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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

HEATHER BOONE and ROXANNE
RIVERA, on behalf of themselves and all
others similarly situated,

Plaintiffs,

CRISTIAN BARRERA, individually,

Plaintiff,

v.

AMAZON.COM SERVICES, LLC,

Defendant.

Case No. 1:21-CV-00241-NODJ-BAM – LEAD
Case No. 1:22-CV-00146-NODJ-BAM-MEMBER

**DECLARATION OF DON FOTY IN
SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

DECLARATION OF DON FOTY

I, Don J. Foty, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1 1. My name is Don J. Foty. I am of sound mind, at least eighteen (18) years, and have
2 personal knowledge of the facts set forth in this Declaration. I am one of the attorneys representing
3 the Plaintiffs in the above-captioned lawsuit. I make this Declaration based upon my personal
4 knowledge.

5 **A. QUALIFICATIONS OF DON FOTY**

6 2. I graduated in 2003 from The University of Texas at Austin and in 2006 from
7 the University of Houston Law Center. I have been a member of the Texas bar since 2006 and
8 I am admitted to the following federal courts: the United States District Courts for the Northern,
9 Southern, Eastern, and Western Districts of Texas; the United States District Court for the
10 Eastern District of Michigan; the United States District Court for the District of Colorado; the
11 United States District Courts for the Central, Northern, and Southern Districts of Illinois; the
12 United States District Court for the District of North Dakota, the United States District Court
13 for the District of New Mexico, the United States District Court for the Northern District of
14 Ohio, the United States District Court for the Court of Federal Claims, the United States
15 District Court for the Western District of Oklahoma, the United States District Court for the
16 District of Maryland, and the United States Courts of Appeals for the Fifth Circuit.

17 3. I have substantial experience handling wage and hour matters, including class
18 actions and collective actions. Specifically, for the past 15 years, I have regularly litigated
19 wage and hour disputes, including claims involving employee misclassification, regular rate
20 miscalculation, independent contractor misclassification, claims for compensation for working
21 off-the-clock, fluctuating workweek disputes, claims for unpaid meal periods, and claims for
22 unpaid waiting and travel time. I have also served as class counsel in approximately 100 wage
23 and hour class and collective actions in Texas, California, Colorado, New Mexico, New York,
24 Ohio, Pennsylvania, and other States.

25 4. During the past 15 years, I have recovered through settlement or verdict over
26 \$100,000,000 for my clients. Some of these cases include *Larkin, et al. v. EG Systems, Inc.*,
27 No. Civ. A. 1:13-CV-01363 in the Southern District of New York. *Larkin* was a national
28

1 FLSA collective action that settled for \$8.975 million on behalf of approximately 1,100 class
2 members. I also helped obtain a \$4,000,000 settlement in the District of Colorado in the case
3 of *Power v. Sandbox Logistics, LLC*, No. Civ. A. 1:16-CV-1978-JLK. The *Power* litigation
4 was a class and collective alleging that a group of workers were misclassified as exempt under
5 the motor carrier act exemption. Other examples include resolving collective actions under
6 the FLSA for \$5.1 million for misclassifying a group of workers as exempt from overtime,
7 \$4.875 million for misclassifying a group of workers as independent contractors, \$4.35 million
8 for requiring employees to perform work off the clock violations, for \$2.8 for misclassifying
9 workers as independent contractors, and \$2.3 million for misclassifying wage payments as
10 expenses and thereby, failing to pay overtime at the rate of time and one half.

11 5. Several courts have lauded the work that I have performed in wage and hour
12 matters, including the following courts:

- 13 • “Counsel for the plaintiffs has appeared multiple times in this Court with success on
14 most, if not all, occasions.” *Sandras v. Expeditors & Production Serv. Co.*, No. Civ. A.
15 16-0239, 2019 WL 658819, at *3 (W.D. La. Feb. 13, 2019).
- 16 • “Furthermore, both [the named plaintiff] and his counsel have vigorously prosecuted
17 this action on behalf of the California Class, and nothing in the record suggests that
18 they will not continue to do so.” *Swamy v. Title Source, Inc.*, No. Civ. A. 17-01175-
19 WHA, 2018 WL 1586139, at *2 (N.D. Cal. Apr. 2, 2018).
- 20 • “Class counsel’s skill, knowledge, reputation, and experience is well-recognized in
21 FLSA cases such as this.” *Sandras v. Expeditors & Production Serv. Co.*, No. Civ. A.
22 16-0239, 2019 WL 658819, at *2 (W.D. La. Feb. 13, 2019).
- 23 • In granting approval of a \$4,8750,000.00 settlement on behalf of approximately 260
24 drivers who alleged that they were misclassified as independent contractors, the Chief
25 Judge of the Southern District of Texas - Lee Rosenthal - complimented the work that
26 I performed in representing the plaintiffs and class members in *Sterling v. Metropolitan*
27
28

Transit Authority of Harris County, Texas, et al., 20-cv-00910, Southern District of Texas.

