

EXHIBIT 1

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22 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
23 **FOR THE COUNTY OF STANISLAUS – CIVIL DIVISION**

24 NATHAN SMITH, on behalf of herself and
25 all others similarly situated or aggrieved,

26 Plaintiff,

27 v.

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

Defendants.

CASE NO.: 20-CV-002938

[Assigned to the Hon. John R. Mayne in
Dept. 21]

CLASS ACTION

**JOINT STIPULATION RE: CLASS
ACTION AND REPRESENTATIVE
ACTION SETTLEMENT**

Action Filed: July 8, 2020
Trial Date: None Set

1 This Joint Stipulation re: Class Action and Representative Action Settlement
2 (“Settlement” or “Agreement” or “Settlement Agreement”) is made by, between and among
3 plaintiff NATHAN SMITH (“Plaintiff”) individually and on behalf of the Settlement Class, as
4 defined below, on the one hand; and defendants MCMILLEN ENTERPRISES, INC., doing
5 business as “United Paving” (“United Paving”) and DAVID JOSEPH MCMILLEN (“McMillen”
6 and, collectively with United Paving, “Defendants”), on the other hand, in the lawsuit entitled
7 *Nathan Smith v. McMillen Enterprises, Inc., et al.* filed in Stanislaus County Superior Court,
8 Case No. CV-20-002938 (the “Action”). Plaintiff and Defendants shall be, at times, collectively
9 referred to as the “Parties”. This Agreement is intended by the Parties to fully, finally, and
10 forever resolve, discharge and settle the claims as set forth herein, based upon and subject to the
11 terms and conditions of this Agreement.

12 **1. DEFINITIONS**

13 **A. “Action”** means *Nathan Smith v. McMillen Enterprises, Inc., et al.* filed in
14 Stanislaus County Superior Court, Case No. CV-20-002938.

15 **B. “Class Counsel”** means: Jasmin K. Gill, Esq. of J. Gill Law Group, P.C. and
16 David Bibiyan, Esq., Diego Aviles, Esq., and Sara Ehsani Nia, Esq., of Bibiyan Law Group, P.C.
17 The term “Class Counsel” shall be used synonymously with the term “Plaintiff’s Counsel.”

18 **C. “Class Period”** means the period from July 8, 2016 through July 31, 2021.

19 **D. “Court”** means the Superior Court of the State of California for the County of
20 Stanislaus.

21 **E. “Final Approval Date”** means the later of: (1) the date the Court signs an Order
22 granting final approval of this Settlement (“Final Approval”) and Judgment; (2) if there is an
23 objector, 60 days from the date the Final Approval and Judgment; or (3) to the extent any appeals
24 have been filed, the date on which they have been resolved or exhausted.

25 **F. “Defendants”** means McMillen Enterprises, Inc., doing business as “United
26 Paving” and David Joseph McMillen.

27 **G. “Employer Taxes”** means employer-funded taxes and contributions imposed on
28 the wage portions of the Individual Settlement Payments (defined below) under the Federal

1 Insurance Contributions Act, the Federal Unemployment Tax Act, and any similar state and
2 federal taxes and contributions required of employers, such as for unemployment insurance.

3 **H. “General Release”** means the general release of claims by Plaintiff, which is in
4 addition to his limited release of claims as a Participating Class Member.

5 **I. “Gross Settlement Amount”** means a non-reversionary fund in the sum of Two
6 Hundred Eighty-Five Thousand and Eight Hundred Dollars and Zero Cents (\$285,800.00),¹
7 which shall be paid by Defendants, from which all payments for the Individual Settlement
8 Payments to Participating Class Members (defined below) and the Court-approved amounts for
9 attorneys’ fees and reimbursement of litigation costs and expenses to Class Counsel, Settlement
10 Administration Costs, a Service Award, and the Labor Code Private Attorneys’ General Act,
11 codified at Labor Code Section 2698, *et seq.* (“PAGA”) payment, shall be paid. Unless escalated
12 pursuant to Paragraph 17 of this Agreement, the Gross Settlement Amount expressly is the
13 maximum amount that Defendants shall be required to pay to fund the settlement of this Action
14 with the exception of the Employer Taxes, which shall be paid by Defendants separate and apart
15 from the Gross Settlement Amount. Aside from any escalation pursuant to Paragraph 17 and the
16 Employer Taxes, Defendants shall not be required in any event to pay more than \$285,800 as
17 part of this Agreement.

18 **J. “Service Award”** means monetary amounts to be paid to Plaintiff of up to Seven
19 Thousand Five Hundred Dollars and Zero Cents (\$7,500), which subject to Court approval, will
20 be paid out of the Gross Settlement Amount.

21 **K. “Individual Settlement Payment”** means a payment to a Participating Class
22 Member (defined below) of his or her net share of the Net Settlement Amount (defined below,
23 which share and payment shall be determined by the calculations provided in this Agreement).

24 **L. “Individual Settlement Share”** means the gross amount of the Net Settlement
25 Amount that a Settlement Class Member is eligible to receive based on the number of Workweeks
26 that he or she worked as a Settlement Class Member during the Class Period if he or she does not
27 submit a timely and valid Request for Exclusion.

28

¹ As the same may be increased in accordance with Paragraph 16, below.

1 **M. “LWDA Payment” or “PAGA Payment”** means the payment to the State of
2 California Labor and Workforce Development Agency (“LWDA”) for its seventy-five percent
3 (75%) share of the total amount allocated toward penalties under the PAGA all of which is to be
4 paid from the Gross Settlement Amount. The Parties have agreed that Ten Thousand Dollars and
5 Zero Cents (\$10,000.00) shall be allocated toward PAGA penalties (“PAGA Payment”), of which
6 Seven Thousand Five Hundred Dollars and Zero Cents (\$7,500.00) will be paid to the LWDA
7 and Two Thousand Five Hundred Dollars and Zero Cents (\$2,500.00) will remain a part of the
8 Net Settlement Amount for payment to Participating Class Members on a *pro rata* basis.

