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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.

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

**DECLARATION OF DON FOTY IN
SUPPORT OF PLAINTIFFS' MOTION FOR
FINAL 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 Plaintiffs Boone and Rivera in the above-captioned lawsuit. I make this Declaration based upon
4 my personal 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*
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1 *Transit Authority of Harris County, Texas, et al.*, 20-cv-00910, Southern District of
2 Texas.

3 6. I have spoken before the Houston Bar Association on the Fair Labor Standards Act,
4 authored articles for the Houston Bar Association on the Fair Labor Standards Act, and I have
5 written for the Houston Lawyer Magazine about the Fair Labor Standards Act. I currently serve
6 as the Texas editor for the American Bar Association FLSA Treatise. Below are some of the
7 articles and speeches that I have authored.

- 8 • “The *Loper-Bright* decision and its impact on the FLSA” – Houston Bar Association,
9 August 13, 2024.
- 10 • “An Analysis of *Helix Energy Solutions Group, Inc. v. Hewitt* and the Salary Basis Test –
11 A Test that Provides Benefits to Employers and Employees” – Houston Lawyer Magazine,
12 May/June 2023 edition.
- 13 • “*Hewitt v. Helix Energy Solutions Group*: An Essay on Textualism” – Houston Lawyer
14 Magazine, January/February 2022 edition.
- 15 • “The *Swales* Decision and its Aftermath” – Houston Lawyer Magazine, May/June 2021
16 edition.
- 17 • “A Panel Discussion of FLSA Collective Actions Post-*Swales*” – Houston Bar Association,
18 October 11, 2021.
- 19 • “Collective Actions Under the FLSA After *Swales*” – Houston Bar Association, October
20 11, 2021.
- 21 • “Current Trends and Hot Topics Under the Fair Labor Standards Act” - Houston Bar
22 Association, December 3, 2015.

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

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

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

6 **B. BACKGROUND**

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

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

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

24 13. Accordingly, on February 23, 2021, Plaintiffs Heather Boone and Roxanne Rivera
25 filed their lawsuit alleging that Amazon (1) failed to pay them for all hours worked, (2) failed to
26 pay them overtime wages, (3) provided to them invalid wage statements, and (4) a derivative
27 violation of California Business & Professions Code §§ 17200 *et seq.* (through violation of
28

1 California Labor Code § 2802 and/or California Labor Code § 226). (*See* Dkt. 1.). Boone and
2 Rivera filed their lawsuit as a collective action under the Fair Labor Standards Act, 29 U.S.C. §
3 201, et seq. and as a Rule 23 Class Action under the California Labor Code. *Id.* They sought
4 damages on their own behalf and on behalf of a putative class. *Id.* Boone and Rivera later added
5 to their lawsuit representative claims under PAGA.

6 14. Since the inception of this case, Amazon disputed all liability. In June 2021,
7 Amazon filed a Motion to Dismiss arguing that the time spent undergoing Covid screenings is not
8 compensable under the law. (Dkt. 24). On March 11, 2022, the Court granted in part and denied
9 in part Amazon’s Motion to Dismiss. (Dkt. 39). In the decision, the Court held that the facts as
10 pled by the Plaintiffs establish that the time spent in the COVID-19 screenings are compensable
11 under both the California Labor Code and the Fair Labor Standards Act (“FLSA”). (*See id.*)
12 Afterwards, Amazon sought an interlocutory appeal under section 1292(b) (Dkt. 44), which the
13 parties have fully briefed and is pending. Boone and Rivera’s Counsel also moved to be appointed
14 by the Court as interim class counsel. (Dkt. 62). Findings and Recommendations recommending
15 that the Court grant the motion for appointment as interim class counsel were issued on May 30,
16 2023. (Dkt. 74). On October 18, 2023, the Court adopted that recommendation in full and granted
17 the motion to appoint Boone and Rivera’s counsel as interim class counsel. (Dkt. 80).

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

26 16. After engaging in this discovery and motion practice, the Parties decided to attend
27 mediation. On April 6, 2023, the Parties attended a full-day mediation with experienced mediator
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1 Lisa Klerman. Ms. Klerman is a well-regarded mediator who has mediated hundreds of class
2 action cases involving claims under the California Labor Code. Based on the discovery and
3 investigation undertaken, Plaintiffs were able to engage in well-informed settlement negotiations
4 with Amazon. Negotiations between the Parties were rigorous and conducted at arms-length.
5 Indeed, the mediation on April 6, 2023 was unsuccessful. Nevertheless, the Parties continued to
6 negotiate with the assistance of Ms. Klerman. Ms. Klerman played an active role in the settlement
7 negotiations, including identifying each side's strengths, weaknesses, and risks. Ms. Klerman also
8 had the benefit of detailed briefs, dozens of exhibits (including statistical modeling), and hours of
9 in-person discussions with the Parties and their counsel. This process culminated in a tentative
10 settlement at the end of August 2023.

11 **C. SETTLEMENT TERMS**

12 17. The Settlement provides for significant monetary relief to the Class Members. The
13 Settlement is for \$5,500,000.00. After deductions, the remaining amount of the Settlement is to
14 be divided amongst the Class Members proportionally based on their dates of employment and
15 weeks worked. Amazon also agrees to pay the employer's share of the applicable payroll taxes in
16 addition to the gross settlement amount. There will be no claims process because the Settlement
17 Administrator will process checks for everyone who has not opted out of the Settlement.

18 18. The Settlement provides for an enhancement award of \$10,000 to each of the three
19 named Plaintiffs. The award is to compensate the Plaintiffs for the time, expense, and risks they
20 incurred in litigating this action on behalf of the Class Members.

21 19. Further, Plaintiffs' Counsel seeks an award of reasonable attorneys' fees of up to
22 one-third of the Settlement as well as reimbursement of litigation costs. Plaintiffs' Counsel
23 previously moved for approval of the attorneys' fees, litigation costs and the enhancement awards
24 on May 3, 2024. (Dkt. 104).

25 20. Further, the Class Notice was distributed to the Class Members following the
26 Court's granting of preliminary approval. No Class Member has objected to the settlement,
27 including to the attorneys' fees, litigation costs, and the enhancement awards.

1 **D. THE SETTLEMENT IS FAIR AND REASONABLE**

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

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

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

20 24. Finally, the proposed Settlement here is the product of extensive, arm's-length
21 negotiations, which included an all-day mediation session. Indeed, the mediator played an active
22 role for months in assisting the Parties to reach this Settlement. In light of these facts, I believe
23 that the proposed Settlement is fair and reasonable and I respectfully ask that the Court approve
24 the Settlement.

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

26
27 Dated this 1st day of October 2024.
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