6. I have spoken before the Houston Bar Association on the Fair Labor Standards Act, authored articles for the Houston Bar Association on the Fair Labor Standards Act, written for the Houston Lawyer Magazine about the Fair Labor Standards Act, and I have served as a contributing author to the American Bar Association FLSA Midwinter Report each year since 2016. Below are some of the articles and speeches that I have authored.

- “*Hewitt v. Helix Energy Solutions Group*: An Essay on Textualism” – Houston Lawyer Magazine, January/February 2022 edition.
- “The *Swales* Decision and its Aftermath” – Houston Lawyer Magazine, May/June 2021 edition.
- “A Panel Discussion of FLSA Collective Actions Post-*Swales*” – Houston Bar Association, October 11, 2021.
- “Collective Actions Under the FLSA After *Swales*” – Houston Bar Association, October 11, 2021.
- “Current Trends and Hot Topics Under the Fair Labor Standards Act” - Houston Bar Association, December 3, 2015.

7. Since 2006, I have handled through conclusion at least 300 civil actions in state and federal courts, I have tried 9 cases to verdict, and I have tried several cases in arbitration. In addition, I was recognized from 2012-2020 as a “Rising Star” and as a “Super Lawyer” since 2021 by my peers in the annual survey of Texas attorneys published by Thompson Reuters.

8. Additionally, I was listed as one of the top 40 lawyers under 40 by the National Trial Lawyers' Association, one of the top 100 civil trial lawyers by the National Trial Lawyers' Association, and one of the top 100 employment lawyers in the country by the National Advocates.

9. In summary, I have substantial expertise in wage and hour matters, including class action and collective action litigation under the FLSA.

1 **B. BACKGROUND**

2 10. Following the outbreak of the COVID-19 pandemic, Amazon instituted a company-
3 wide policy requiring its hourly, non-exempt employees at its fulfillment centers and distributions
4 centers to undergo a COVID-19 screening prior to the start of their scheduled shifts. (Dkt. 1). The
5 screenings were required by Amazon, were conducted on the premises of Amazon, and were
6 controlled by Amazon. (*Id.*) Amazon did not automatically pay for the time spent by its employees
7 completing the COVID-19 screenings. (*Id.*)

8 11. Moreover, the process for conducting the screenings was similar across all Amazon
9 fulfillment centers and distributions centers. Under Amazon's company-wide policy, every hourly
10 employee was required to (1) report to a designated location at an Amazon facility, (2) wait in line
11 standing six feet apart from other employees, (3) answer questions about whether they had any
12 signs or symptoms of the Coronavirus, (4) have their temperature taken, (5) wear an Amazon
13 approved mask, and (6) pass the health examination to work that day. (*Id.*)

14 12. After passing the screening, employees at Amazon were allowed to clock-in for the
15 day. During discovery, Amazon produced data showing that some employees clocked-in on a
16 mobile app before they began the screening process, and were thus, on the clock during the
17 screening process. This occurred during approximately 20% of the shifts. During the remaining
18 shifts, the screenings were conducted off the clock, without pay.

19 13. Accordingly, on February 23, 2021, Plaintiffs Heather Boone and Roxanne Rivera
20 filed their lawsuit alleging that Amazon (1) failed to pay them for all hours worked, (2) failed to
21 pay them overtime wages, (3) provided to them invalid wage statements, and (4) a derivative
22 violation of California Business & Professions Code §§ 17200 *et seq.* (through violation of
23 California Labor Code § 2802 and/or California Labor Code § 226). (*See* Dkt. 1.). Boone and
24 Rivera filed their lawsuit as a collective action under the Fair Labor Standards Act, 29 U.S.C. §
25 201, *et seq.* and as a Rule 23 Class Action under the California Labor Code. *Id.* They sought
26 damages on their own behalf and on behalf of a putative class. *Id.* Boone and Rivera later added
27 to their lawsuit representative claims under PAGA.
28

