THE HONORABLE ADRIENNE MCCOY
Noted for Hearing: August 26, 2022 at 8:30 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

JAY MORGAN and DANIEL MYDLAND, on their own behalf and on behalf of others similarly situated, Plaintiffs, v. SILVERSTREAK, INC., a Washington Corporation; and TINA MARIE BENSON and JOHN/JANE DOE BENSON and the marital community thereof, Defendants.	No. 19-2-08785-4 KNT **PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

I. INTRODUCTION

On April 29, 2022, this Court granted preliminary approval of a class action settlement ("Settlement Agreement") entered into by Plaintiffs Jay Morgan and Daniel Mydland ("Plaintiffs") on behalf of themselves and a class of drivers employed by Silverstreak, Inc. ("Silverstreak") from March 29, 2016 through March 30, 2022 (the "Class Period"). Dkt. No. 174 ("Preliminary Approval Order"). Plaintiffs allege that they and the Settlement Class members are entitled to compensation under Washington law for all hours worked, including wages at the prevailing wage rate for all work performed on public works contracts, overtime at the prevailing wage rate for all work performed over 8 hours on public works contracts, for

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

mandated meal and rest breaks, for unlawful deductions, and willful failure to pay such wages. Defendants have denied Plaintiffs' claims in their entirety. After a hearing and reviewing the Settlement Agreement, this Court found it and its terms to be "fair, reasonable and adequate." *Id.*

The Settlement – which requires Defendants to pay a total of $1,500,000 for the benefit of the Class – is fair, adequate, and reasonable, and in the best interest of the Settlement Class. The Settlement is an excellent result, with Settlement Class members receiving on average $4,385.19 in damages. Settlement Administrator Simpluris successfully implemented the notice program approved by this Court, providing notice to 98% of members of the Settlement Class by U.S. mail. No Settlement Class Members objected to or opted out of the Settlement.

For the reasons set forth below and previously submitted in support of preliminary settlement approval, the Settlement is fair, adequate, reasonable, and in the best interests of the Settlement Class. Thus, Plaintiffs respectfully request the Court grant final approval of the Settlement by: (1) finding the Settlement to be fair, adequate, and reasonable; (2) determining that adequate notice was provided to Settlement Class members; and (3) approving the requested Class Representative service awards, settlement administration expenses, and attorneys' fees and costs.

II. STATEMENT OF FACTS

A. Factual and Procedural Background.

Defendants have operated Silverstreak during the Class Period, from March 29, 2016 through March 30, 2022. Declaration of Hardeep S. Rekhi in support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Rekhi Decl.") ¶ 3. During the Class Period, Defendants paid their drivers on an hourly basis. *Id.* Plaintiffs allege that Defendants engaged in a systemic course of wage and hour abuses against their employees including: (1) failing to pay

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

minimum wages to drivers for all hours worked; (2) failing to pay drivers at the prevailing wage rate for all work performed on public works contracts; (3) failing to pay overtime compensation at the prevailing wage rate when drivers work more than 8 hours a day on public works projects; (4) encouraging drivers to take rest and meal breaks during times when they are not relieved of all their work responsibilities; and (5) making deductions from drivers' pay that do not benefit drivers and, instead, financially benefit Defendants. *Id.* Plaintiffs also allege Defendants' violations of Washington law were willful. *Id.* Defendants deny Plaintiffs' claims. *Id.*

Plaintiff Jay Morgan filed his complaint against Silverstreak on May 29, 2019, amending his complaint on October 15, 2019 to add Daniel Mydland as a co-plaintiff. Dkt. No. 19. The Parties have engaged in substantial discovery. Plaintiffs' counsel completed extensive investigation, including reviewing and analyzing the damages data with the assistance of a damages expert, contacting and interviewing the proposed class members, and reviewing other relevant documents. Rekhi Decl. ¶ 4. The Court certified the Class on January 14, 2021. Dkt. No. 114. The Court also partially granted and partially denied Plaintiffs' Motion for Partial Summary Judgment on August 20, 2021. Dkt. No. 148. Defendants sought interlocutory review of the Court's ruling on Plaintiffs' summary judgment motion. Dkt. Nos. 149, 150. On February 4, 2022, the Court of Appeals denied Defendants' Motion for Discretionary Review, finding that Defendants failed to meet the stringent criteria under RAP 2.3(b). *See* Washington State Court of Appeals, Div. I, Case No. 831437.

