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Attorneys for Plaintiffs and the Certified Class

UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

19 ARABELLA LEMUS, MALVIN
 20 A. AYALA as individuals and on
 21 behalf of all others similarly
 22 situated,

Plaintiffs,

vs.

23 H&R BLOCK ENTERPRISES,
 24 LLC (fka H&R BLOCK
 25 ENTERPRISES, INC., a Missouri
 26 corporation); and DOES 1 through
 27 50, inclusive,

Defendants.

Case No. CV-09-03179 SI
 The Honorable Susan Illston

CLASS ACTION

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION FOR PRELIMINARY
 APPROVAL OF CLASS ACTION
 SETTLEMENT**

Date: February 10, 2012
 Time: 9:00 a.m.
 Courtroom: 10

1 TO: ALL PARTIES HEREIN AND TO THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on February 10, 2012, at 9:00 a.m., or as
3 soon thereafter as the matter can be heard in Courtroom No. 10 in the above
4 entitled courthouse located at 450 Golden Gate Avenue, San Francisco, California,
5 Plaintiffs, on their own behalf, and on behalf of the certified Class, will move for
6 preliminary approval of a class wide settlement reached with defendant H&R
7 Block Enterprises, LLC. This motion is unopposed.

8 Said Motion shall be based upon this Notice of Motion, the accompanying
9 Memorandum of Points & Authorities filed herewith, the declarations of Louis M.
10 Marlin and Larry W. Lee, and upon such further evidence, both documentary and
11 oral, as may be presented at the hearing of said motion.

12 Dated: January 27, 2012

MARLIN & SALTZMAN, LLP
THE DIVERSITY LAW GROUP, APC
LAW OFFICES OF SHERRY JUNG

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15 By: /s/ Louis M. Marlin
16 Louis M. Marlin
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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. NATURE OF RELIEF SOUGHT**

3 By this unopposed motion, Plaintiffs and the certified plaintiff class seek
4 preliminary approval of a substantial settlement of all claims between the parties.
5 Previously, this Court issued its Order of December 7, 2010 granting the Plaintiffs'
6 motion for class certification. (Docket No. 55) The parties now seek this
7 honorable Court's approval of the settlement reached.

8 The settlement requires Defendant H&R Block to pay a maximum of **\$35**
9 **million** to the 18,370 class members, a sum which represents a substantial recovery
10 for the members of the Class. This is particularly true in light of the fact that the
11 settlement is composed entirely of penalty payments by the Defendant, since there
12 is no dispute that all wages due were paid years earlier, as discussed *ante*.
13 Approval of the proposed settlement will resolve this complex and hotly contested
14 litigation for the benefit of approximately 18,400 class members.¹

15 **II. INTRODUCTION AND SUMMARY OF ARGUMENT**

16 After more than 4 years of litigation, after the production and analysis of
17 more than a thousand documents, after in depth investigation by Class Counsel and
18 expert analysis for both sides, after numerous depositions of defendant's witnesses
19 (taken in Kansas City, Missouri, Orange County, California and via teleconference
20 where appropriate), after the filing of Plaintiffs' comprehensive motion for
21 certification of the class and the Defendant's ultimate decision not to oppose the
22 same, after the filing of a fourth amended complaint narrowing the claims for
23 which certification was sought, after two separate days of mediation with two
24 highly regarded mediators, and moments before this honorable Court was set to
25 hear arguments concerning highly complex, case dispositive cross-motions for

26 _____
27 ¹ Approximately 8,500 seasonal tax professionals are hired by Defendant each tax season.
28 Marlin dec. ¶ 7. Some are returning former employees and some are first time employees. The
18,370 number encompasses both groups. The tax seasons involved in this settlement run from
the 2007 season through and including the 2011 season.

1 summary judgment/adjudication, the matter was finally resolved.

2 Defendant H&R Block has agreed to pay a maximum of **\$35 million** to
3 resolve the penalty claims raised by plaintiffs and the plaintiff class.² The primary
4 claim litigated in this case was whether or not Defendant's annually employed
5 seasonal tax professionals were entitled to receive penalties pursuant to Labor
6 Code § 203 because either their final hourly wages, or their "end of season
7 compensation" wages were paid late each tax season during the class period.

8 Class Members all earned an hourly wage as seasonal tax professionals.
9 Many were entitled to earn, and did in fact earn, "additional" or "end of season"
10 compensation during the Class Period. This end of season "additional"
11 compensation was based, in part, upon the sale of goods and services to
12 Defendant's customers, with the amount earned based on detailed compensation
13 schedules. Seasonal tax pros would earn end of season compensation if their
14 earnings based on the compensation schedules exceeded their season long hourly
15 compensation. By example, if a seasonal tax pro earned \$20,000 in hourly
16 compensation for a tax season, and his/her sale of goods and services entitled
17 him/her to \$22,000 of scheduled compensation, that employee would receive
18 \$2,000 in end of season compensation, in addition to the \$20,000 of hourly
19 compensation earned.

20 Comprehensive discovery in this matter revealed that the underlying wages
21 for hours worked and for end of season compensation were, in fact, paid in full
22 each tax season. The issue is when earned wages were paid. For the tax seasons
23 encompassed by the settlement, final hourly wages were paid in full at the end of
24 each seasonal contract which was within approximately 7 days after the end of
25 each tax season. In connection with "additional compensation", those funds were
26 paid in full within approximately 25 days of the last day to file a timely tax return

27 _____
28 ² By agreeing to the settlement, H&R Block does not concede that any of the claims raised in the
complaints in this matter are either legally or factually valid.

1 each year.³

2 The dispute between the parties centers upon whether, under California law,
3 either of those payments were made late or untimely, thus subjecting Defendant to
4 payment of penalties. Labor Code § 203. The parties disagreed on this issue in the
5 extreme, with Class Counsel arguing that the provisions of California Labor Code
6 §§ 200 – 202 mandated that final annual hourly and “end of season compensation”
7 payments be paid upon termination of employment (in connection with final hourly
8 pay), and within a reasonable time after termination of employment (in connection
9 with end of season compensation wages). Defendant, as evidenced by its Motion
10 for Summary Judgment and its opposition to Plaintiffs’ Motion for Summary
11 Adjudication, vigorously disputes Plaintiffs’ interpretation of the applicability of
12 the Labor Code provisions to Defendant’s business model. Despite this
13 disagreement, the parties were ultimately able to reach an agreement that awards
14 class members substantial penalties pursuant to Labor Code § 203.⁴ In short, the
15 settlement represents a very favorable result for class members.

