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6 Attorneys for Plaintiff, NATHAN SMITH, on behalf of himself
7 and all others similarly situated or aggrieved,

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF STANISLAUS – CIVIL DIVISION**

11 NATHAN SMITH, on behalf of himself and
12 all others similarly situated or aggrieved,

13
14 Plaintiffs,

15 v.

16 MCMILLEN ENTERPRISES, INC., a
California corporation, doing business as
"United Paving"; DAVID JOSEPH
17 MCMILLEN, an individual; and DOES 1
through 100, inclusive,

18
19 Defendants.

FILED

DEC 03 2021

CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

BY *Maritza S. Herrera*

CASE NO.: CV-20-002938

[Assigned for all purposes to the Hon. Marie
Sovey Silveira, Dept. 21]

~~[PROPOSED]~~ ORDER GRANTING
PRELIMINARY APPROVAL OF CLASS
AND REPRESENTATIVE ACTION
SETTLEMENT AND PROVISIONAL
CLASS CERTIFICATION FOR
SETTLEMENT PURPOSES ONLY

[Lodged concurrently with Motion for
Preliminary Approval]

HEARING INFORMATION:

DATE: December 2, 2021
TIME: 8:30 a.m.
DEPT: 21

1 This Court, having considered the Motion of plaintiff Nathan Smith (“Plaintiff” or “Mr.
2 Smith”) for Preliminary Approval of Class and Representative Action Settlement and Provisional
3 Class Certification for Settlement Purposes Only (“Motion for Preliminary Approval”), the
4 Declarations of David D. Bibiyan and Jasmin K. Gill, the Joint Stipulation Re: Class Action and
5 Representative Action Settlement (the “Settlement Agreement”), the Notice of Proposed Class
6 Action Settlement (“Class Notice”), and other documents submitted in support of the Motion for
7 Preliminary Approval, hereby **ORDERS, ADJUDGES AND DECREES THAT:**

8 1. The definitions set out in the Settlement Agreement are incorporated by reference
9 into this Order; all terms defined therein shall have the same meaning in this Order.

10 2. The Court certifies the following settlement class for the purpose of settlement only:
11 all current and former non-exempt, hourly-paid employees who worked for defendants McMillen
12 Enterprises, Inc., doing business as “United Paving” (“United Paving”) and David Joseph McMillen
13 (“McMillen” and, collectively with United Paving, “Defendants”) from July 8, 2016 through July
14 31, 2021 (“Class Period”) in California (“Class Members”).

15 3. The Court preliminarily appoints named plaintiff Mr. Smith as Class
16 Representatives, and David D. Bibiyan of Bibiyan Law Group, P.C. as well as Jasmin K. Gill of J.
17 Gill Law Group, P.C. as Class Counsel.

18 4. The Court preliminarily approves the proposed class settlement upon the terms and
19 conditions set forth in the Settlement Agreement. The Court finds, on a preliminary basis, that the
20 settlement appears to be within the range of reasonableness of settlement that could ultimately be
21 given final approval by the Court. It appears to the Court on a preliminary basis that the settlement
22 amount is fair, adequate and reasonable as to all potential Class Members when balanced against
23 the probable outcome of further litigation relating to liability and damages issues. It further appears
24 that extensive and costly investigation and research has been conducted such that counsel for the
25 parties at this time are reasonably able to evaluate their respective positions. It further appears to
26 the Court that the settlement at this time will avoid substantial additional costs by all parties, as well
27 as the delay and risks that would be presented by the further prosecution of the Action. It further
28 appears that the settlement has been reached as the result of intensive, non-collusive, arms-length

1 negotiations utilizing an experienced neutral third party.

2 5. The Court approves, as to form and content, the Class Notice that has been submitted
3 herewith.

4 6. The Court directs the mailing of the Class Notice by first-class mail to Class
5 Members in accordance with the procedures set forth in the Settlement Agreement. The Court finds
6 that the dissemination of the Class Notice set forth in the Settlement Agreement complies with the
7 requirements of law, and appears to be the best notice practicable under the circumstances.

8 7. The Court hereby preliminarily approves the definition and disposition of the Gross
9 Settlement Amount of \$285,800, which is inclusive of attorneys' fees up to 35% the Gross
10 Settlement Amount (or \$100,030 if the Gross Settlement Amount is not escalated pursuant to
11 Paragraph 8 below), in addition to actual costs not to exceed \$25,000; an enhancement award of
12 \$7,500.00 for Plaintiff; costs of settlement administration of no more than \$6,000; and PAGA
13 penalties in the amount of \$10,000.00, of which \$7,500 (75%) will be paid to the LWDA and
14 \$2,500.00 (25%) will be paid to Participating Class Members (*i.e.*, Class Members who do not
15 validly opt out). The Gross Settlement Amount expressly excludes Employer Taxes, which will be
16 paid separately and apart by Defendants on the wages portion of the Settlement Amount.