9 **N. “Net Settlement Amount”** means the portion of the Gross Settlement Amount
10 that is available for distribution to the Participating Class Members after deductions for the Court-
11 approved allocations for Settlement Administration Costs, a Service Award to Plaintiff, an award
12 of attorneys’ fees, reimbursement of litigation costs and expenses to Class Counsel, and the
13 LWDA Payment.

14 **O. “Operative Complaint” or “Complaint”** means the First Amended Complaint
15 that was filed with the Court on September 18, 2020.

16 **P. “PAGA Period”** means the period from April 11, 2019 through July 31, 2021.

17 **Q. “Participating Class Members”** means all Settlement Class Members who do
18 not submit a timely and valid Request for Exclusion.

19 **R. “Plaintiff”, “Named Plaintiff” or “Class Representative”** shall refer to
20 Plaintiff Nathan Smith.

21 **S. “Preliminary Approval Date”** means the date on which the Court enters an
22 Order granting preliminary approval of the Settlement.

23 **T. “Released Parties”** shall mean Defendants and each of their past, present, and
24 future respective subsidiaries, dba’s, affiliates, parents, divisions, related entities, joint venturers,
25 insurers and reinsurers, and company-sponsored employee benefit plans of any nature and their
26 successors, assigns and predecessors in interest, including all of their officers, directors,
27 shareholders, members, partners, owners, co-employers, employees, agents, principals, heirs,
28

1 spouses, associates, representatives, accountants, auditors, consultants, attorneys, administrators,
2 fiduciaries, trustees, and agents.

3 **U. “Response Deadline”** means the deadline for Settlement Class Members to mail
4 any Requests for Exclusion, objections, or Workweek Disputes to the Settlement Administrator,
5 which is forty-five (45) calendar days from the date that the Class Notice is first mailed in English
6 and Spanish by the Settlement Administrator. The date of the postmark shall be the exclusive
7 means for determining whether a Request for Exclusion, objection, or Workweek Dispute was
8 submitted by the Response Deadline.

9 **V. “Request for Exclusion”** means a written request to be excluded from the
10 Settlement Class pursuant to Section 9.C below.

11 **W. “Settlement Administration Costs”** means all costs incurred by the Settlement
12 Administrator in administration of the Settlement, including, but not limited to, translating the
13 Class Notice to Spanish, the distribution of the Class Notice to the Settlement Class in English
14 and Spanish, calculating Individual Settlement Shares and Individual Settlement Payments and
15 associated taxes and withholdings, providing declarations, generating Individual Settlement
16 Payment checks and related tax reporting forms, doing administrative work related to unclaimed
17 checks, transmitting payment to Class Counsel for the Court-approved amounts for attorneys’
18 fees and reimbursement of litigation costs and expenses, to Plaintiff for his Service Award, and
19 to the LWDA for the LWDA Payment, providing weekly reports of opt-outs, objections and
20 related information, and any other actions of the Settlement Administrator as set forth in this
21 Agreement, all pursuant to the terms of this Agreement. The Settlement Administration Costs are
22 estimated not to exceed \$6,000. If the actual amount of the Settlement Administration Costs is
23 less than \$6,000, the difference between \$6,000 and the actual Settlement Administration Costs
24 shall be a part of the Net Settlement Amount. If the Settlement Administration Costs exceed
25 \$6,000, then such excess will be paid solely from the Gross Settlement Amount and Defendants
26 will not be responsible for paying any additional funds in order to pay these additional costs.

27 **X. “Settlement Administrator”** means the Third-Party Administrator mutually
28 agreed upon by the Parties that will be responsible for the administration of the Settlement

1 including, without limitation, translating the Class Notice in Spanish, the distribution of the
2 Individual Settlement Payments to be made by Defendants from the Gross Settlement Amount
3 and related matters under this Agreement.

4 **Y. “Settlement Class” or “Settlement Class Members”** means all current and
5 former non-exempt, hourly paid employees who worked in California for Defendants at any time
6 during the Class Period.

7 **Z. “Workweeks”** means the number of workweeks that a Settlement Class Member
8 was employed by Defendants in a non-exempt, hourly position during the Class Period. If a
9 Settlement Class Member disputes his/her Individual Settlement Share, it shall be termed a
10 “Workweek Dispute.”

11 **2. BACKGROUND**

12 **A.** On April 11, 2020, Plaintiff filed with the LWDA and served on Defendants a
13 notice under Labor Code section 2699.3 (the “PAGA Notice”) stating he intended to serve as a
14 proxy of the LWDA to recover civil penalties for aggrieved employees. The PAGA Notice
15 includes a description of alleged violations of law originally pled in the Action referenced below,
16 plus a request for penalties for the alleged failure to comply with Labor Code sections 204, 246,
17 432, 1174, 1198.5, and 2810.5.

18 **B.** Plaintiff filed a putative wage-and-hour class action complaint against Defendants
19 on July 8, 2020. Plaintiff alleges that during the Class Period, with respect to Plaintiff and the
20 Settlement Class Members, Defendants, *inter alia*, failed to pay the Settlement Class Members’
21 overtime wages and minimum wages for all hours worked and/or recorded. Plaintiff further
22 alleges that Defendants failed to provide compliant meal and rest periods and associated premium
23 payments; failed to issue compliant and accurate itemized wage statements; failed to timely pay
24 all wages due and owing at the time of termination or resignation; failed to reimburse employees
25 for business expenses; and engaged unfair competition based on the alleged Labor Code
26 Violations.

27 **C.** On September 18, 2020, Plaintiff filed a First Amended Complaint, which added
28 claims for failure to timely pay wages, civil penalties pursuant to Labor Code sections 210, 226.3,

1 558 and 1197.1, as well as Plaintiff's representative allegations under PAGA as 65 days had
2 passed without any communication from the LWDA, on behalf of himself and all other aggrieved
3 employees in the PAGA Period as a proxy of the LWDA to recover civil penalties for the Labor
4 Code violations set out in the PAGA Notice.