16 The terms of the settlement are set forth in the Settlement Agreement
17 entered into by the parties and attached hereto as Exhibit A. Pursuant to the
18 settlement terms, H&R Block will pay up to \$35 million (the Maximum Settlement

19 ³ The Settlement Agreement reflects a difference between the delay in payment of final hourly
20 wages and delay in payment of end of season compensation. Allowing for reasonable
21 “calculation” time, end of season compensation was paid about 3 times later (21 days vs. 7 days)
22 than hourly wages. The settlement distribution plan takes this difference into account, giving
23 class members who were paid for both final hourly pay and end of season compensation
proportionately three times the recovery than those paid only final hourly wages (as adjusted for
each person average adjusted hourly wage).

24 ⁴ In order to have the settlement include all Seasonal Tax Professionals employed by Defendant
25 in California through the end of the 2011 tax season included in the settlement, the parties have
26 agreed to ask this Court to slightly modify its earlier order granting class certification. The
27 earlier order included persons employed by Defendant in California from June 9, 2006 through
December 31, 2010 in the class. By changing the end date restriction to those employed by
28 Defendant through April 15, 2011, the very few persons hired by Defendant for the first time
after the commencement of the 2011 tax season will be included in the settlement. This addition
of class members was taken into account by Plaintiffs during the negotiation of this settlement.
Marlin declaration, ¶ xx.

1 Amount). Payment of this Maximum Settlement Amount will depend upon
2 participation by the class, but in no event will H&R Block pay less than a sum
3 equal to the amount of any attorneys' fees and costs awarded to Class Counsel,
4 plus 50% of the remaining portion of the Maximum Settlement Amount
5 (designated as the Minimum Settlement Amount). If Class Counsels' request for a
6 fee award and reimbursement of costs and expenses is granted, the Minimum
7 Settlement Amount to be paid by Defendant will be 67% of the Maximum
8 Settlement Amount, or \$23,413,333. Class Counsel expect that this relatively
9 sophisticated class will participate at a rate even higher than this minimum number.

10 Pursuant to the Settlement, Plaintiffs request that the Court enter an order:

11 (1) Preliminarily approving the proposed settlement, and executing the
12 [Proposed] Order Granting Preliminary Approval of Class Action Settlement (filed
13 contemporaneously herewith);

14 (2) Certifying the Settlement Class for purposes of settlement only,
15 including execution of the Amended Certification Order (Filed contemporaneously
16 herewith);

17 (3) Appointing current class representatives Arabella Lemus and Malvin
18 Ayala as Settlement Class Representatives;

19 (4) Appointing current Class Counsel as counsel for the Settlement Class;

20 (5) Directing that the Class be given notice of the pendency of this action
21 and the settlement in the form of the proposed Notice discussed hereafter;

22 (6) Scheduling a hearing to consider final approval of the settlement, entry
23 of a proposed final judgment, and plaintiffs' counsels' application for an award of
24 attorneys' fees and reimbursement of costs and expenses, as well as an
25 enhancement award to the Settlement Class Representatives.

26 For purposes of the proposed settlement, the Settlement Class that the Court
27 is being asked to certify is defined as:

28 ///

1 All individuals who were employed by H&R Block in California from
2 June 9, 2006 through May 15, 2011 as seasonal, non-exempt Tax
3 Professionals.

4 The parties have agreed on the form of all the necessary documents to be
5 provided to Class Members to inform them of the settlement. They are presented
6 herewith for review by the Court. The Claim Form, and the Notice of Proposed
7 Class Action Settlement are Exhibits 1 and 2 respectively, to the Settlement
8 Agreement, (and filed herewith as Exhibit B and C to this Motion). The parties
9 have further agreed as to the terms and conditions under which notice will be
10 provided, designation of a claims administrator (Simpluris, Inc.), the estimated fees
11 of the Claims Administrator, the contingencies or conditions to the settlement's
12 final approval, and other terms that are necessary and customarily provided by
13 such class action settlements.

14 The proposed settlement meets the criteria for preliminary approval which
15 are set forth in the *Manual for Complex Litigation*, 4th Ed., is well within the range
16 of what would be fair, reasonable, and adequate in this case, and thus the plaintiffs
17 request that the Court take the first step in the approval process – granting the
18 requested preliminary approval of the settlement which is sought herein.

19 **III. SUMMARY OF THE LITIGATION**

20 **A. Nature of the Case**

21 This case seeks only penalties from the Defendant for violation of the -
22 Labor Code. The primary and over-arching alleged violation relates to Plaintiffs'
23 claim that the Defendant, throughout the class period, failed to make final hourly
24 wage payments and end of season compensation payments in a timely manner.

25 The Class Members were all employed by Defendant as Seasonal Tax
26 Professionals, preparing tax returns in Defendant's offices in California. These
27 employees were hired one tax season at a time and, for the overwhelming majority,
28 their assigned tasks are completed on the last day to file a timely federal tax return

1 each year, usually April 15th. It is Plaintiffs' position that, on that date, their
2 employment relationship with the Defendant is legally terminated by H&R Block,
3 such that they are all discharged under California law. Based upon that argument,
4 Plaintiffs' contend that the failure to pay final hourly wages for another
5 approximately 7 days is a violation of Labor Code §§ 201 and 202.

6 In addition, many Class Members earn what Defendant calls "End of
7 Season" compensation - additional wages tied, in part, to the sale of the various
8 products and services sold by Class Members during the tax season to H&R
9 Block's customers. Once the tax season ends, it is Plaintiffs' position that Class
10 Members have met all of Defendant's requirements in connection with their
11 entitlement to the payment of end of season compensation, and thus these wages
12 must be paid immediately (allowing for a reasonable time for Defendant to
13 calculate the same). Plaintiffs maintain that payments made annually around May
14 11th or 12th are late and also represent a violation of Labor Code §§ 201 and 202.