The Parties engaged in mediation on July 14, 2021 with an experienced mediator but were unable to reach a resolution on the day of mediation. Rekhi Decl. ¶ 6. The Parties continued negotiations with the assistance of the mediator in the months following the failed mediation. *Id.*

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529 Warren Ave N., Suite 201
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During this period, the Parties also engaged in additional discovery, including depositions of both Parties' damages experts. *Id.*

After months of negotiations, the Parties were able to reach an agreement as to the essential terms of the settlement. *Id.* The Parties then drafted, finalized, and executed the long-form settlement agreement ("Agreement") in March 2022, attached to the Rekhi Declaration as Exhibit 1.

All of the Parties' settlement negotiations have been non-collusive and at arm's length. Rekhi Decl. ¶ 6; *see also* Agreement § III. Plaintiffs and their counsel believe the Agreement is fair, adequate, reasonable, and in the best interests of the Class. Rekhi Decl. ¶ 6; *see also* Agreement § III.

On April 29, 2022, the Court granted Plaintiffs' motion preliminary approval of the Settlement. *See* Preliminary Approval Order, Dkt. No. 174. The Settlement requires Defendants to pay a total of $1,500,000 for the benefit of the Settlement Class. *Id*. § IV.1.p. Subject to Court approval, these settlement proceeds will be used to pay settlement administration expenses, service awards to Plaintiffs, attorneys' fees and costs, and awards to eligible members of the Settlement Class (the "Class Fund"). *Id*. §§ IV.1.k-o. After deducting the settlement administration expenses, service awards, and attorneys' fees and costs, the Settlement Class will be entitled to recover at least $969,126.47, with the average Settlement Class recovering on average $4,385.19 in damages. *Id*. § IV.1.k.

B. Notice Process.

The notice campaign was successful. During the course of litigation, the Parties have identified 221 individuals as members of the Settlement Class. Rekhi Decl. ¶ 22. Simpluris mailed notices to these 221 Settlement Class Members. Declaration of Evelin Reyes ("Reyes

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

Decl.") ¶ 8. Only four Class Notices were undeliverable. *Id.* ¶ 9. Notices were therefore sent to over 98% of the Settlement Class with no members objecting to or opting out of the Settlement. *Id.* ¶¶ 13-15.

Given the excellent recovery of the Settlement Class, reflecting more than 67% of the potential unpaid wages on almost all claims as calculated by Class Counsel, Plaintiffs and Class Counsel maintain the Settlement is fair, adequate, reasonable, and in the best interest of the Settlement Class. *See* Rekhi Decl. ¶ 6.

III. STATEMENT OF ISSUES

Whether the Court should: (1) grant final approval of the Settlement Agreement; (2) find the notice program was constitutionally sound; (3) approve service awards of $5,000 each to Plaintiffs as Class Representatives; (4) approve an award of up to $5,500 to Simpluris for its settlement administration expenses; and (5) approve an award of $450,000 to Class Counsel in fees and $65,373.53 in costs.

IV. EVIDENCE RELIED UPON

Plaintiffs rely on the Declarations of Hardeep S. Rekhi and Evelin Reyes in support of this motion and the attached exhibit(s), including the Settlement Agreement.

V. AUTHORITY AND ARGUMENT

The approval process for a class action settlement takes place in three stages: (1) preliminary approval of the settlement; (2) dissemination of notice to class members; and (3) a "fairness hearing" or final approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented. *Manual for Complex Litigation* (Fourth) ("*MCL 4th*") §§ 21.632-.634 (2016). This procedure, which is used by Washington state courts

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

and endorsed by class action commentator Professor Newberg, safeguards class members' due process rights and enables the Court to fulfill its role as the guardian of class interests. *See* 4 William B. Rubenstein, *Newberg on Class Actions* §§ 13:10, 13:39 (5th ed. 2019).

Here, the first two steps in this procedure have already occurred. The Court granted preliminary approval of the Settlement on April 29, 2022. *See* Preliminary Approval Order, Dkt. No. 174. On May 25, 2022, Simpluris sent out notice by direct mail to the members of the Settlement Class. Reyes Decl. ¶¶ 5-9. As mentioned above, the notice program was successful, resulting in less than 2% of the Settlement Class as being unreachable. *Id.* By this motion, Plaintiffs ask the Court to take the final step in this process.