17 8. Defendants represent that there are no more than 5,716 Workweeks worked by Class
18 Members between July 8, 2016 through July 31, 2021. In the event the number of Workweeks in
19 the Class Period exceeds 6,287 Workweeks, then the Gross Settlement Amount shall be increased
20 proportionally for every Workweek above and beyond 6,287 Workweeks by the Workweek Value.
21 The Workweek Value shall be calculated by dividing the current Gross Settlement Amount
22 (\$285,800.00) by 5,716, which amounts to a Workweek Value of \$50.00. Thus, for example, should
23 there be 6,500 Workweeks in the Class Period, then the Gross Settlement Amount shall be increased
24 by \$10,650.00. (6,500 Workweeks – 6,287 Workweeks x \$50.00/Workweek.)

25 9. The Court appoints Phoenix Settlement Administrators (“Phoenix”) as the
26 Settlement Administrator, and approves payment of administrative costs, not to exceed \$6,000.00,
27 out of the Gross Settlement Amount for services to be rendered by Phoenix on behalf of the class.

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1 10. The Court directs Defendants to, within ten (10) calendar days of the date of this
2 Order, provide the Settlement Administrator with the "Class List" for Settlement Class Members
3 providing the following information for each Settlement Class Member: (1) name, last known
4 address(es) and last known telephone number(s) currently in Defendants' possession, custody, or
5 control; (2) Social Security Number in Defendants' possession, custody, or control; and (3) the hire
6 dates and termination or resignation dates for each Class Member, which shall be made available to
7 Class Counsel upon request. The Settlement Administrator shall perform an address search using
8 the United States Postal Service National Change of Address ("NCOA") database and update the
9 addresses contained on the Class List with the newly-found addresses, if any.

10 11. Within seven (7) calendar days of receiving the Class List from Defendants, the
11 Settlement Administrator shall mail the Class Notice in English and Spanish to the Class Members
12 via first-class regular U.S. Mail using the most current mailing address information available. Prior
13 to mailing the Notice to each Class Member, the Settlement Administrator shall undertake
14 reasonable address verification measures so as to update the last known address for each Class
15 Member. To the extent that this process yields an updated address, that updated address shall replace
16 the last known address and be treated as the new last known address for purposes of this Settlement,
17 and for subsequent mailings. The Settlement Administrator shall maintain a Class List with
18 continuously updated contact information for the Class Members and maintain a list with names and
19 all addresses to which notice was given, and digital copies of all the Settlement Administrator's
20 records evidencing the giving of notice to any Settlement Class Member, for at least four (4) years
21 from the Effective Final Approval Date.

22 12. If a Class Notice from the initial notice mailing is returned as undeliverable, the
23 Settlement Administrator will attempt to obtain a current address for the Settlement Class Member
24 to whom the returned Class Notice had been mailed, within five (5) calendar days of receipt of the
25 returned Class Notice, by: (1) contacting the Settlement Class Member by phone, if possible, and
26 (2) undertaking skip tracing. If the Settlement Administrator is successful in obtaining a new
27 address, it will promptly re-mail the Class Notice to the Settlement Class Member. Further, any
28 Class Notices that are returned to the Settlement Administrator with a forwarding address before the

1 Response Deadline shall be promptly re-mailed to the forwarding address affixed thereto. Class
2 Members who are re-mailed a Class Notice shall have an additional fifteen (15) calendar days to
3 submit a Request for Exclusion, objection or to dispute estimated payments.

4 13. The deadline for filing objections to any of the terms of the settlement shall be forty-
5 five (45) days from the date of mailing of the Class Notice (as the same may be extended in the
6 event of the remailing of a Class Notice). Any Class Member who wishes to object to the settlement
7 must mail a written objection to the Settlement Administrator, who will email a copy of the objection
8 to Class Counsel and counsel for Defendants. Class Counsel will lodge a copy of the objection with
9 the Court with the Motion for Final Approval. The objection should set forth in writing: (1) the
10 objector's name and address, (2) the reason(s) for the objection, along with whatever legal authority,
11 if any, the objector asserts supports the objection. Any Class Member who fails to make his or her
12 objection in the manner provided for in this Order may still be heard at the Final Approval Hearing.