15 Throughout the course of the litigation, Defendant has disputed the position
16 taken by Plaintiffs. In connection with final hourly wages, Defendant claims that
17 the written employment agreement entered into by each Class Member specifies an
18 "end of employment" date that coincides with, or is later than, the date that final
19 hourly wages are actually paid, and that employees are employed until that date,
20 whether or not they are in fact called on to provide services to Defendant after tax
21 season ends. In connection with end of season compensation, the published terms
22 and conditions for this compensation provided to Class Members provide that
23 payments will be made by mid-May each year. Defendant contends that these
24 payments are governed solely by the agreement and that such an agreement is valid
25 and enforceable.

26 From such acorns of disputes, mighty oaks of litigation are born, as
27 evidenced by the competing motions for summary judgment/adjudication which
28 were filed by the parties. The settlement reached by the parties creates a

1 substantial common fund for the settlement class, while taking into consideration
2 the differing positions on the law and the facts.⁵

3 **B. Litigation History**

4 **(1) Initial and Subsequent Pleadings**

5 This matter was originally filed on June 9, 2009 in the California Superior
6 Court, County of San Francisco. Thereafter, on July 13, 2009, the Defendant
7 removed this matter to the United States District Court for the Northern District of
8 California. The case was ultimately assigned to this honorable court.

9 The original complaint pled various causes of action related to Defendant's
10 compensation policies. Shortly after removal, the parties stipulated to the filing of
11 a Second Amended Complaint (Docket No. 16) which contained causes of action
12 based upon various alleged violations of the California Labor Code, as well as the
13 California Business & Professions Code. Among those causes of action were
14 claims related to violations of Labor Code § 226.7 (failure to provide mandated
15 meal and rest breaks).

16 Another action was filed in the Central District which, in part, raised the
17 same or similar causes of action, and which involved the same or similar
18 defendants.⁶ The parties involved in both cases met and conferred, and it was
19 agreed that certain claims, including the Labor Code § 226.7 claim would be
20 litigated in the Central District case, with other claims remaining in this action. As
21 a result of that agreement, the parties stipulated to plaintiffs filing a Third
22 Amended Complaint (Docket No. 40). This Court issued an order granting leave
23

24 ⁵ Plaintiffs also contend that the end of season compensation should be calculated on an ongoing
25 basis during the tax season, and reported on bi-weekly pay stubs, thus amounting to a violation
26 of Labor Code § 226. Defendant argues that the calculations cannot be completed until the tax
27 season is over as the amount of end of season compensation due any particular employee is
28 based, in part, on the amount of hourly wages earned during the entire tax season. The final
penalty claim by Plaintiffs relates to the Private Attorney General Act, and is based upon the
aforementioned violations of the Labor Code.

⁶ *Delana L. Ugas vs. H&R Block Enterprises, LLC, et.al.*, Case No. CV09-6510 CAS.

1 to file the Third Amended Complaint on June 3, 2010.

2 The Third Amended Complaint contained 5 causes of action: (1) failure to
3 pay all wages due in violation of Labor Code § 204, (2) Failure to provide accurate
4 wage statements in violation of Labor Code § 226, (3) Failure to reimburse
5 employees for necessary business expenses in violation of Labor Code § 2802, (4)
6 Failure to pay overtime in violation of Labor Code § 510, and (5) Late payment of
7 final wages in violation of Labor Code §§ 201 – 202, resulting in penalties
8 pursuant to section 203.

9 (2) Discovery and Investigation

10 The parties engaged in very active discovery. Plaintiffs propounded
11 substantial requests for production of written documentation which related to
12 Defendant's policies and procedures, as well as interrogatories and requests for
13 admission. Defendant produced over 1,000 pages of documents, each of which
14 was reviewed and analyzed by Plaintiffs' counsel. These documents proved
15 crucial in regard to the investigation of the claims raised in the litigation, and in
16 making ultimate determinations as to which alleged Labor Code violations could,
17 in the opinion of Plaintiffs' counsel, be factually established.

18 Among the documents ultimately produced by Defendant were the annual
19 Timelines employed by Defendant in planning for and completing the payment of
20 final hourly wages and end of season wages each tax season. These documents
21 proved to be invaluable in supporting the arguments presented by Plaintiffs in
22 connection with the competing summary judgment/adjudication motions.⁷

23 In addition to obtaining responses to written discovery, Plaintiffs' Counsel
24 took approximately 18 depositions of 15 different H&R Block employees in order

25 _____
26 ⁷ Defendant did not dispute the fact that it followed these Timelines. It argued that the Timelines
27 were evidence of the complexity of the task facing H&R Block in calculating and paying both
28 final hourly wages and, most importantly, end of season calculations. These competing views of
the impact of the Timelines provide further support for the argument that this settlement is an
outstanding result for the Class in light of the viable positions put forth by both sides.

1 to establish legal and factual grounds to support both class certification as well as
2 Plaintiffs' Summary Adjudication Motion. Class Counsel also obtained substantial
3 electronic discovery from Defendant. This information included the work and
4 wage history for all class members for each tax season encompassed by the
5 proposed class period. This information was critical in allowing Class Counsel to
6 properly evaluate the potential penalty claims being raised, and was used
7 extensively for mediation and in connection with the ongoing settlement
8 discussions thereafter.

9 (3) Class Certification

10 With class certification discovery complete, Plaintiffs' counsel filed a
11 motion for class certification on September 24, 2010 (Docket No. 47). Plaintiffs
12 sought certification of the First Cause of Action (Labor Code § 204, failure to pay
13 all wages), Second Cause of Action (Labor Code § 226, failure to provide accurate
14 wage statements), the Fifth Cause of Action (Labor Code § 203, for penalties for
15 late payment of final wages).⁸

16 After Plaintiffs filed their comprehensive Motion for Class Certification, a
17 stipulation was reached whereby (1) Plaintiffs filed a Fourth Amended Complaint
18 which contained only the causes of action which discovery had confirmed to
19 Plaintiffs' Counsels' satisfaction were factually and legally supported and (2) the
20 Defendant agreed to certification of the causes of action in the Fourth Amended
21 Complaint.. (Docket No. 50).⁹ This Court approved the stipulation of the parties,
22 and certified the class on November 30, 2010 (Docket No. 51).