When considering final approval of a class action settlement, a court determines whether the settlement is "fair, adequate, and reasonable." *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001) (quoting *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). This is a "largely unintrusive inquiry." *Id.* at 189. Although the Court possesses some discretion whether to approve a settlement,

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Id. (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)). Indeed, "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution." *Id.* at 190 (quoting *Officers for Justice*, 688 F.2d at 625).

A. The Settlement is fair, adequate, and reasonable.

To decide whether a class action settlement is fair, adequate, and reasonable such that final approval is appropriate, courts consider several factors, including the strength of the

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
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Facsimile: (206) 577-3924

plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the state of the proceedings; the experience and views of counsel; the presence of a governmental participant; the reaction of the class members to the proposed settlement; and the absence of collusion. *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *see also Pickett*, 145 Wn.2d at 188-89. This list is "not exhaustive, nor will each factor be relevant in every case." *Pickett*, 145 Wn.2d at 189 (*quoting Officers for Justice*, 688 F.2d at 625). An analysis of these factors supports final approval of the Settlement Agreement.

1. The strength of Plaintiffs' case.

Plaintiffs and Class Counsel continue to believe they have a strong case but are also pragmatic in their awareness of the risks inherent in litigation and the various defenses available to Defendants. The reality that members of the Settlement Class could end up recovering only a fraction of their claimed damages or losing some claims at trial was significant enough to convince Plaintiffs and Class Counsel that the Settlement reached with Defendants outweighs the gamble and expense of further litigation. Rekhi Decl. ¶ 18.

First, although the Court has certified the Class, Defendants could have moved for decertification. Plaintiffs recognize the risk that the Court could have decertified the Class, leaving only Plaintiffs' individual claims. *Id*. At that point, individual members of the Settlement Class would have to file their own lawsuits or have payouts on any class-wide recovery substantially delayed by appeals. *Id*.

Second, Defendants have denied liability and maintained Settlement Class Members did receive their wages and mandated breaks as required. *Id*. Indeed, prior to mediation, Defendants were able to establish sufficient disputed questions of fact regarding rest and meal breaks and

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529 Warren Ave N., Suite 201
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unlawful deductions and maintain these claims for trial. *See* Order Granting, in Part, Denying, in Part, Plaintiffs' Motion for Partial Summary Judgment. Dkt. No. 148. Factoring in the likely damages to be awarded for Plaintiffs' stronger prevailing wage claims, liability of which have already been established by a successful motion for partial summary judgment, recovering approximately $4,385 in damages on average per Settlement Class Member. *See* Rekhi Decl. ¶ 23.

2. <u>The risk, expense, complexity, and likely duration of further litigation.</u>

Additional litigation would be lengthy and expensive if this action were to proceed. Plaintiffs had many hurdles to clear before a potential successful resolution. As mentioned above, Defendants could have moved to decertify the Class. *Id.* ¶ 20. In addition, trial is always risky and even if Plaintiffs prevailed, they would likely face an appeal. *Id.* ¶ 18. This Settlement avoids these risks and provides immediate and certain benefits. *Id.* ¶ 20.

3. <u>The amount offered in settlement.</u>

The Settlement requires Defendants to pay $1,500,000. This amount will be used to pay Settlement Class Members after deducting the Class Representative service awards, settlement administration expenses, and attorneys' fees and costs as approved by the Court. If the Court approves, Plaintiffs will each receive a service award of $5,000, Simpluris will be paid fees and costs of up to $5,500, and Class Counsel will be awarded $450,000 for attorneys' fees and $65,373.53 in costs. Agreement §§ IV.1.n-o; Rekhi Decl. ¶ 21, 23, 24; Reyes Decl. ¶ 11.

If approved, the remaining amount of $969,126.47 shall be distributed to Settlement Class Members. Agreement § IV.1.k. The amount of each Member's award is based on the Member's aggregate proportional share of the Class fund as split among their claims, as calculated by Class

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529 Warren Ave N., Suite 201
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Counsel using data and information provided by Defendants. *Id*. §§ IV.4.a-b. Each Settlement Class Members will recover over $4,385 in damages on average. Rekhi Decl. ¶ 23.

Even when all claims are added, an average recovery of over $4,385.00 is an excellent recovery. This results in an overall recovery of more than 67% of the unpaid wages allegedly owed to the Class. This percentage is substantially above the percentage recoveries obtained in settlements approved by other courts. *See, e.g., Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (approving settlement amounting to 30 percent of damages estimated by expert and noting even if plaintiffs were entitled to treble damages, settlement would be approximately 10 percent of estimated damages); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement estimated to be worth between 1/6 and ½ of plaintiffs' estimated loss).