5 **D.** Thereafter, the Parties agreed to exchange informal discovery and attend an early
6 mediation, in which Plaintiff was provided with, among other things: (1) hire dates, separation
7 dates (as applicable), and rates of pay for the one-hundred and five (105) non-exempt employees
8 working for Defendants during the Class Period; (2) a representative sampling of corresponding
9 time and payroll records for twenty-seven (27) Class Members; (3) a spreadsheet indicating
10 whether any employee signed a meal period waiver with copies of each; (4) an Employee
11 Handbook along with all additional pertinent written policies in place during the Class Period;
12 (5) all versions of Defendants' timecards during the Class Period; and (6) Plaintiff's personnel
13 file.

14 **E.** On June 23, 2021, the Parties participated in a full-day mediation before mediator
15 Jeffrey Ross, Esq., a well-regarded mediator experienced in mediating complex labor and
16 employment matters. With the aid of the mediator's evaluation, the Parties reached the
17 Settlement to resolve the Action.

18 **F.** Class Counsel has conducted significant investigation of the law and facts relating
19 to the claims asserted in the Action and the PAGA Notice and has concluded that that the
20 Settlement set forth herein is fair, reasonable, adequate, and in the best interests of the Settlement
21 Class, taking into account the sharply contested issues involved, the expense and time necessary
22 to litigate the Action through trial and any appeals, the risks and costs of further litigation of the
23 Action, the risk of an adverse outcome, the uncertainties of complex litigation, the information
24 learned through informal discovery regarding Plaintiff's allegations, and the substantial benefits
25 to be received by the Settlement Class Members.

26 **G.** Defendants have concluded that, because of the substantial expense of defending
27 against the Action, the length of time necessary to resolve the issues presented herein, the
28 inconvenience involved, and the concomitant disruption to their business operations, it is in their

1 best interest to accept the terms of this Agreement. Defendants deny each of the allegations and
2 claims asserted against them in the Action and the PAGA Notice. However, Defendants
3 nevertheless desire to settle the Action for the purpose of avoiding the burden, expense and
4 uncertainty of continuing litigation and for the purpose of putting to rest the controversies
5 engendered by the Action.

6 **H.** This Agreement is intended to and does effectuate the full, final, and complete
7 resolution of all Released Claims of Plaintiff and Settlement Class Members, other than those
8 Settlement Class Members who submit a timely and valid Request for Exclusion.

9 **3. JURISDICTION**

10 The Court has jurisdiction over the Parties and the subject matter of the Action. The
11 Action includes claims that, if proven, would authorize the Court to grant relief pursuant to the
12 applicable statutes. After the Court has granted Final Approval of the Settlement and entered
13 judgment, the Court shall retain jurisdiction over the Parties to enforce the terms of the judgment
14 pursuant to California Rule of Court, rule 3.769, subdivision (h).

15 **4. STIPULATION OF CLASS CERTIFICATION**

16 The Parties stipulate to the certification of the Settlement Class under this Agreement for
17 purposes of settlement only.

18 **5. MOTION FOR PRELIMINARY APPROVAL**

19 Plaintiff will move for an order granting preliminary approval of the Settlement,
20 approving and directing the mailing of the proposed Notice of Class Action Settlement (“Class
21 Notice”) attached hereto as **Exhibit “A”**, conditionally certifying the Settlement Class for
22 settlement purposes only, and approving the deadlines proposed by the Parties for the submission
23 of Requests for Exclusion, Workweek Disputes, and objections, the papers in support of Final
24 Approval of the Settlement, and any responses to Objections or opposition papers to the Motion
25 for Final Approval.

26 **6. DENIAL OF LIABILITY AND STATEMENT OF NO ADMISSION**

27 Defendants deny any and all claims, contentions, and each and every allegation of
28 wrongdoing of any sort and further deny any and all liability to Plaintiff and the Settlement Class

1 with respect to any claims or allegations asserted in the Action and the PAGA Notice, including
2 all allegations that class certification is warranted or proper. This Agreement shall not be deemed
3 an admission by Defendants of any claims or allegations asserted in the Action or the PAGA
4 Notice. In the event that this Agreement is not approved by the Court, or any appellate court, is
5 terminated, or otherwise fails to be enforceable, Plaintiff will not be deemed to have waived,
6 limited or affected in any way any claims, rights or remedies, or defenses in the Action or the
7 PAGA Notice, and Defendants will not be deemed to have waived, limited, or affected in any
8 way any of their objections or defenses in the Action and the PAGA Notice. The Parties shall be
9 restored to their respective positions in the Action prior to the entry of this Settlement.

10 **7. RELEASE OF CLAIMS**

11 **A. Release by All Participating Class Members.**

12 Effective only upon the entry of an Order granting Final Approval of the Settlement, entry
13 of Judgment, and payment by Defendants to the Third-Party Administrator of the full Gross
14 Settlement Amount and Employers' Taxes necessary to effectuate the Settlement, Plaintiff and
15 all Participating Class Members shall be deemed to conclusively and forever waive, release and
16 discharge all claims, demands, rights, liabilities, causes of action, injuries, grievances,
17 obligations, losses, damages, penalties, interest, fines, debts, liens, liabilities, attorneys' fees,
18 costs and any other form of relief or remedy in law or equity, of every nature and description
19 whatsoever, asserted or that might have been asserted against the Released Parties in the First
20 Amended Complaint filed in the Action, or that may be asserted against the Released Parties
21 based on the factual allegations in the First Amended Complaint, whether arising under federal,
22 state or other applicable law; including, but not limited to, California Labor Code and any
23 applicable IWC Wage Orders, expressly including, for the duration of the Class Period, those
24 which arise out of, relate to, or are in connection with: (a) all claims for failure to pay overtime
25 wages; (b) all claims for failure to pay minimum wages; (c) all claims for failure to provide
26 compliant meal and rest periods and associated premium pay; (d) all claims for failure to timely
27 pay wages during employment; (e) all claims for the failure to timely pay wages upon
28 termination; (f) all claims for non-compliant wage statements; and (g) all claims asserted through