13 14. Any Class Member may request exclusion from (*i.e.*, "opt out" of) the Settlement by
14 mailing a written request to be excluded from the Settlement ("Request for Exclusion") to the
15 Settlement Administrator, postmarked within forty-five (45) days from the date of mailing of the
16 Class Notice (as the same may be extended in the event of the remailing of a Class Notice). To be
17 valid, a Request for Exclusion must include the Class Member's name, social security number and
18 signature and the following statement or something to its effect: "Please exclude me from the
19 Settlement Class in the *Nathan Smith v. McMillen Enterprises, Inc., et al.* matter" or a statement of
20 similar meaning. The Settlement Administrator shall immediately provide copies of all Requests
21 for Exclusion to Class Counsel and Defendants' Counsel and shall report the Requests for
22 Exclusions that it receives, to the Court, in its declaration to be provided in advance of the Final
23 Approval Hearing. Any Settlement Class Member who requests exclusion using this procedure will
24 not be entitled to receive any payment from the Settlement and will not be bound by the Settlement
25 Agreement or have any right to object to, appeal, or comment on the Settlement. Any Settlement
26 Class Member who does not opt out of the Settlement by submitting a timely and valid Request for
27 Exclusion will be bound by all terms of the Settlement, including those pertaining to the Released

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1 Claims, as well as any Judgment that may be entered by the Court if Final Approval of the Settlement
2 is granted.

3 15. If a Class Member objects to the Settlement, the Class Member will remain a member
4 of the Settlement Class and, if the Court approves the Settlement, the Class Member will be bound
5 by the terms of the Settlement in the same way and to the same extent as a Class Member who does
6 not object. A Class Member cannot both object and opt out. If a Class Member both objects and
7 opts out of the Settlement, the objection will be overruled and the opt-out will control.

8 16. No later than seven (7) calendar days from the Response Deadline, the Settlement
9 Administrator shall prepare and submit to Class Counsel and Defendants' Counsel a declaration
10 attesting to the completion of the notice process as set forth in the Settlement Agreement, including
11 an explanation of the number of attempts to obtain valid mailing addresses for, and re-sending of,
12 any Class Notice returned undeliverable and the identities, number of, and copies of all opt-outs and
13 objections and comments received by the Settlement Administrator.

14 17. For any checks from this distribution that are not cashed by Participating Class
15 Members within one-hundred-eighty (180) calendar days from the date of the mailing of the checks,
16 the Settlement Administrator will pay over the amount represented by the check to the California
17 State Controller's Office, with the identity of the Participating Class Member to whom the funds
18 belong, to be held for the Participating Class Member per California Unclaimed Property Law, in
19 the interest of justice. The money paid to the California State Controller's Office will remain the
20 Participating Class Member's property. This will allow Participating Class Members who did not
21 cash their checks to collect their Individual Settlement Amounts at any time in the future. There
22 will be no unpaid residue or unclaimed or abandoned class member funds and California Code of
23 Civil Procedure § 384 shall not apply.

24 18. All papers filed in support of final approval, including supporting documents for
25 attorneys' fees and costs, shall be filed by _____, 2022.

26 19. Class Counsel and counsel for Defendants shall file any responses to any written
27 objections submitted to the Court by five (5) court days prior to the final approval hearing.

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1 20. A final approval hearing shall be held with the Court on _____, 2022
2 at ___ a.m./p.m. in Department 21, (City Towers Courthouse) of the above-entitled Court to
3 determine: (1) whether the proposed settlement is fair, reasonable, and adequate and should be
4 finally approved by the Court; (2) the amount of attorneys' fees and costs to award Class Counsel;
5 (3) the amount of incentive award to the Class Representative; (4) the amount to be paid to the
6 Settlement Administrator; and (5) the amount to be apportioned to PAGA and/or paid to the LWDA.
7 In the event the settlement does not become effective in accordance with the terms of the Settlement,
8 or the settlement is not finally approved, or is terminated, cancelled or fails to become effective for
9 any reason, this Order shall be rendered null and void and shall be vacated, and the parties shall
10 revert to their respective positions as of the entry of the Settlement Agreement. The parties will be
11 free to assert any claim or defense that could have been asserted at the time of entry of the Settlement
12 Agreement.

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IT IS SO ORDERED.

Dated: 12/2, 2021


Judge of the Superior Court JOHN R. MAYNE

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