holding a disbursement hearing thereafter at the Court's
19 convenience.

20 **E. Submission to the LWDA**

21 As set forth in the Mankin Declaration at ¶ 29, the Settlement Agreement and this
22 motion are concurrently being submitted to the LWDA in accordance with Labor Code §
23 2699(1)(2). The LWDA has not commented on the Settlement to date.

24 ///

25 ///

26 ///

27 ///

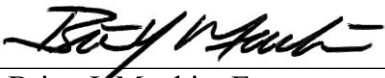
28 ///

1 **IX. CONCLUSION**

2 Plaintiff respectfully submits that the Settlement is fair, adequate, and reasonable, and
3 merits final approval.
4

5 Dated: October 19, 2023

LAUBY, MANKIN & LAUBY LLP

6
7 BY: 
8 Brian J. Mankin, Esq.
9 Attorneys for Plaintiff and the Class
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 October 19, 2023, 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.

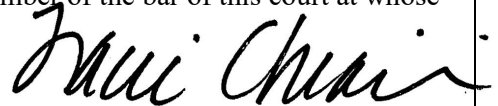
☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service 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 October 19, 2023, 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

Boris Sorsher, Esq.
Lisa L. Peterson, Esq,
FISHER & PHILLIPS
2050 Main Street, #1000
Irvine, CA 92614
949-798-2101
bsorsher@fisherphillips.com
lpeterson@fisherphillips.com
Attorneys for PATRIOT PAVING INC.