1 California Business & Professions Code § 17200 *et seq.* arising out of the Labor Code violations
2 referenced in the First Amended Complaint. The release extends to the Fair Labor Standards
3 Act, 29 USC § 201 (“FLSA”), *et seq.* only insofar as a Settlement Class Members timely cash
4 their Individual Settlement Payment checks. Only in such an instance will a Settlement Class
5 Member be deemed to have opted into the action for the purposes of the FLSA and thereby
6 released any claims he or she may have under the FLSA. For individuals employed during the
7 PAGA Period, the release includes, for the duration of the PAGA Period, all claims released
8 during the Class Period, as well as all asserted PAGA claims for penalties arising out of Labor
9 Code Sections 210, 226.3, 558, 1197.1 and 2699 based on the factual allegations and Labor Code
10 sections alleged to have been violated in the First Amended Complaint filed on September 18,
11 2020, which include, without limitation, alleged violations of Labor Code sections 204, 246, 432,
12 1174, 1198.5, and 2810.5. All of the foregoing constitute the “Released Claims.”

13 **B. General Release.**

14 Effective only upon the entry of an Order granting Final Approval of the Settlement, entry
15 of Judgment, and payment by Defendants to the Third-Party Administrator selected of the full
16 Gross Settlement Amount and Employers’ Taxes necessary to effectuate the Settlement, in
17 addition to the Released Claims, Plaintiff makes the additional following General Release:
18 Plaintiff releases the Released Parties from of all claims, demands, rights, liabilities, causes of
19 action, demands, injuries, grievances, obligations, losses, penalties, interest, fines, debts, liens,
20 liabilities, attorneys’ fees, costs and any other form of relief or remedy in law or equity, of every
21 nature and description whatsoever, known or unknown, foreseen or unforeseen, anticipated or
22 unanticipated, suspected or unsuspected, asserted or that might have been asserted, whether in
23 tort, contract, or for violation of any local, state or federal statute, rule, law or regulation arising
24 out of, relating to, or in connection with any act or omission of the Released Parties through the
25 date of full execution of this Agreement in connection with Plaintiff’s employment and/or the
26 termination thereof. With respect to the General Release, Plaintiff stipulates and agrees that,
27 through the Final Approval Date, Plaintiff shall be deemed to have, and by operation of the Final
28 Judgment shall have, expressly waived and relinquished, to the fullest extent permitted by law,

1 the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other
2 similar provision under federal or state law, which provides:

3 A general release does not extend to claims which the creditor
4 does not know or suspect to exist in his or her favor at the time of
5 executing the release, which if known by him or her must have
6 materially affected his or her settlement with the debtor or
7 released party.

7 **8. SETTLEMENT ADMINISTRATOR**

8 Plaintiff and Defendants, through their respective counsel, have selected Phoenix
9 Settlement Administrators to administer the Settlement, which includes but is not limited to
10 translating the Class Notice to Spanish, distributing and responding to inquiries about the Class
11 Notice and calculating all amounts to be paid from the Gross Settlement Amount. Charges and
12 expenses of the Settlement Administrator, currently estimated to be \$6,000.00, will be paid from
13 the Gross Settlement Amount. If the actual Settlement Administrator fees are less than
14 \$6,000.00, the difference will remain a part of the Net Settlement Amount.

15 **9. NOTICE, WORKWEEK DISPUTE, OBJECTION, AND EXCLUSION PROCESS**

16 **A. Notice to the Settlement Class Members.**

17 (1) Within ten (10) calendar days after the Preliminary Approval Date,
18 Defendants' Counsel shall provide the Settlement Administrator with information with respect
19 to each Settlement Class Member, including his or her: (1) name, last known address(es) and last
20 known telephone number(s) currently in Defendants' possession, custody, or control; (2) Social
21 Security Number(s) in Defendants' possession, custody, or control; and (3) the hire dates and
22 termination or resignation dates for each Settlement Class Member ("Class List"), which shall
23 be made available to Class Counsel upon request. The Settlement Administrator shall perform
24 an address search using the United States Postal Service National Change of Address ("NCOA")
25 database and update the addresses contained on the Class List with the newly-found addresses,
26 if any. Within seven (7) calendar days of receiving the Class List from Defendants, the Settlement
27 Administrator shall mail the Class Notice in English and Spanish to the Settlement Class
28 Members via first-class regular U.S. Mail using the most current mailing address information

1 available. The Settlement Administrator shall maintain a list with names and all addresses to
2 which notice was given, and digital copies of all the Settlement Administrator's records
3 evidencing the giving of notice to any Settlement Class Member, for at least four (4) years from
4 the Final Approval Date.

5 (2) The Class Notice will set forth:

- 6 (a) the Settlement Class Member's estimated payment and the basis
7 for it;
- 8 (b) the information required by California Rule of Court, rule 3.766,
9 subdivision (d);
- 10 (c) the material terms of the Settlement, including Defendants' denial
11 of liability;
- 12 (d) the proposed Settlement Administration Costs;
- 13 (e) the definition of the Settlement Class;
- 14 (f) a statement that the Court has preliminarily approved the
15 Settlement;
- 16 (g) how the Settlement Class Member can obtain additional
17 information, including contact information for Class Counsel;
- 18 (h) information regarding opt-out and objection procedures;
- 19 (i) the date and location of the Final Approval Hearing; and
- 20 (j) that the Settlement Class Member must notify the Settlement
21 Administrator no later than the Response Deadline if the
22 Settlement Class Member disputes the accuracy of the number of
23 Workweeks as set forth on his or her Class Notice ("Workweek
24 Dispute"). If a Settlement Class Member fails to timely dispute
25 the number of Workweeks attributed to him or her in conformity
26 with the instructions in the Class Notice, then he or she shall be
27 deemed to have waived any objection to its accuracy and any claim
28 to any additional settlement payment based on different data.