23 The Fourth Amended Complaint seeks penalties for violation of Labor
24 Code § 226 (inaccurate wage statements), penalties for violation of Labor Code §

25 _____
26 ⁸ By prior stipulation of the parties, the claims alleged in the Third and Fourth Causes of Action
had been dismissed without prejudice due to a lack of evidentiary support.

27 ⁹ There can be no doubt that every plaintiffs' counsel hopes to present such a compelling
28 certification motion that highly experienced counsel like those retained by H&R Block decide
that opposition to the same is futile. This is the rare situation where such hope became reality.

1 203 (late payment of final wages), and civil penalties under the Private Attorney
2 General Act (Labor Code §§ 2698 et.seq.).

3 The certified class was defined as:

4 All seasonal, non-exempt Tax Professional employees
5 who were or are employed by defendants during the
6 Class Period in California as tax preparers.¹⁰

7 The Class period was defined as the period from June 9, 2006 through
8 December 31, 2010 (now to be extended to May 15, 2011).

9 **(4) Summary Judgment/Adjudication Motions**

10 Subsequent to certification, the parties continued their actions involving
11 pre-trial discovery, and important motion practice, while beginning to explore the
12 possibility of engaging in private mediation. It was agreed that the filing of cross-
13 motions for summary judgment/adjudication would be beneficial in highlighting
14 the positions of the parties as a precursor to mediation, and each side filed their
15 summary motions on May 18, 2011 (Docket Nos. 68 through 77-25).

16 As the Court is no doubt aware, these competing motions were extensively
17 briefed, analyzed and supported by numerous exhibits, references to deposition
18 testimony, declarations, etc. They represented a comprehensive and detailed
19 presentation by both sides of their respective positions, thus posturing the case for
20 a significant case dispositive ruling by this Court.

21 **C. Mediation**

22 With the motions pending, the parties prepared for and attended a mediation
23 conducted by Mr. Hunter Hughes, a highly respected mediator from Atlanta,
24 Georgia. Prior to the mediation, the parties exchanged all necessary financial,

25 _____
26 ¹⁰ The class definition also included a sub-class defined as, “All members of the Plaintiff Class
27 whose employment ended during the Class Period. For purposes of the Settlement herein, the
28 sub-class has been eliminated as unnecessary since, as of May 15, 2011 (the new end of class
period date), all class members had been terminated from their positions as seasonal tax
professionals, as is the Defendant’s ongoing custom and practice after each tax season.

1 payroll and related information necessary to permit a full and complete analysis of
2 the value of the potential penalties being. The information included the payroll
3 history for each class member, as well as specific information concerning last day
4 worked each tax season, average number of hours worked each day by each class
5 member, etc. While the parties disagreed upon the underlying theories of liability
6 and defense, they were in identical positions at this first mediation in relation to
7 having the required financial information.

8 Despite the best efforts of Mr. Hughes, the mediation proved to be
9 unsuccessful. It was felt that a second day of mediation would be futile at that
10 time, and that the most reasonable next step would be to await the Court's ruling
11 on the cross-motions for summary judgment/adjudication. The parties filed their
12 respective oppositions and replies, as the motions were scheduled for hearing on
13 July 18, 2011. However, counsel for the Class and counsel for Defendant
14 continued to have ongoing discussions in an attempt to "close the gap" between
15 their respective settlement positions. As a result of these ongoing discussions, the
16 parties agreed to attempt a second session of mediation.

17 Mr. Anthony Piazza of San Francisco, also a well respected mediator, was
18 mutually agreed upon. This second mediation session lasted for a full day and was
19 also unsuccessful. Despite this, counsel for the parties continued direct
20 discussions, as well as discussions through Mr. Piazza's good offices. As the
21 hearing date for the summary judgment/adjudication motions approached, the
22 parties began to make progress toward a mutually agreeable solution.¹¹ Proposals
23 and counter proposals had to be presented to the appropriate corporate
24 representatives for Defendant, as well as the Plaintiffs and various Plaintiffs'
25 counsel. The back and forth process was arduous and, the closer to the hearing, the
26 more intense and constant the negotiations became.

27 _____
28 ¹¹ For various reasons, the hearing on the motions was ultimately continued to October, 2011.

1 As this Court is no doubt aware, a mutually agreed upon broad settlement
2 was not achieved until approximately 2 or 3 minutes prior to the Court taking the
3 bench to hear argument on the summary judgment/adjudication motions. Until that
4 moment, the parties remained apart.

5 The broad settlement terms were subject to necessary Board approvals by
6 Defendant, as well as the completion of a comprehensive settlement agreement that
7 would encompass all of the terms necessary for such a significant resolution of this
8 litigation.

9 **IV. SUMMARY OF THE SETTLEMENT**

10 **A. Settlement Terms**

11 The oral agreement to the broad settlement terms was of course a milestone
12 in the settlement process, but definitely not the end of that process. Since the
13 general terms of the settlement were agreed upon, the parties have engaged in
14 continuing detailed negotiations, over the subsequent three months, regarding the
15 specifics of the settlement. Plaintiffs' Counsel sought and obtained the assistance
16 of this honorable Court in having Magistrate Judge Spero appointed to conduct a
17 settlement. On the eve of that settlement conference, all key terms were agreed to.
18 However, the negotiations did not end there in connection with the final settlement
19 details. It was not until January 6, 2012 – 7 days before the re-scheduled summary
20 judgment/adjudication hearing – that the Settlement Agreement was signed by all
21 parties.

22 While the process has been mostly collegial, the negotiations have been
23 non-collusive, adversarial, and at arm's length. The investigation and discovery
24 described above, the parties' ongoing case evaluations and exchanges of ideas, the
25 full and complete briefing regarding class certification and summary
26 judgment/adjudication, and the Court's rulings, have all combined to enable the
27 two sides to fully and completely assess the merits of their respective positions.