1 14. Since the inception of this case, Amazon disputed all liability. In June 2021,
2 Amazon filed a Motion to Dismiss arguing that the time spent undergoing Covid screenings is not
3 compensable under the law. (Dkt. 24). On March 11, 2022, the Court granted in part and denied
4 in part Amazon's Motion to Dismiss. (Dkt. 39). In the decision, the Court held that the facts as
5 pled by the Plaintiffs establish that the time spent in the COVID-19 screenings are compensable
6 under both the California Labor Code and the Fair Labor Standards Act ("FLSA"). (*See id.*)
7 Afterwards, Amazon sought an interlocutory appeal under section 1292(b) (Dkt. 44), which the
8 parties have fully briefed and is pending. Boone and Rivera's Counsel also moved to be appointed
9 by the Court as interim class counsel. (Dkt. 62). Findings and Recommendations recommending
10 that the Court grant the motion for appointment as interim class counsel were issued on May 30,
11 2023. (Dkt. 74). On October 18, 2023, the Court adopted that recommendation in full and granted
12 the motion to appoint Boone and Rivera's counsel as interim class counsel. (Dkt. 80).

13 15. Along with this motion practice, the Parties engaged in informal merits-based and
14 class discovery. Amazon produced substantial visual evidence of the COVID-19 screenings
15 collected by security cameras at several facilities in California. Additionally, Amazon produced
16 the payroll data and time clock data for the California Class. Plaintiffs then retained three experts:
17 (1) Chad Staller (economist), (2) Nichols Briscoe (economist), and (3) Richard Drogin, Ph.D.
18 Plaintiffs produced to Amazon two expert reports and a damages analysis. The expert reports
19 provide an evaluation of the surveillance data and the amount of time spent undergoing the
20 COVID-19 screenings.

21 16. After engaging in this discovery and motion practice, the Parties decided to attend
22 mediation. On April 6, 2023, the Parties attended a full-day mediation with experienced mediator
23 Lisa Klerman. Ms. Klerman is a well-regarded mediator who has mediated hundreds of class
24 action cases involving claims under the California Labor Code. Based on the discovery and
25 investigation undertaken, Plaintiffs were able to engage in well-informed settlement negotiations
26 with Amazon. Negotiations between the Parties were rigorous and conducted at arms-length.
27 Indeed, the mediation on April 6, 2023 was unsuccessful. Nevertheless, the Parties continued to
28

1 negotiate with the assistance of Ms. Klerman. Ms. Klerman played an active role in the settlement
2 negotiations, including identifying each side's strengths, weaknesses, and risks. Ms. Klerman also
3 had the benefit of detailed briefs, dozens of exhibits (including statistical modeling), and hours of
4 in-person discussions with the Parties and their counsel. This process culminated in a tentative
5 settlement at the end of August 2023.

6 **C. SETTLEMENT TERMS**

7 17. The Settlement provides for significant monetary relief to the Class Members. The
8 Settlement is for \$5,500,000.00. After deductions discussed below, the remaining amount of the
9 Settlement is to be divided amongst the Class Members proportionally based on their dates of
10 employment and weeks worked. Amazon also agrees to pay the employer's share of the applicable
11 payroll taxes in addition to the gross settlement amount. There will be no claims process because
12 the Claims Administrator will process checks for everyone who does not properly request to be
13 excluded.

14 18. The fees and costs associated with retaining a third-party administrator to
15 administer the terms of the Settlement will be deducted from the Settlement. Plaintiffs have
16 obtained settlement administration quotes from several vendors and ultimately selected Rust
17 Consulting to administer the Settlement because it provided the lowest bid. Exhibit A is the bid
18 submitted by Rust. In administering the Settlement, the Parties have agreed to use their best efforts
19 to keep the costs as low as possible, including by sending the Notice via electronic mail where
20 possible.

21 19. The Settlement provides for an enhancement award of \$10,000 each to the three
22 named Plaintiffs, which if approved will be deducted from the Settlement. The award is to
23 compensate the named Plaintiffs for the time, expense, and risks they incurred in litigating this
24 action on behalf of the Class Members. Plaintiffs will file an application for the service award in
25 connection with moving for final approval of the Settlement.

26 20. Further, Plaintiffs' Counsel will move the Court for an award of reasonable
27 attorneys' fees of up to one-third of the Settlement as well as reimbursement of litigation costs.
28

Any amount of the requested fees and costs award not approved by the Court will be included in the distribution to the Class.