1 (3) If a Class Notice from the initial notice mailing is returned as
2 undeliverable, the Settlement Administrator will attempt to obtain a current address for the
3 Settlement Class Member to whom the returned Class Notice had been mailed, within five (5)
4 calendar days of receipt of the returned Class Notice, by: (a) contacting the Settlement Class
5 Member by phone, if possible, and (b) undertaking skip tracing. If the Settlement Administrator
6 is successful in obtaining a new address, it will promptly re-mail the Class Notice to the
7 Settlement Class Member. Further, any Class Notices that are returned to the Settlement
8 Administrator with a forwarding address before the Response Deadline shall be promptly re-
9 mailed to the forwarding address affixed thereto. Class Members who are re-mailed a Class
10 Notice shall have an additional fifteen (15) calendar days to submit a Request for Exclusion,
11 objection or to dispute estimated payments.

12 (4) No later than seven (7) calendar days from the Response Deadline, the
13 Settlement Administrator shall provide counsel for the Parties with a declaration attesting to the
14 completion of the notice process, including the number of attempts to obtain valid mailing
15 addresses for and re-sending of any returned Class Notices, as well as the identities, number of,
16 and copies of all Requests for Exclusion and objections/comments received by the Settlement
17 Administrator (“Settlement Administrator’s Declaration”).

18 **B. Objections.**

19 Only Settlement Class Members who do not opt out of the Settlement (*i.e.*, Participating
20 Class Members) may object or comment regarding the Settlement. In order for any Settlement
21 Class Member to object to this Settlement, or any term of it, he or she should do so by mailing a
22 written objection to the Settlement Administrator at the address or phone number provided on
23 the Class Notice no later than the Response Deadline. The Settlement Administrator shall email
24 a copy of the objection forthwith to Class Counsel and Defendants’ counsel. Class Counsel shall
25 lodge a copy of the objection with the Court with the Motion for Final Approval. The objection
26 should set forth in writing: (1) the objector’s name and address, and (2) the reason(s) for the
27 objection, along with whatever legal authority, if any, the objector asserts supports the objection.
28 If a Settlement Class Member objects to this Settlement, the Settlement Class Member will

1 remain a member of the Settlement Class and if the Court approves this Agreement, the
2 Settlement Class Member will be bound by the terms of the Settlement in the same way and to
3 the same extent as a Settlement Class Member who does not object. The date of mailing of the
4 Class Notice to the objecting Settlement Class Member shall be conclusively determined
5 according to the records of the Settlement Administrator. Settlement Class Members do not need
6 to object or comment in writing to be heard at, or object/comment to the Settlement, at the Final
7 Approval Hearing.

8 **C. Requesting Exclusion.**

9 Any Settlement Class Member may request exclusion from (i.e., “opt out” of) the
10 Settlement by mailing a written request to be excluded from the Settlement (“Request for
11 Exclusion”) to the Settlement Administrator, postmarked on or before the Response Deadline.
12 To be valid, a Request for Exclusion must include the Class Member’s name, social security
13 number and signature and the following statement or something to its effect: “Please exclude me
14 from the Settlement Class in the *Nathan Smith v. McMillen Enterprises, Inc., et al.* matter” or a
15 statement of similar meaning. The Settlement Administrator shall immediately provide copies of
16 all Requests for Exclusion to Class Counsel and Defendants’ Counsel and shall report the
17 Requests for Exclusions that it receives, to the Court, in its declaration to be provided in advance
18 of the Final Approval Hearing. Any Settlement Class Member who requests exclusion using this
19 procedure will not be entitled to receive any payment from the Settlement and will not be bound
20 by the Settlement Agreement or have any right to object to, appeal, or comment on the
21 Settlement. Any Settlement Class Member who does not opt out of the Settlement by submitting
22 a timely and valid Request for Exclusion will be bound by all terms of the Settlement, including
23 those pertaining to the Released Claims, as well as any Judgment that may be entered by the
24 Court if Final Approval of the Settlement is granted.

25 **D. Disputes Regarding Settlement Class Members’ Workweek Data.**

26 Each Settlement Class Member may dispute the number of Workweeks attributed to him
27 or her on his or her Class Notice (“Workweek Dispute”). Any such disputes must be mailed to
28 the Settlement Administrator by the Settlement Class Member, postmarked on or before the

1 Response Deadline. The Settlement Administrator shall immediately provide copies of all
2 disputes to Class Counsel and counsel for Defendants and shall immediately attempt to resolve
3 all such disputes directly with relevant Settlement Class Member(s) with the assistance of
4 Defendants and Class Counsel. If the dispute cannot be resolved in this manner, the Court shall
5 adjudicate the dispute.

6 **10. INDIVIDUAL SETTLEMENT PAYMENTS TO PARTICIPATING CLASS**
7 **MEMBERS**

8 Individual Settlement Payments will be calculated and distributed to Participating Class
9 Members from the Net Settlement Amount on a *pro rata* basis, based on the Participating Class
10 Members' respective number of Workweeks during the Class Period. Specific calculations of the
11 Individual Settlement Payments will be made as follows:

12 A. The Settlement Administrator will determine the total number of Workweeks
13 worked by each Settlement Class Member and the aggregate number of Workweeks worked by
14 all Settlement Class Members during the Class Period ("Class Workweeks"), as reflected on
15 the Class List provided by Defendants.

16 B. To determine each Participating Class Member's Individual Settlement Share,
17 the Settlement Administrator will determine the aggregate number of Workweeks worked by
18 all Participating Class Members during the Class Period ("Participating Class Workweeks")
19 and use the following formula: Individual Settlement Share = (Participating Class Member's
20 Workweeks ÷ Participating Class Workweeks) × Net Settlement Amount, which shall be
21 subject to required deductions for the portion of the Individual Settlement Share that is
22 considered wages (*i.e.* 20%).

23 C. This net amount is to be paid out to Participating Class Members by way of
24 check and is referred to as "Individual Settlement Payment(s)."