28 The terms of the settlement are set forth in the Settlement Agreement

1 attached hereto as Exhibit A and incorporated herein by reference. The principal
2 terms are:

3 a. Defendant will pay up to a Maximum Settlement Amount of \$35 million.
4 This sum includes payments made to claimants, the LWDA payment,
5 settlement administration costs, awards of attorneys' fees and costs, and
6 incentive awards to the named plaintiffs.

7 b. The sum available for use for payments to claimants after the LWDA
8 payment, settlement administration costs, awards of attorneys' fees and costs,
9 and incentive awards to the named plaintiffs is designated in the Settlement
10 Agreement as the Net Settlement Amount.

11 c. H&R Block agrees that it shall pay a **Minimum Settlement Amount**,
12 regardless of the claims rate, equal to the amount of attorneys' fees and costs
13 awarded plus fifty percent (50%) of the sum remaining from the Maximum
14 Settlement Amount after deduction of the attorneys' fee and cost award. If
15 Class Counsel are awarded attorneys' fees of 1/3 of the Maximum Settlement
16 amount and \$166,000 in costs, which would total \$11,833,333, million, the
17 total Minimum Settlement Amount will be \$23,416,666 – which represents
18 67% of the Maximum Settlement Amount

19 d. H&R Block will not object to an award of attorneys' fees to Class Counsel
20 not to exceed 1/3 of the Maximum Settlement, and up to \$166,000 in actual
21 costs and expenses. Said fee includes all of the work remaining to be
22 performed in documenting the Settlement, securing Court approval of the
23 Settlement, making sure that the Settlement is fairly administered, and
24 obtaining dismissal of the action.

25 e. Plaintiffs will seek incentive awards up to a maximum of \$25,000 each.
26 H&R Block will not object to incentive awards to each of the plaintiffs of
27 \$15,000 each, but reserves the right to object to a higher amount.
28

- 1 f. Each Class Member who returns a valid and timely Claim Form will be
2 entitled to receive a portion of the amount of the Net Settlement Amount,
3 which shall be allocated as follows:
- 4 (1) Each member of the Settlement Class shall be awarded 10 “tax season
5 points” for each tax season worked between 2007 and May 15, 2011 in
6 which he/she was employed at any time as a seasonal tax professional in
7 California. By example, if a class member was employed in the 2007
8 and 2009 tax seasons, that individual would be awarded 20 tax season
9 points.
- 10 (2) Each member of the Settlement Class shall be awarded an additional 20
11 “tax season points” for each tax season worked between 2007 and May
12 15, 2011 in which he/she received “Additional Compensation” (paid by
13 H&R Block in May each year).
- 14 (3) The share of each member of the Settlement Class in the Net Settlement
15 Amount shall be calculated by multiplying the Net Settlement Amount by
16 a fraction, the numerator of which is the individual class member’s
17 average adjusted hourly compensation for the 2007 through 2011 tax
18 seasons multiplied by the total of that member’s total “tax season” points,
19 and the denominator of which is the total of all tax season points
20 attributed to all members of the Settlement Class multiplied by the
21 average of the adjusted hourly compensation of all Settlement Class
22 Members for the 2007 through 2011 tax seasons. The resulting number
23 shall be the amount that each member of the Settlement Class is eligible to
24 claim.
- 25 g. H&R Block will provide the Claim Administrator with sufficient funds to
26 distribute the settlement proceeds based on the claims received.
- 27 h. The parties have selected Simpluris, Inc. as the Claims Administrator.
28 Simpluris, Inc. has estimated that the administration expenses (including

1 mailing of the CAFA letter) in this matter will not exceed \$115,000. (xxx
2 decl., ¶xx)

3 i. The parties have agreed on a Claim Form, which is attached as Exhibit B,
4 and a form of notice to be mailed to the Class, attached as Exhibit C. These
5 documents are collectively referred to as the “Notice Packet.”
6 Accompanying the Notice Packet will be a **“no postage necessary”** return
7 envelope permitting an easy and cost free method for class members to
8 return their claim form.

9 j. The Settlement Agreement sets forth the language to be used in a
10 **“reminder postcard”** which will be sent to each Class Member who has
11 not presented a claim after passage of 60 days of the 80 day claims period.
12 This reminder will serve the important purpose of encouraging all class
13 members to submit their claims in a timely manner.

14 k. The Notice Packet will be mailed by first class mail.

15 l. Class Members will have forty five (45) days from the date the Notice
16 Packets are mailed to postmark their objections, and/or requests for
17 exclusion, and eighty (80) days to postmark their Claim Form.

18 m. The Claims Administrator shall establish a toll free number to respond to
19 inquiries from Settlement Class Members, and to provide a mechanism by
20 which Settlement Class Members can verify that the Claims
21 Administrator has received a submitted claim.

22 n. The Notice Packet as approved by the Court shall also be available at a
23 website to be set up by the Claims Administrator, and on the website of
24 Class Counsel. Settlement Class Members shall be able to access the
25 settlement documents and download a copy of the Claim Form from the
26 websites, which the Settlement Class Member can then mail to the Claims
27 Administrator. The Claims Administrator's website shall also provide a
28 mechanism by which Settlement Class Members can verify that the

- 1 Claims Administrator has received a submitted claim.
- 2 o. The Claims Administrator shall establish a toll free number to respond to
- 3 inquiries from Settlement Class Members, and to provide a mechanism by
- 4 which Settlement Class Members can verify that the Claims
- 5 Administrator has received a submitted claim.
- 6 p. The Claims Administrator will perform one skip-trace on returned mail
- 7 and re-mail Claim Forms to an updated address (if any) within ten (10)
- 8 days of receiving notice that a Notice Packet was undeliverable. It is the
- 9 intent of the parties that reasonable means be used to locate Class
- 10 Members.
- 11 q. A process is included in the Settlement Agreement for the handling of late
- 12 claims for up to 30 days after the cutoff date for presenting claims.