D. THE SETTLEMENT IS FAIR AND REASONABLE

21. The proposed Settlement is fair and reasonable and should be preliminarily approved. There are no unfair terms: (1) the release narrowly covers only those claims asserted in this lawsuit; (2) the Parties have not agreed to any limit on a potential fee award or litigation costs award; (3) the Class Members can easily opt out; (4) there is no claims process to receive a payment; (5) there is no reversion to Amazon; and (6) all Class Members who do not timely opt-out will receive a payment.

22. Additionally, the Parties heavily disputed the amount of time the Class Members spent waiting-in line and completing the screening. Amazon argued that after the installation of the thermal scanners, the Class Members rarely waited in line and the time spent being screened was merely a few seconds. Based upon a review the surveillance data produced by Amazon, Plaintiffs believe that the reasonable range of time spent waiting-in line and being screened was between 58 seconds and one minute and nine seconds. The median amount of time was identified by Plaintiffs' expert at 48 seconds and the average amount of time was identified at one minute and three seconds. The settlement provides a recovery of approximately one minute of screening time.

23. The Settlement is fair and reasonable because it provides for a recovery that is approximately 100% of the amount of unpaid wages owed to the Class Members at approximately one minute of additional time worked off-the-clock as a result of the COVID screenings

24. Finally, the proposed Settlement here is the product of extensive, arm's-length negotiations, which included an all-day mediation session. Indeed, the mediator played an active role for months in assisting the Parties to reach this Settlement. In light of these facts, the proposed Settlement is fair and reasonable and should be preliminarily approved.

I declare under penalty of perjury that the foregoing is true and correct.

1 Dated this 16th day of February 2024.

2 By: /s/ Don J. Foty
3 Don J. Foty
4 Hodges & Foty, LLP
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Settlement Administration Estimate
Amazon Settlement
November 22, 2023

Prepared by:
Eric Bishop
SVP
612-359-2988
ebishop@rustconsulting.com

EXPERIENCE

With experience on approximately 3,500 labor and employment cases, we are the nation's largest labor and employment settlement administrator. We have managed employment settlements with class sizes ranging from dozens to multi-million class members. In fact, we've been trusted to administer many of the nation's largest settlements, including the nation's top wage-and-hour cases in recent years.

DATA SECURITY

Our internal data and system security practices meet or exceed today's exacting industry standards. We have received system accreditation under the Federal Information Security Management Act (FISMA), comply with and adhere to Safe Harbor Principles, and undergo an annual SSAE 16 SOC 1 Type II Report audit of our data security and information technology controls designed to demonstrate our substantial level of data and system security.

DEDICATED SPECIALISTS

Our labor and employment case team is strictly dedicated to managing settlement administration for cases involving matters such as wage-and-hour, FLSA, discrimination and ERISA. They're specialists, not generalists, with an industry reputation for responsiveness and expertise in relevant areas such as the applicable banking and tax regulations. We are confident that Rust is the best choice for the administration of your settlement.

Project Summary

Estimated Class Size	260,000
<u>Project Cost</u>	
Mailed Notice	\$ 66,297
Telephone Support	\$ 33,033
Website	\$ 4,300
Processing and Administration	\$ 1,300
Fund Distribution & Tax Reporting	\$ 277,942
Project Management	\$ 15,950
Other Out-of-pocket Expenses	\$ 1,000
Total Project Cost	\$ 399,822
	Discount
	\$ (7,481)
Total Project Cost w/ Discount	\$ 392,341

Key Assumptions

Email Notice to All
Mailed Notice to Missing/Bounced Emails - 4 Pgs
Dynamic Website for Opt-Outs & Objections
No Claims Process
Telephone Support Included
1 State Tax ID - California Only
180 Day Void Period on Payments
NO Reminder Mailings
NO Redistribution
Uncashed Payments Sent to Cy Pres

Thank you for considering Rust Consulting, Inc. as your administrator -- we appreciate the opportunity to submit this estimate.