25 **11. DISTRIBUTION AND TREATMENT OF PAYMENTS**

26 **A. Distribution of Individual Settlement Payments.**

27 Settlement Class Members who do not submit a timely and valid Request for Exclusion
28 (*i.e.*, Participating Class Members) will receive an Individual Settlement Payment. Individual

1 Settlement Payment checks shall remain valid and negotiable for one hundred and eighty (180)
2 calendar days after the date of their issuance. For any check not cashed after 180 calendar
3 days, the Settlement Administrator will pay over the amount represented by the check to the
4 California State Controller's Office, with the identity of the Participating Class Member to
5 whom the funds belong, to be held for the Participating Class Member per California
6 Unclaimed Property Law, in the interest of justice. The money paid to the California State
7 Controller's Office will remain the Participating Class Member's property. This will allow
8 Participating Class Members who did not cash their checks to collect their Individual
9 Settlement Amounts at any time in the future. Therefore, there will be no unpaid residue or
10 unclaimed or abandoned class member funds and California Code of Civil Procedure § 384
11 shall not apply.

12 **B. Funding of Settlement.**

13 Defendants shall, within thirty (30) calendar days of executing this Agreement, or on the
14 date that the Settlement Administrator provides Defendants with wiring instructions, whichever
15 is later, make a payment in the amount of \$285,800 to the Settlement Administrator pursuant to
16 Internal Revenue Code section 1.468B-1 for deposit in an interest-bearing qualified settlement
17 account ("QSA") with an FDIC insured banking institution, for distribution in accordance with
18 this Agreement and the Court's Orders and subject to the conditions described herein.
19 Defendants shall, within ten (10) calendar days of the Settlement Administrator notifying
20 Defendants of the amount of Defendants' share of taxes owed on the wages portion of the
21 settlement ("Employers' Taxes"), make payment of said Employers' Taxes to the Settlement
22 Administrator for deposit into an interest-bearing QSA with an FDIC insured banking institution,
23 for distribution in accordance with this Agreement and the Court's Orders subject to the
24 conditions described herein.

25 Payments from the QSA shall be made for (1) the Service Award to Plaintiff as specified
26 in this Agreement and approved by the Court; (2) the Attorneys' Fees and Cost Award to be paid
27 to Class Counsel, as specified in this Agreement and approved by the Court; (3) the Settlement
28 Administrator Costs, as specified in this Agreement and approved the Court; and (4) the amount

1 allocated to PAGA penalties to be paid to the LWDA, as specified in this Agreement and
2 approved by the Court. The balance remaining shall constitute the Net Settlement Amount from
3 which Individual Settlement Payments shall be made to Participating Class Members, less
4 applicable taxes and withholdings. All interest accrued shall be for the benefit of the Class
5 Members and distributed in a pro-rata basis.

6 **C. Time for Distribution.**

7 Within seven (7) calendar days after the Final Approval Date, or as soon thereafter as
8 practicable, the Settlement Administrator shall distribute all payments due under the Settlement,
9 including the Individual Settlement Payments to Participating Class Members, as well as the
10 Court-approved payments for the Service Award to Plaintiff, attorneys' fees and litigation costs
11 and expenses to Class Counsel, Administration Costs to the Settlement Administrator, and the
12 portion of the LWDA payment payable to the LWDA.

13 **D. No Effect on Employee Benefits.** The Individual Settlement Payments available
14 to Class Members and the Service Award paid to Plaintiff shall not be deemed to be
15 "pensionable" earnings and shall not have any effect on the eligibility for, or calculation of, any
16 employee benefits (*e.g.*, vacations, holiday pay, leave or illness policies, retirement plans, etc.)
17 of Plaintiff or Class Members. The Parties agree that any Individual Settlement Payments or
18 Service Award paid under the terms of this Agreement do not represent any modification of Class
19 Members' previously credited hours of service or other eligibility criteria under any employee
20 pension benefit plan or employee welfare benefit plan sponsored by Defendants. Further, any
21 Individual Settlement Payment or the Service Award paid hereunder shall not be considered
22 "compensation" in any year for purposes of determining eligibility for, or benefit accrual within,
23 an employee pension benefit plan, employee welfare benefit plan, employee bonuses, or
24 employee past, current, or future compensation levels. The Parties further agree that Plaintiff and
25 all Class Members will be deemed to have waived any claims or benefits under the Employee
26 Retirement Income Security Act of 1974 (29 U.S.C. § 1001, *et seq.*) premised upon any and all
27 amounts they receive under this Agreement as part of the claims released under this Agreement.

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1 **12. ATTORNEYS' FEES AND LITIGATION COSTS**

2 Class Counsel shall apply for, and Defendants shall not oppose, an award of attorneys'
3 fees of up to 35% of the Gross Settlement Amount, or One Hundred Thousand Eight Hundred
4 Dollars and Zero Cents (\$100,800). Class Counsel shall further apply for, and Defendants shall
5 not oppose, an application or motion by Class Counsel for reimbursement of actual costs
6 associated with Class Counsel's prosecution of this matter as set forth by declaration testimony
7 in an amount up to Twenty-Five Thousand Dollars and Zero Cents (\$25,000.00). Awards of
8 attorneys' fees and costs shall be paid out of the Gross Settlement Amount, for all past and future
9 attorneys' fees and costs necessary to prosecute, settle, and obtain Final Approval of the
10 settlement in the Class and PAGA Action. The "future" aspect of the amounts stated herein
11 includes, without limitation, all time and expenses expended by Class Counsel (including any
12 appeals therein). There will be no additional charge of any kind to either the Settlement Class
13 Members or request for additional consideration from Defendants for such work. Should the
14 Court approve attorneys' fees and/or litigation costs and expenses in amounts that are less than
15 the amounts provided for herein, then the unapproved portion(s) shall be a part of the Net
16 Settlement Amount.

17 **13. SERVICE AWARD TO PLAINTIFF**

18 Named Plaintiff shall seek, and Defendants shall not oppose, a Service Award in an
19 amount not to exceed Seven Thousand Five Hundred Dollars and Zero Cents (\$7,500.00) for
20 Plaintiff, for participation in and assistance with the Class Action. Any Service Award awarded
21 to Plaintiff shall be paid from the Gross Settlement Amount and shall be reported on an IRS Form
22 1099. If the Court approves the Service Award to Plaintiff in less than the amounts sought herein,
23 then the unapproved portion(s) shall be a part of the Net Settlement Amount.