13 **B. Settlement Value**

14 The settlement represents a compromise between the positions and

15 evaluations of the two sides to this controversy. Clearly, there were significant

16 disagreements between the parties as to the facts, the law, and the application of

17 both to Defendant's business model. As an example and in connection with end of

18 season compensation, the parties disagreed substantially on (1) whether Defendant

19 should be required to maintain an ongoing calculation of these wages during the

20 tax season, and (2) if Defendant was entitled to a reasonable amount of time to

21 calculate end of season compensation after the end of the tax season, exactly how

22 much time was reasonable.

23 The mediation process as well as the ongoing discussions between counsel,

24 not only narrowed the monetary gap, it helped to lessen this analytical chasm

25 also. Ultimately, the parties moved their positions so that they had a less

26 significant disagreement as to maximum potential damages. Giving credence for

27 negotiation purposes to some of Defendant's damage related assertions, (which this

28 Court may or may not have accepted), Plaintiffs valued the realistic range of

1 settlement to be between \$25 million and \$42. The settlement at a maximum
2 payment of \$35 million represents a reasonable compromise, resulting in a significant
3 recovery for the Class. (Marlin dec., ¶¶ 7 - 17)

4 **V. THE SETTLEMENT CLEARLY MEETS, AND EXCEEDS, THE**
5 **STANDARDS FOR PRELIMINARY APPROVAL**

6 Federal Rule of Civil Procedure 23(e) provides that any compromise of a
7 class action must receive Court approval. The court has broad discretion to grant
8 such approval and should do so where the proposed settlement is “fair, adequate,
9 reasonable, and not a product of collusion.” *Hanlon v. Chrysler Corp.*, 150 F.3d
10 1011, 1026 (9th Cir. 1998); *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2nd Cir. 2000).
11 In determining whether a proposed settlement should be approved, the Ninth
12 Circuit has a “strong judicial policy that favors settlement, particularly where
13 complex class action litigation is concerned.” (*In re Heritage Bond Litigation*,
14 2005 WL 1594403, citing *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir.
15 1992).)

16 Court approval involves a two-step process in which the Court first
17 determines whether a proposed class action settlement deserves preliminary
18 approval and then, after notice is given to Class Members, whether final approval
19 is warranted. *Manual of Complex Litigation*, Fourth, § 21,632 (2004). *See*,
20 *Hanlon, supra*, at 1019. (“The court ordinarily holds a preliminary hearing to
21 determine whether there is a likelihood it could approve the settlement before
22 conducting a full ‘fairness hearing’”).

23 At the preliminary approval stage, the Court need only “determine whether
24 the proposed settlement is within the range of possible approval.” (*Gatreaux v.*
25 *Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982).) Ultimately, a class action should be
26 approved if “it is fundamentally fair, adequate and reasonable.” *Class Plaintiffs v.*
27 *Seattle*, 955 F.2d at 1276; *See also Officers for Justice v. Civil Service Com’n of*
28 *City and County of San Francisco*, 688 F.2d 615, 625 (C.D. Cal. 1982) (“the

1 court's intrusion on what is otherwise a private consensual agreement negotiated
2 between parties to a lawsuit must be limited to the extent necessary to reach a
3 reasoned judgment that the agreement is not the product of fraud or overreaching
4 by, or collusion between, the negotiating parties, and that the settlement, taken as a
5 whole, is fair, reasonable and adequate to all concerned"). There is a "strong initial
6 presumption that the compromise is fair and reasonable." *Hanlon, supra*, at 1019.
7 Courts strongly favor settlement, particularly in complex class actions. *See, e.g.,*
8 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting that
9 there is a "strong judicial policy that favors settlement, particularly where complex
10 class action litigation is concerned").

11 Although at this stage of preliminary approval, the Court is not expected to
12 engage in the more rigorous analysis that is required for final approval (*see Manual*
13 *for Complex Litigation*, Fourth, § 22.661 at 438 (2004)), the Court's ultimate
14 fairness determination will include balancing several factors, including some or all
15 of the following:

16 . . . the strength of plaintiffs' case; the risk, expense, complexity
17 and likely duration of further litigation; the risk of maintaining
18 class action status throughout the trial; the amount offered in
19 settlement; the extent of discovery completed, and the stage of the
20 proceedings; the experience and the stage of the proceedings; the
21 experience and views of counsel; the presence of a governmental
22 participant; and the reaction of the Class Members to the proposed
23 settlement. (*Officers for Justice, supra*, 688 F. 2d 615, 625.)

24 Not all of the above factors apply to every class action settlement, and one
25 factor alone may prove determinative in finding sufficient grounds for court
26 approval. (*Nat'l Rural Telecommunication Cooperative v. Directv, Inc.*, 221
27 F.R.D. 523, 525-26 (C.D. Cal. 2004).) District courts have wide discretion in
28 assessing the weight and applicability of each factor. (*Id.*)

1 **A. The Settlement Resulted from Arm’s-Length Negotiations.**

2 The Ninth Circuit has shown longstanding support of settlements reached
3 through arms’ length negotiation by capable opponents. In *Rodriguez v. West*
4 *Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009), the Ninth circuit expressly opined
5 that courts should defer to the “private consensual decision of the [settling]
6 parties.” *Id.* at 965, citing *Hanlon, supra*, at 1027. The primary reason for
7 deferring to such settlements is the experience of counsel and the participation of a
8 neutral (in this case, several neutrals), both of which factors are present here:

9 “...the court's intrusion upon what is otherwise a private consensual
10 agreement negotiated between the parties to a lawsuit must be
11 limited to the extent necessary to reach a reasoned judgment that
12 the agreement is not the product of fraud or overreaching by, or
13 collusion between, the negotiating parties, and that the settlement,
14 taken as a whole, is fair, reasonable and adequate to all concerned.”

15 *Id.* at 965, quoting *Officers for Justice, supra*, at 625.