EXHIBIT "A"



**Settlement Administration Estimate
Amazon Settlement
November 22, 2023**

**Prepared by:
Eric Bishop
SVP
612-359-2988
ebishop@rustconsulting.com**

Key Assumptions Used to Prepare this Estimate

Class Size	260,000	
Initial Notice:		
Emailed Notice	234,000	90.0%
Mailed Notice - Missing Emails	26,000	10.0%
Mailed Notice - Email Bounces	35,100	15.0%
Forwarded Notices	1,528	2.5%
Undeliverable Notices	7,332	12.0%
Re-Mailed Notices after Trace	5,866	80.0%
Telephone Support:		
Number of Telephone Contacts	18,200	7.0%
Number of Telephone Contacts - CSR	9,100	50.0%
Connect Minutes per Call - IVR	1.0	
Connect Minutes per Call - CSRs	4.0	
Claimant Communications:		
Exclusions Received	650	0.25%
Payments	259,350	100.0%

Standard Hourly Rates*

SVP	\$175-\$275
Program Manager	\$160-\$180
Project Manager	\$100-\$140
Technical Consultant	\$110-\$180
Call Center Manager	\$125
CSR	\$ 43-\$ 50
Processor	\$ 43-\$ 50
Other	\$ 43-\$125

**Subject to change*

Additional Administration Assumptions Used to Prepare this Estimate:

Database Development: Receive and Process Database assumes that the data provided is complete with respect to the data components needed to mail and calculate settlement payments. Data that includes multiple records for individuals or work history that needs to be accumulated and totaled by individual generally requires additional efforts to bring to a point where it is final settlement data. These additional efforts can take a significant amount of time and should be considered when setting key settlement dates, especially the mailed notice deadline. Data must be provided in a complete, consistent, standardized electronic format. Rust's standard format is ASCII fixed width complete with field layout. Other formats may be accepted at Rust's discretion. Resources used to enhance or further develop non-standardized data will be billed on a time and materials basis according to Rust's Current Standard Hourly Rates.

CASS/NCOA/LACS: CASS - Coding Accuracy Support System; NCOA - National Change of Address; LACS - Locatable Address Conversion System.

Notice Package: Print and Mail per unit price is estimated. Actual prices will be provided after form is finalized prior to mailing.

Telephone Support included.

Processing & Administration: Receipt and Process Forms includes open, date stamp, label and data capture a 1-page form with up to five fields.

Project Management: Project Management fees are estimated and will be billed on actual time expended based on the rates found in the Current Standard Hourly Rates section above. The rates included in the estimate are a blended estimate of the rates listed above.

Out of Pocket Expenses: Includes post office box rental, overnight shipments, postage, labels, travel, long distance and other miscellaneous charges and expenses.

Pricing good for 90 days.



Settlement Administration Estimate

Amazon Settlement

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Administrative Task	Estimated Quantity		Per Unit	Task Amount	Total
Database Development					
Receive and Process Database	10 Hours @		\$ 180	\$ 1,800	\$ 1,800
Additional Efforts to Finalize Settlement Data				<i>As Incurred</i>	
Initial Notice					
CASS / NCOA / LACS Processing				\$ 750	
Setup and Deploy Emails	234,000 Emails @		\$ 0.03	\$ 7,020	
Print and Mail Notice Package - Missing and Bounced Emails	61,100 Notices @		\$ 0.21	\$ 12,831	
Postage - 1 Ounce First Class	61,100 Notices @		\$ 0.54	\$ 32,994	\$ 53,595
Follow-up to Initial Notice					
Receive Undeliverable Notices and Update Database	7,332 Notices @		\$ 0.25	\$ 1,833	
Address Trace	7,332 Traces @		\$ 0.40	\$ 2,933	
Remail Notice Package	7,393 Notices @		\$ 0.20	\$ 1,479	
Remail Postage - 1 Ounce First Class	7,393 Notices @		\$ 0.63	\$ 4,658	\$ 10,902
Telephone Support					
Setup IVR System	3 Hours @		\$ 175	\$ 525	
Live Telephone Support	9,100 Calls @		\$ 2.25	\$ 20,475	
IVR System Charges	18,200 Minutes @		\$ 0.25	\$ 4,550	
800# Charges	72,800 Minutes @		\$ 0.11	\$ 8,008	\$ 33,033
- a minimum charge of \$400 per month will be charge for live telephone support					
Website					
Develop Dynamic Website w/ Ability to File Opt Outs	20 Hours @		\$ 185	\$ 3,700	
Monthly Hosting & Maintenance	8 Months @		\$ 75	\$ 600	\$ 4,300
Processing and Administration					
Receipt, Process, and Validate Forms	650 Forms @		\$ 2.00	\$ 1,300	\$ 1,300
Additional Administrative Services Requested by Client					<i>As Incurred</i>
Fund Distribution					
Print and Mail Payments	259,350 Payments @		\$ 0.13	\$ 33,716	
Postage - 1 Ounce First Class	259,350 Payments @		\$ 0.63	\$ 163,391	
Check Processing	259,350 Payments @		\$ 0.20	\$ 51,870	
Reissues	25,935 Payments @		\$ 0.20	\$ 5,187	
Postage - 1 Ounce First Class	25,935 Payments @		\$ 0.63	\$ 16,339	
FDIC Charges				\$ 3,290	
Monthly Bank Account Fee	6 Months @		\$ 200	\$ 1,200	\$ 274,992
Tax Reporting					
Annual Fee -Qualified Settlement Fund	1 Year @		\$ 2,000	\$ 2,000	
Setup and Maintain State Tax IDs	1 State @		\$ 200	\$ 200	
Individual Income Tax Reporting (W2 & 1099)	1 Year @		\$ 750	\$ 750	\$ 2,950
Project Management					
Senior Vice President	2 Hours @		\$ 225	Waived	
Project Management	70 Hours @		\$ 175	\$ 12,250	
Technical Consulting	20 Hours @		\$ 185	\$ 3,700	\$ 15,950
Other Charges and Out-of-pocket Costs					
					\$ 1,000
Total Settlement Administration Estimate					\$ 399,822