24 **14. TAXATION AND ALLOCATION**

25 **A.** Each Individual Settlement Share shall be allocated as follows: 20% as wages (to
26 be reported on an IRS Form W2); and 80% as interest and penalties (to be reported on an IRS
27 Form 1099). The Parties agree that the employees' share of taxes and withholdings with respect
28 to the wage-portion of the Individual Settlement Share will be withheld from the Individual

1 Settlement Share in order to yield the Individual Settlement Payment. The amount of federal
2 income tax withholding will be based upon a flat withholding rate for supplemental wage
3 payments in accordance with Treasury Regulation § 31.3402(g)-1(a)(2) as amended or
4 supplemented. Income tax withholding will also be made pursuant to applicable state and/or
5 local withholding codes or regulations.

6 **B.** Forms W-2 and/or Forms 1099 will be distributed by the Settlement
7 Administrator at times and in the manner required by the Internal Revenue Code of 1986 (the
8 “Code”) and consistent with this Agreement. If the Code, the regulations promulgated
9 thereunder, or other applicable tax law, is changed after the date of this Agreement, the processes
10 set forth in this Section may be modified in a manner to bring Defendants into compliance with
11 any such changes.

12 **C.** All Employer Taxes shall be paid by Defendants separate, apart and above from
13 the Gross Settlement Amount. Defendants shall remain liable to pay the employer’s share of
14 payroll taxes as described above.

15 **D.** Neither Counsel for Plaintiff nor Defendants intend anything contained in this
16 Agreement to constitute advice regarding taxes or taxability, nor shall anything in this Agreement
17 be relied upon as such within the meaning of United States Treasury Department Circular 230
18 (31 C.F.R. Part 10, as amended) or otherwise.

19 **15. PRIVATE ATTORNEYS’ GENERAL ACT ALLOCATION**

20 The Parties agree to allocate Ten Thousand Dollars and Zero Cents (\$10,000) of the Gross
21 Settlement Amount toward PAGA penalties. Pursuant to the PAGA, seventy-five percent (75%)
22 of the amount allocated toward PAGA (\$7,500.00) will be paid to the LWDA (*i.e.*, the PAGA
23 Payment), and twenty-five percent (25%) (\$2,500.00) will remain a part of the Net Settlement
24 Amount to be distributed to Participating Class Members on a *pro rata* basis, based upon their
25 respective Workweeks.

26 **16. COURT APPROVAL**

27 This Agreement is contingent upon an order by the Court granting Final Approval of the
28 Settlement, and that the LWDA does not intervene and object to the Settlement. In the event it

1 becomes impossible to secure approval of the Settlement by the Court and the LWDA, the Parties
2 shall be restored to their respective positions in the Class and PAGA Action prior to entry of this
3 Settlement. If this Settlement Agreement is voided, not approved by the Court or approval is
4 reversed on appeal, it shall have no force or effect and no Party shall be bound by its terms except
5 to the extent the Court reserves any authority to issue any appropriate orders when denying
6 approval.

7 **17. INCREASE IN WEEKLY PAY PERIODS**

8 Defendants represent that there are no more than 5,716 Workweeks worked during the
9 Class Period by Class Members. In the event the number of Workweeks increases by more
10 than 10%, or 571 Workweeks, then the Gross Settlement Amount shall be increased
11 proportionally by the workweeks in excess of 6,287 workweeks multiplied by the Workweek
12 Value. The Workweek Value shall be calculated by dividing the Gross Settlement Amount
13 (\$285,800.00) by 5,716, which amounts to a Workweek Value of \$50.00. Thus, for example,
14 should there be 6,500 Workweeks in the Class Period, then the Gross Settlement Amount shall
15 be increased by \$10,650 (6,500 Workweeks – 6,287 Workweeks = 213 Workweeks x \$50.00
16 per Workweek).

17 **18. VOIDING OF SETTLEMENT AND RETURN OF GROSS SETTLEMENT**
18 **AMOUNT AND EMPLOYERS' TAXES**

19 If the Court declines to approve any material term or condition of this Agreement, then
20 this entire Agreement shall be void and unenforceable as to all Parties, at the option of any Party,
21 which shall be exercised by providing written notice to the other Parties within thirty (30)
22 calendar days of the date the Parties are notified of the Court's decision. Further, Defendants
23 have the option of voiding this Agreement within seven (7) calendar days of receiving the
24 Settlement Administrator's Declaration if the Settlement Administrator's Declaration indicates
25 that the number of Settlement Class Members who have timely submitted a valid Requests for
26 Exclusion (i.e., opt out) is five percent (5%) or more of all Class Members, which option shall
27 be exercised by providing written notice to Class Counsel and the Settlement Administrator. If
28 the foregoing occurs, this Agreement shall be null and void *ab initio*, no Party shall be bound by

1 the terms thereof, and this Agreement shall not be admissible or offered into evidence in the
2 litigation or any other action for any purpose whatsoever, and any order or judgment entered by
3 the Court in furtherance of this Agreement shall be treated as withdrawn or vacated by stipulation
4 of the Parties. In such case, the Parties shall be returned to their respective positions as of the
5 date immediately prior to the execution of this Agreement, the Parties shall proceed in all respects
6 as if this Agreement had not been executed, Defendants shall have no obligation to make any
7 payments to Plaintiff, Counsel for Plaintiff, the LWDA, or any Class Member, and the Settlement
8 Administrator shall return the entirety of the Gross Settlement Amount and Employers' Taxes to
9 Defendants within seven (7) calendar days of receipt of Defendant's written notice exercising the
10 option to void this Agreement. In the event either Party voids the Settlement pursuant to the
11 terms of this Agreement, any amounts owed to the Settlement Administrator shall be paid by the
12 voiding Party. If the Court does not approve the Settlement without material changes made,
13 including, for instance, requiring that Defendant pay an enhancement Gross Settlement Amount,
14 then the Parties shall equally bear any settlement administration costs required from voiding the
15 Settlement.