4. <u>The extent of discovery completed and the state of the proceedings.</u>

"A key inquiry is whether the parties had enough information to make an informed decision about the strength of their cases and the wisdom of settlement." *Rinky Dink, Inc. v. World Business Lenders,* Case No. C14-0268-JCC, 2016 WL 3087073, at *3 (W.D. Wash. May 31, 2016). Here, the parties were well informed about the strengths and weaknesses of their cases. *See* Rekhi Decl. ¶ 4. The Parties engaged in arm's-length negotiations from July 2021 to March 2022 before reaching an agreement. *Id*. ¶ 6. During this period, the Parties exchanged voluminous written discovery, conducted several depositions including those of both Parties' damages experts, engaged in motions practice including the motion to certify the Class and a summary judgment on several claims, and engaged in extensive discussions about the strengths and weaknesses of their respective cases. *Id*. ¶ 4. Additionally, Plaintiffs' counsel spent numerous hours interviewing Plaintiffs and Class Members and analyzing the payroll data and employee

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
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pay sheets, and other information provided by Defendants to determine and assess the risks associated with a trial on the merits of the claims. *Id*. Based on the damages analysis performed by both Plaintiff's damages expert and information obtained in discovery and directly from Class members, Plaintiffs' counsel was well prepared for settlement discussions and to enter into the Settlement Agreement in March 2022. *See* Rekhi Decl. ¶¶ 4, 23. Plaintiffs and Class Counsel only agreed to settle because it best serves the Class. *Id*. ¶¶ 6,21.

5. <u>The experience and views of counsel.</u>

Where class counsel is qualified and well informed, their opinion that a settlement is fair, reasonable, and adequate is entitled to significant weight. *See Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 543 (W.D. Wash. 2009). Class Counsel are particularly experienced in litigating employment class actions and have a keen understanding of the legal and factual issues involved in this case on behalf of truck drivers. *See* Rekhi Decl. ¶¶ 7-17. Class Counsel believe the Settlement is fair, reasonable, adequate, and in the best interest of the Settlement Class. *Id*. ¶ 6.

6. <u>The reaction of members of the Settlement Class.</u>

A positive response to a settlement by the class—as evidenced by a small percentage of opt-outs and objections—will further support final approval. *See Pelletz*, 255 F.R.D. at 543; *Tadepalli v. Uber Techs., Inc.*, No. 15-CV-04348-MEJ, 2016 WL 1622881, at *8 (N.D. Cal. Apr. 25, 2016) (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1043) (observing "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members"). The deadline for objecting or opting out of the Settlement was July 25, 2022, and to date, no members of the Settlement Class have objected or opted out of the Settlement. Reyes Decl. ¶¶ 13-15. This factor weighs in favor of approval.

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
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B. Members of the Settlement Class received the best notice practicable.

This Court has determined that the notice program meets the requirements of due process and applicable law, provides the best notice practicable under the circumstances, and constitutes due and sufficient notice to all individuals entitled thereto. Preliminary Approval Order, ¶¶ 4-5. Simpluris has fully implemented the program. *See* Reyes Decl. ¶¶ 5-9.

Specifically, on May 25, 2022, Simpluris sent the Court approved notice by U.S. mail to the Class. *Id*. ¶ 8. Class Counsel's contact information was on the notices. *Id*., Ex. A. Settlement Class Members could also contact Simpluris for information. *Id*.

The notice program was successful. Of the 221 Class Members, 217 received notice. *Id*. ¶ 9. Thus, the Court should find that Simpluris provided adequate notice to the Settlement Class.

C. The requested service awards for the named Plaintiffs are reasonable.

Service payments "are intended to compensate class representatives for work undertaken on behalf of a class" and "are fairly typical in class action cases." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (citation omitted). Such awards are generally approved so long as the awards are reasonable and do not undermine the adequacy of the class representatives. *See Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013). These awards promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. *See Rodriguez*, 563 F.3d at 958–59.