Settlement Administration Estimate

Amazon Settlement

November 22, 2023

Prepared by:
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Terms and Conditions

All claims administration services to be provided by Rust Consulting to Customer shall be subject to the following terms and conditions:

1. **Services.** Subject to the terms hereof, Rust Consulting agrees to provide the Customer with claims administration services (hereinafter, "Claims Services") as specified in the Proposal provided to Customer to which these Terms and Conditions are attached.
2. **Term.** The terms of this agreement will remain in effect until completion of the Claims Services, unless earlier terminated in accordance with Section 10 hereof.
3. **Charges for Services.** Charges to the Customer for Claims Services shall be on a time and materials basis at our prevailing rates, as the same may change from time to time. Any fee estimates set forth in the proposal are estimates only, based on information provided by Customer to Rust Consulting. Actual fees charged by Rust Consulting to Customer may be greater or less than such estimate, and Customer shall be responsible for the payment of all such charges and expenses in accordance with Section 4 hereof. Furthermore, Customer will be responsible for payment of all state and local sales and use taxes, if any, levied upon the charges payable by the Customer hereunder. Rust Consulting may derive financial benefits from financial institutions in connection with the deposit and investment of settlement funds with such institutions, including without limitation, discounts on eligible banking services and fees, and loans at favorable rates.
4. **Payment of Charges.** Payment by Customer of Rust Consulting's monthly invoices shall be due upon receipt thereof. Amounts unpaid after thirty (30) days are subject to a service charge at the rate of 1.5% per month or, if less, the highest rate permitted by law. Decisions of the court and actions of the parties, including disapproval or withdrawal of a settlement, do not affect the Customer's liability to Rust Consulting for payment of Claims Services. Claims Services are not provided on a contingency fee basis.
5. **Confidentiality.** Rust Consulting agrees to implement and maintain reasonable and appropriate security measures and safeguards to protect the security and confidentiality of Customer data provided to Rust Consulting by Customer in connection herewith. Should Rust Consulting ever be notified of any judicial order or other proceedings in which a third party seeks to obtain access to the confidential data created by or for the Customer, Rust Consulting will promptly notify the Customer, unless prohibited by applicable law. The Customer shall have the option to (1) provide legal representation at the Customer's expense to avoid such access or (2) promptly reimburse Rust Consulting for any of its costs, including attorneys' fees, reasonably incurred in avoiding, attempting to avoid or providing such access and not paid by the entity seeking the data. If Rust Consulting is required, pursuant to a court order, to produce documents, disclose data, or otherwise act in contravention of the obligations imposed by this Agreement, or otherwise, with respect to maintaining the confidentiality, proprietary nature and secrecy of the produced documents or disclosed data, Rust Consulting will not be liable for breach of said obligation.
6. **Standard Banking Procedures.** In accordance with Rust Consulting's standard banking procedures, Rust Consulting will establish a demand deposit checking account (i.e. non-interest bearing) for funds received related to a distribution, unless directed otherwise in writing by the parties or unless the settlement agreement stipulates otherwise. When directed to invest funds in an interest bearing or investment accounts, Rust Consulting intends to invest all funds in U.S. government backed securities, unless directed by the parties in writing or the settlement agreement or distribution plan to invest in other types of securities; however, even in cases where funds are temporarily placed in interest bearing or investment accounts, funds will eventually be migrated to a demand deposit checking account prior to a fund distribution.
7. **Rights in Data.** Rust Consulting does not convey nor does the Customer obtain any right in the programs, system data, or materials utilized or provided by Rust Consulting in the ordinary course of business in the performance of this Agreement.