16 The *Rodriguez* court “put a good deal of stock in the product of an arms-
17 length, non-collusive, negotiated resolution, and have never prescribed a particular
18 formula by which that outcome must be tested.” *Rodriguez, supra*, at 965
19 (citations omitted). As the Court explained, “In reality, parties, counsel, mediators,
20 and district judges naturally arrive at a reasonable range for settlements by
21 considering the likelihood of a plaintiffs’ or defense verdict, the potential recovery,
22 and the chances of obtaining it, discounted to present value.” *Id.* at 965 (citations
23 omitted). *See also, Williams v. Vukovich*, 720 F.2d 909, 922-923 (6th Cir.1983)
24 (“The court should defer to the judgment of experienced counsel who has
25 competently evaluated the strength of his proofs”); 2 *Newberg on Class Actions*
26 §11.24 (4th Ed. & Supp. 2002); *Manual For Complex Litigation* (Fourth) §30.42.)

27 The proposed settlement here is the product of literally days, weeks and
28 months of arm’s-length negotiations between the parties. Plaintiffs conducted

1 significant investigation of the facts and law during the prosecution of this action,
2 including (1) review and analysis of critical documents, (2) comprehensive
3 depositions of key H&R Block personnel, (3) filing a certification motion which
4 the Defendant elected not to oppose, (4) filing a Fourth Amended Complaint
5 pursuant to stipulation, (5) investigating, researching and drafting a motion for
6 summary adjudication which would have resolved all issues except the amount of
7 penalties due the class,¹² (6) researching and drafting a comprehensive opposition
8 to Defendant's motion for summary judgment, (7) obtaining detailed employment
9 and wage histories for all class members, and (8) retention of Tamarah Hunt, Ph.D.
10 for the purpose of conducting a comprehensive analysis of the employment data
11 obtained. (Marlin dec., ¶¶ 4, 6, 7, 14, 16).

12 Plaintiffs' counsel considered the strengths and weaknesses of their case,
13 and of H&R Block's defense. Considerable effort has been put forth to analyze the
14 law as it would apply to the facts of this matter, including the Plaintiffs' claim that
15 penalties could be recovered pursuant to *Labor Code* §203. (Marlin dec., ¶¶ 11-
16 13, 17). This settlement of a potential maximum of \$35 million represents a
17 substantial portion of the potential penalties the class may have recovered. (Marlin
18 dec., ¶17).

19 The parties were able to negotiate a fair settlement, taking into account the
20 costs and risks of continued litigation. The opinion of experienced counsel, as
21 here, supporting the settlement is entitled to considerable weight. "A presumption
22 of fairness, adequacy, and reasonableness may attach to a class settlement reached
23 in arm's length negotiations between experienced, capable counsel after
24 meaningful discovery. *H&R Block Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96,
25 116 (2nd Cir. 2005). See, *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal.

26 ¹² At the completion of the motion process, Plaintiffs' Counsel had the matter essentially "trial
27 ready", with the exception of the calculation of damages. Those calculations were performed by
28 Dr. Hunt. Thus, had settlement discussion failed, the case was for all intents and purposes ready
for trial.

1 1988) (opinion of experienced counsel is entitled to considerable weight); *Boyd v.*
2 *Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979) (recommendations of
3 plaintiffs' counsel should be given a presumption of reasonableness).¹³

4 Plaintiffs have also taken into account the uncertainty and risk of the
5 outcome of further litigation, and the difficulties and delays inherent in such
6 litigation. Plaintiffs are also aware of the burdens of proof necessary to establish
7 liability for the claims asserted in the action, and the difficulties in establishing the
8 requisite level of "willfulness" to support an award of penalties at trial.

9 Based on the foregoing, Plaintiffs and their counsel have determined that
10 the settlement set forth in the Agreement is a fair, adequate and reasonable
11 settlement, and is in the best interests of Plaintiffs and the proposed Settlement
12 Class. (Marlin dec., ¶¶ 17 – 19, 21 – 23). H&R Block also has expended
13 substantial amounts of time, energy and resources in connection with the litigation,
14 and unless this settlement is approved, will continue to have to do so. Defendant
15 has, therefore, agreed to settle in the manner and upon the terms set forth in the
16 Settlement Agreement, to put to rest the claims as set forth in the Class Action.

17 **B. The Settlement Has No Obvious Deficiencies.**

18 The proposed settlement has no obvious deficiencies. Under the terms of
19 the settlement, Defendant will make a maximum payment of up to \$35 million.
20 The settlement provides no preferential treatment for Plaintiffs or other Class
21 members. Plaintiffs will receive distributions from the settlement proceeds
22 calculated in the same manner as the distributions to all other Class Members.¹⁴

23 There is no standard or benchmark for determining whether any given
24 settlement is fair. "Ultimately the district court's determination is nothing more
25 than 'an amalgam of delicate balancing, gross approximations and rough justice.'"

26 _____
27 ¹³The Class has been represented by highly experienced Class Counsel. See, declarations of
Louis Marlin and Larry Lee, filed contemporaneously herewith.

28 ¹⁴In fact, the named plaintiffs will provide Defendant with releases that are more extensive than
the release provided by absent class members.

1 *Officers for Justice, supra*, at 625 (citation omitted). In making its determination,
2 the Court should weigh the benefits that the settlement will realize for the class
3 against the uncertainty of litigation and the possibility that the class members
4 would obtain no relief in the absence of a settlement. *See, Linney v. Cellular*
5 *Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (“...it is the very uncertainty of
6 outcome in litigation and avoidance of wasteful and expensive litigation that
7 induce consensual settlements.”)

8 Throughout this litigation, Plaintiffs have argued that Defendant should be
9 liable for late payment penalties pursuant to *Labor Code* §203. (Citing Title 8,
10 *California Code of Regulations*, §13520; *California Department of Labor*
11 *Standards Enforcement Manual* §4.2; *Davis v. Morris*, 37 Cal.App. 2d 269 (1940);
12 *Barnhill v. Saunders & Co.*, 125 Cal.App.3d 1 (1981) and related cases).
13 Defendant, on the other hand, has steadfastly maintained that plaintiffs would be
14 unable to establish a violation of the time requirements of the Labor Code and/or
15 the level of willfulness necessary to support the penalty claim. (Citing, *In re:*
16 *Trombly*, 31 Cal.2d 801 (1948); *Kwan v. Mercedes Benz of North America*, 23
17 Cal.App.4th 174 (1994, and related cases). This settlement represents a substantial
18 recovery for the class, and a well crafted compromise of the divergent positions of
19 the parties in relation to penalties.