The requested awards of $5,000 for the named Plaintiffs are reasonable given their efforts during the litigation and settlement and are well in line with awards approved by other courts. *See, e.g., Pelletz v. Weyerhauser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash. 2009) (approving $7,500 service awards and citing decisions approving awards in other cases). Plaintiffs assisted Class Counsel with investigating and mediating this case and took the risk of

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529 Warren Ave N., Suite 201
Seattle, WA 98109
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stepping forward as representatives of the Class. Rekhi Decl. ¶ 21. In addition, Plaintiffs also sat for individual depositions, assisted with discovery responses, and provided input during settlement negotiations. *Id*. Plaintiffs' support of the settlement is independent of any award and not conditioned on the Court awarding an award at all. *Id*. Thus, Plaintiffs' adequacy is unaffected by the proposed awards and the awards should be approved.

D. The award of attorneys' fees and costs is fair and reasonable.

A plaintiff may recover his or her attorneys' fees when the plaintiff obtains a "common fund" for the benefit of others. *Bowles v. Dept. of Retirement*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). Under Washington law, the percentage-of-recovery approach is used in calculating fees in common fund cases. *Bowles*, 121 Wn.2d at 72. Plaintiffs' efforts obtained a common fund for the benefit of the Class. *See* Agreement § IV.1. (establishing a common fund to be shared among the Settlement Class).

Here, Class Counsel seeks a fee award of 30% of the recovery obtained. Rekhi Decl. ¶ 24. Class Counsel has worked on these class claims without compensation for over three years, collectively accruing over $435,000 in fees. *Id*. In addition, Class Counsel anticipates additional work with the Settlement Administrator to ensure the settlement is fairly administered and implemented and obtaining dismissal of this action. *Id*.

Class Counsel also seeks to be reimbursed for their out-of-pocket litigation costs that they have and will continue to incur until dismissal of this lawsuit. *Id*. ¶ 25. "Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit from the settlement." *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996); *see also In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177–1178 (S.D. Cal. 2007) (finding costs such as filing fees,

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529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

messenger fees, and online legal research fees, are relevant and necessary expenses in class action litigation). Class Counsel requests reimbursement of $65,373.53 for their filing, mailing, research, deposition, expert, and mediation fees which were reasonable and necessary to secure the successful resolution of this litigation. *Id*. ¶ 25.

The fee request is particularly reasonable in light of the risks inherent in this class action. Indeed, there was a real possibility that Class Counsel would recover nothing for their work. But Class Counsel thoroughly investigated and litigated these claims, applied their investigation to the claims and defenses, engaged in extensive discovery and motions practice, participated in lengthy negotiations with Defendants, and ultimately achieved a favorable settlement for the Settlement Class. *Id*. ¶ 24. Plaintiffs and Class Counsel maintain the Settlement is in the best interests of the Settlement Class. *Id*. ¶ 6, 24.

Indeed, this is an excellent result, given the risks and delays posed with continued litigation and possible appeals. *Id*. ¶ 18-20. Class Counsel's request for fees and costs of $515,373.53, is therefore reasonable.

Finally, Settlement Class Members were explicitly advised of the requested fee award as set forth in the Notice of Settlement. *See* Reyes Decl., Ex. A. None of the Settlement Class Members objected to the award. Again, this supports granting the requested fee award.

VI. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant final approval of the Settlement Agreement, including the awards to Plaintiffs, Simpluris, and Class Counsel, and enter the Proposed Order Granting Final Approval.

Rekhi & Wolk, P.S.
529 Warren Ave N., Suite 201
Seattle, WA 98109
Phone: (206) 388-5887
Facsimile: (206) 577-3924

VII. LCR CERTIFICATION

I certify that this memorandum contains not more than 4,200 words, in compliance with the Local Civil Rules.

RESPECTFULLY SUBMITTED AND DATED this 15th day of August, 2022.

REHKI & WOLK, P.S.

By: *<u>/s/ Hardeep S. Rekhi, WSBA #34579</u>*
Hardeep S. Rekhi, WSBA #34579
Gregory A. Wolk, WSBA #28946
Jennifer T. Song, WSBA #39801
529 Warren Ave North, Suite 201
Seattle, Washington 98109
Telephone: (206) 388-5887
Facsimile: (206) 577-3924
E-mail: hardeep@rekhiwolk.com
greg@rekhiwolk.com
jennifer@rekhiwolk.com

Toby J. Marshall, WSBA #32726
Erika Nusser, WSBA #40854
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450
E-mail: tmarshall@terrellmarshall.com
enusser@terrellmarshall.com

Attorneys for Named Plaintiffs and Class Counsel