8. **Document Retention.** Unless directed otherwise in writing by Customer, Rust Consulting will destroy undeliverable notice mail on the effective date of the settlement or the date that the disposition of the case is no longer subject to appeal or review, whichever is later. Rust will maintain claim forms and other correspondence for one year after final distribution of funds or benefits, or until the date that the disposition of the case is no longer subject to appeal or review, whichever is later. Rust Consulting will retain all bank and tax documents for such period of time as it determines is required to maintain compliance with various federal and state requirements.
9. **Limitation of Liability; Disclaimer of Warranty.** Rust Consulting warrants that our services will be performed with reasonable care in a diligent and competent manner. Our sole obligation will be to correct any non-conformance with this warranty. Rust Consulting shall not be liable, whether under theories of contract, negligence or other tort, statutory duty or other theories of liability in an amount exceeding the total charges to the Customer for the specific work affected by the error or omission. Rust Consulting will not be liable for any incidental, special, indirect, consequential or exemplary damages of any kind; or for any lost profits, lost opportunities, business interruption or for any liability incurred by the Customer or others to any third party. **THE WARRANTIES SET FORTH HEREIN ARE EXCLUSIVE AND ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED, IMPLIED, OR STATUTORY, INCLUDING BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR USE FOR PARTICULAR PURPOSE.**
10. **Termination.** The Claims Services to be provided under this Agreement may be terminated, at will by the Customer upon at least 30 calendar days' prior written notice to Rust Consulting. The Customer's obligation to pay for services or projects in progress at the time of notice of withdrawal shall continue throughout that 30 day period. Rust Consulting may terminate this Agreement (i) with 10 calendar days' prior written notice, if the Customer is not current in payment of charges or (ii) in any event, upon at least 3 months' prior written notice to the Customer.
11. **Notice.** Any notice required or permitted hereunder shall be in writing and shall be delivered personally, by, or sent by registered mail, postage prepaid, or overnight courier service to the responsible officer or principal of Rust Consulting or the Customer, as applicable, and shall be deemed given when so delivered personally, or, if mailed, five days after the date of deposit in United States mail, or, if sent by courier, one business day after delivery to such courier service.
12. **Force Majeure.** To the extent performance by Rust Consulting of any of its obligations hereunder is substantially prevented by reason of any act of God or by reason of any other matter beyond Rust Consulting's reasonable control, then such performance shall be excused and this Agreement, at Rust Consulting's option, be deemed suspended during the continuation of such condition and for a reasonable time thereafter.
13. **Nonwaiver of Rights.** No failure or delay on the part of a party in exercising any right hereunder will operate as a waiver of, or impair, any such right. No single or partial exercise of any such right will preclude any other or further exercise thereof or the exercise of any other right. No waiver of any such right will be effective unless given in a signed writing.
14. **Jurisdiction.** The parties hereto irrevocably and unconditionally submit to the jurisdiction of the Court of the applicable case for purposes of any suit, action or proceeding to enforce any provision of, or based on any right arising out of, this Agreement. The parties hereto hereby irrevocably and unconditionally waive any objection to the laying of venue of any such suit, action or proceeding in the Court.
15. **Survival.** All accrued payment obligations hereunder, any remedies for breach of this Agreement, this Section and the following Sections will survive any expiration or termination of this Agreement: Section 7 (Rights in Data); Section 5 (Confidentiality); Section 9 (Limitation of Liability; Disclaimer of Warranty); and Section 14 (Jurisdiction).
16. **Entire Agreement.** These Terms and Conditions and the proposal embody the entire agreement between the parties with respect to the subject matter hereof, and cancels and supersedes all prior negotiations, representations, and agreements related thereto, either written or oral, except to the extent they are expressly incorporated herein. No changes in, additions to, or waivers of, the terms and conditions set forth herein will be binding upon any party, unless approved in writing by such party's authorized representative.