20 The settlement has been reached after considerable negotiation, and
21 involving the mediation efforts of highly experienced mediators. Each side
22 evaluated the strengths and weaknesses of their case and independently came to the
23 conclusion that this settlement represents a responsible means of addressing the
24 claims of Plaintiffs, and the defenses of Defendant.

25 **VI. NATURE AND METHOD OF CLASS NOTICE**

26 “For any class certified under Rule 23(b)(3), the court must direct to Class
27 Members the best notice practicable under the circumstances, including individual
28 notice to all members who can be identified through reasonable effort.”

1 (*Fed.R.Civ.P.* Rule 23(c)(2)(B).) “The court must direct notice in a reasonable
2 manner to all class members who would be bound by a proposed settlement,
3 voluntary dismissal or compromise.” (*Fed.R.Civ.P.* Rule 23(e)(B).) Here, the
4 parties have agreed upon a Notice Packet, which will be mailed to all last known
5 addresses in the Defendant’s records, updated via use of the National Change of
6 Address database. This direct mail Notice is the most efficient and effective
7 method for notifying class members.

8 The Settlement also provides for a follow-up procedure intended to
9 maximize participation of the Class Members by the use of a reminder post card.
10 This post card will be to all class members who either have not presented a claim
11 or have not elected to opt out of the settlement by that time. This procedure,
12 bargained for by class counsel, is intended to increase participation in the
13 settlement to as large a number as possible.

14 As for the content of the notice, Rule 23(c)(2) requires that the notice
15 inform prospective class members of (i) the nature of the action; (ii) the definition
16 of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class
17 member may enter an appearance through counsel if the member so desires; (v)
18 that the court will exclude from the class any member who requests exclusion; (vi)
19 the time and manner for requesting exclusion; and (vii) the binding effect of a class
20 judgment on class members under Rule23(c)(3). Rule 23(e) generally requires the
21 same concepts. (“Notice is satisfactory if it generally describes the terms of the
22 settlement in sufficient detail to alert those with adverse viewpoints to investigate
23 and to come forward and be heard.”) *Newberg, 2 Newberg on Class Actions* §8.32
24 at 8-103. The proposed Notice meets all of these requirements.

25 The Settlement Agreement also provides that the Claims Administrator will
26 publish the Notice and Proof of Claim Form on a website created for this case.
27 Class members will be able to download a claim form from this website.

28 **VII. CLAIMS ADMINISTRATION**

1 The parties have agreed to the appointment of Simpluris, Inc. as the
2 Claims/Class Administrator. Simpluris is an experienced class administration
3 company, and has acted as claims administrator in numerous wage and hour cases
4 throughout the country. Simpluris has provided an estimate that its expenses will
5 not exceed \$115,000. (Cook dec., ¶ 5 and Exhibit C to Cook declaration).

6 **VIII. ATTORNEYS' FEES AND COSTS**

7 The Settlement Agreement contemplates that Class Counsel will apply to
8 the Court for an award to be paid from this common fund established for the
9 benefit of the class. Class Counsel will seek fees of 1/3 of the Maximum
10 Settlement Amount (i.e., \$11,666,667.00) as well as costs and expenses not to
11 exceed \$166,000. The request for this award is disclosed in the proposed Notice.
12 Class Counsel will file their motion for an award of fees and costs in a timely
13 manner such that class members have the standard Northern District “motion
14 notice” period to review the same prior to the expiration of the time to object or opt
15 out of this settlement.

16 **IX. ENHANCEMENT AWARD FOR NAMED PLAINTIFFS**

17 The Settlement Agreement (Exhibit A) contemplates that the named
18 plaintiffs will apply to the Court for an incentive award to be paid from the
19 common fund established for the benefit of the class. The named plaintiffs will
20 each seek an incentive award of \$25,000. Defendant has agreed not to object to a
21 request of up to \$15,000 per Settlement Class Representative. The request for this
22 award is disclosed in the proposed Notice. Named plaintiffs will file their motion
23 for an award in a timely manner such that class members have the standard
24 Northern District “motion notice” period to review the same prior to the expiration
25 of the time to object or opt out of this settlement.

26 ///

27 ///

28 ///

1 **X. PROPOSED SCHEDULE FOR CLAIMS ADMINISTRATION**
2 **AND FINAL FAIRNESS HEARING**

3 As part of the settlement negotiations of the parties, a specific timetable for
4 Claims Administration was agreed to, as well as a date for a final approval hearing
5 (subject, of course, to the Court's availability). The proposed schedule is as
6 follows:

| | | |
|----|----------------|---|
| 7 | March 1, 2012 | Notice Packet is mailed to Class Members |
| 8 | April 14, 2012 | Last day for Class Members to Opt Out |
| 9 | April 14, 2012 | Last day for Class Members to Object |
| 10 | May 1, 2012 | Reminder Postcard is mailed |
| 11 | May 10, 2012 | Hearing re: final approval, attorneys' fees, 12 incentive awards, etc. |
| 13 | May 20, 2012 | Last day to postmark timely claim form |

14
15 **XI. CONCLUSION**

16 The parties have reached this settlement following extensive litigation,
17 ongoing case discussions and arm's-length negotiations. Plaintiffs respectfully
18 request that the Court grant preliminary approval of the proposed settlement and
19 enter the proposed Preliminary Approval Order submitted herewith, and for such
20 additional relief as this Court should deem proper.

21 Dated: January 27, 2012

Respectfully submitted,
MARLIN & SALTZMAN, LLP
THE DIVERSITY LAW GROUP, APC
LAW OFFICES OF SHERRY JUNG

22
23
24
25 By: /s/ Louis M. Marlin
 Louis M. Marlin of
26 Marlin & Saltzman, LLP
 Attorneys for Plaintiffs and Plaintiff Class
27
28