16 **19. NOTICE OF JUDGMENT**

17 In addition to any duties set out herein, the Settlement Administrator shall provide
18 notice of the Final Judgment entered in the Class and PAGA Action by posting the same on its
19 website for a period of no less than one (1) year.

20 **20. MISCELLANEOUS PROVISIONS**

21 **A. Voluntary Nature.**

22 The Parties acknowledge they have entered into this Agreement voluntarily, on the basis
23 of their own judgment and without coercion, duress, or undue influence of any Party, and not
24 in reliance on any promises, representations, or statements made by the other Parties other than
25 those contained in this Agreement. Each of the Parties hereto expressly waives any right he/it
26 might ever have to claim that this Settlement was in any way induced by fraud.

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1 **B. Interpretation of the Agreement.**

2 This Agreement constitutes the entire agreement between Plaintiff and Defendants with
3 respect to its subject matter. Except as expressly provided herein, this Agreement has not been
4 executed in reliance upon any other written or oral representations or terms, and no such extrinsic
5 oral or written representations or terms shall modify, vary or contradict its terms. In entering
6 into this Agreement, the Parties agree that this Agreement is to be construed according to its
7 terms and may not be varied or contradicted by extrinsic evidence. The Agreement will be
8 interpreted and enforced under the laws of the State of California, both in its procedural and
9 substantive aspects, without regard to its conflict of law provisions. Any claim arising out of or
10 relating to the Agreement, or the subject matter hereof, will be resolved solely and exclusively
11 in the Superior Court of the State of California for the County of Stanislaus, and Plaintiff and
12 Defendants hereby consent to the personal jurisdiction of the Court in the Action over it solely
13 in connection therewith. The foregoing is only limited to disputes concerning this Agreement.
14 Plaintiff Nathan Smith, on behalf of himself and on behalf of the Settlement Class, and
15 Defendants participated in the negotiation and drafting of this Agreement and had available to
16 them the advice and assistance of independent counsel. As such, neither Plaintiff nor Defendants
17 may claim that any ambiguity in this Agreement should be construed against the other. The
18 Agreement may be modified only by a writing signed by counsel for the Parties and approved by
19 the Court.

20 **C. Further Cooperation.**

21 Plaintiff, Defendants, and their respective attorneys shall proceed diligently to prepare
22 and execute all documents, to seek the necessary approvals from the Court, and to do all things
23 reasonably necessary to consummate the Settlement as expeditiously as possible.

24 **D. Counterparts.**

25 The Agreement may be executed in one or more actual or non-original counterparts, all
26 of which will be considered one and the same instrument and all of which will be considered
27 duplicate originals.

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E. Authority.

Each individual signing below warrants that he or she has the authority to execute this Agreement on behalf of the party for whom or which that individual signs.

F. No Publicity.

The Parties and their counsel agree that they will not, unless required by law, issue any press releases or have any communications with the press concerning this litigation, one another, and/or Defendants' business practices. Plaintiff and Class Counsel will not publicize this Agreement and will not communicate the terms of this Agreement to members of the press, news media, etc. (including organizations that publicize verdicts and settlements). Plaintiff and Class Counsel further agree that they shall not promote, or publicize this Agreement with anyone other than the Court, and in particular agree that they will not issue any press releases, engage in any communications, or take any other action that would provide the press or media or any litigation reporting service with information about this Action or this Agreement, or otherwise enable or allow the press or other media or any litigation reporting service to learn or obtain such information. Nothing herein shall be interpreted as preventing any good-faith communications by any Counsel for the Parties and/or any Parties with the Court, Class Members, or the Settlement Administrator for the purpose of facilitating the settlement of the Action and satisfying the terms of this Agreement.

G. No Prior Assignment.

This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, trustees, executors, administrators and successors. The Parties hereto each individually represent, covenant and warrant they have not directly or indirectly, assigned, transferred, encumbered, or purported to assign, transfer, or encumber to any person or entity any portion of any liability, claim, demand, action, cause of action or rights herein released and discharged except as set forth herein.

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H. No Third-Party Beneficiaries.

Plaintiff, Participating Class Members, Class Counsel, and Defendants are direct beneficiaries of this Agreement, but there are no third-party beneficiaries.

I. Force Majeure.

The failure of any party to perform any of its obligations hereunder shall not subject such party to any liability or remedy for damages, or otherwise, where such failure is occasioned in whole or in part by acts of God, fires, accidents, earthquakes, pandemic(s), other natural disasters, explosions, floods, wars, interruptions or delays in transportation, power outages, labor disputes or shortages, shortages of material or supplies, governmental laws, restrictions, rules or regulations, sabotage, terrorist acts, acts or failures to act of any third parties, or any other similar or different circumstances or causes beyond the reasonable control of such party.

J. Deadlines Falling on Weekends or Holidays.

To the extent that any deadline set forth in this Agreement falls on a Saturday, Sunday, or legal holiday recognized under federal law or the laws of the state of California, that deadline shall be continued until the following business day.

K. Severability.

In the event that one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall in no way effect any other provision if Defendants' Counsel and Class Counsel, on behalf of the Parties and the Settlement Class, mutually elect in writing to proceed as if such invalid, illegal, or unenforceable provision had never been included in this Agreement.

IT IS SO AGREED:

Dated: 9/28/2021, 2021

DocuSigned by:

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NATHAN SMITH
Plaintiff and Class Representative

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Dated: 10/4, 2021


MCMILLEN ENTERPRISES, INC.,
Doing business as "United Paving"
Defendant
By: David McMillen
Its: President

Dated: 10/4, 2021


DAVID JOSEPH MCMILLEN
Defendant

AGREED AS TO FORM:

Dated: October 5, 2021


JASMIN K. GILL
Counsel for Plaintiff Nathan Smith

Dated: October 5, 2021


DAVID D. BIBIYAN
Counsel for Plaintiff Nathan Smith

Dated: Oct. 4, 2021


STACY L. HENDERSON
Counsel for Defendants McMillen Enterprises,
Inc., doing business as "United Paving" and
David Joseph McMillen