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8 JOSE ANGEL FRAUSTO VILLEGAS and JOSE MANUEL BARRAGAN AGUILAR
9 (Additional attorneys for Plaintiff(s) on following page)

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **FOR THE COUNTY OF SANTA BARBARA**

12 **(UNLIMITED JURISDICTION)**

13 JOSE FRAUSTO VILLEGAS, on behalf of
14 himself, all others similarly situated, and the
15 general public,

16 *Plaintiff,*

17 vs.

18 DLP MANAGEMENT CO., INC., a California
19 corporation d/b/a DLP MANAGEMENT CO and
20 DLP MANAGEMENT INC.; and DOES 1–50,
inclusive,

21 *Defendants.*

Lead Case No.: 21CV04500
Consolidated with: 22CV01392
[Hon. Thomas P. Anderle, Department 3]

**AMENDED DECLARATION OF
DAVID SPIVAK IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**



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1 JOSE MANUEL BARRAGAN, on behalf of
2 himself, all others similarly situated, and
the general public,

3 Plaintiff,

4 vs.

5 DLP MANAGEMENT CO., INC., a
6 California corporation doing business in
7 California as DLP MANAGEMENT CO and
8 as DLP MANAGEMENT INC. and DLP
MANAGEMENT INC; DARIO L. PINI, an
individual; and DOES 1-50, inclusive,

9 Defendants.
10

Case No.: 22CV01392

11 **ADDITIONAL ATTORNEYS FOR PLAINTIFF(S)**

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1 **AMENDED DECLARATION OF DAVID G. SPIVAK IN SUPPORT OF MOTION FOR**
2 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**¹

3 I, DAVID SPIVAK, declare as follows:

4 1. I am an attorney duly licensed to practice law in the State of California and am an
5 attorney of record for Plaintiffs Jose Angel Frausto Villegas and Jose Manuel Barragan
6 (collectively “Plaintiffs”) in their lawsuit against Defendants DLP Management Co., Inc. and
7 Dario L. Pini (collectively “Defendants”). Plaintiffs and Defendants are collectively referred to
8 as the “Parties.”

9 2. Except as otherwise indicated, I have personal knowledge of all matters set forth
10 herein and, if called as a witness, could and would competently testify thereto under oath.

11 3. The Class Action Settlement Agreement and Class Notice (the “Settlement”) is
12 attached hereto as **Exhibit 1**.

13 ***Factual and Procedural Background***

14 4. Defendants are a property management company. Defendants employed Plaintiff
15 Villegas as a maintenance worker and handyman from about 2005 until January 2020. Defendants
16 employed Plaintiff Barragan as a maintenance worker from about 2008 until April of 2019.

17 5. On November 12, 2021, Plaintiff Jose Frausto Villegas commenced this Action by
18 filing a Complaint alleging causes of action against Defendant DLP Management Co., Inc. for
19 failure to pay wages, failure to provide meal periods, failure to authorize and permit rest periods,
20 failure to indemnify for business expenses, failure to timely pay wages, and related claims. A true
21 and correct copy of the Villegas complaint is attached hereto as **Exhibit 2**. On April 11, 2022,
22 Plaintiff Jose Manuel Barragan filed a class action complaint alleging the same violations against
23 both Defendants. A true and correct copy of the Barragan complaint is attached hereto as **Exhibit**
24 **3**. The two cases were consolidated on or about June 8, 2022. Defendants deny the allegations in the
25 complaints, deny any failure to comply with the laws identified in in the complaints and deny any
26 and all liability for the causes of action alleged.

27 6. The Parties thereafter engaged in formal as well as informal and voluntary
28 exchange of information in the context of privileged settlement discussions to facilitate an early

¹ An amended declaration was submitted only to correctly state Plaintiff Jose Manuel Barragan’s name in paragraph number one (1) which was inadvertently stated as Jose Manuel Barragan Aguilar.



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1 mediation. Defendants produced Plaintiffs' personnel files and time-keeping and payroll records
2 for Plaintiffs and a sample group of employees.

3 7. On September 26, 2023, following much of the foregoing informal discovery and
4 exchange of information, the Parties participated in a mediation session presided over by Mediator
5 Henry J Bongiovi, Esq. an experienced class action mediator. During the mediation, the Parties
6 had a full day of productive negotiations and reached agreement on a class-wide settlement. A
7 true and correct copy of the Memorandum of Understanding signed by all Parties is attached
8 hereto as **Exhibit 4**. During the mediation sessions, each side, represented by his/their respective
9 counsel, recognized the risk of an adverse result in the Action and agreed to settle the Action and
10 all other matters covered by this Agreement pursuant to the terms and conditions of this
11 Agreement. on January 17, 2024, the Parties participated in a second mediation with Henry
12 Bongiovi, Esq. to address Defendants' concerns as to certain terms of the executed MOU that
13 relates to the release of claims and Plaintiff Jose Frausto Villegas' pending Workers'
14 Compensation claim against Defendants. One of the Parties' concerns was the scope of the release
15 as to Plaintiff Villegas who has a pending Workers' Compensation claim.

Ascertainable and Numerous Class

16 8. A class is ascertainable when it may be readily identified without unreasonable
17 expense or time by reference to official records. Here, each Plaintiff maintains that the above-
18 defined Class is ascertainable because its members may be identified by reference to Defendants'
19 records and Defendants have agreed to share the relevant information from their records to
20 facilitate the settlement process. Therefore, the Settlement Class is ascertainable.

21 9. The Settlement Class has sufficiently numerous members to render joinder
22 impractical. No set number is required as a matter of law to maintain a class action. The California
23 Supreme Court has upheld a class of as few as 10 individuals. Defendants estimate that there are
24 approximately 83 Class Members. Each Plaintiff maintains that it would be impractical and
25 economically inefficient to require each Settlement Class Member to separately maintain an
26 individual action or be joined as a named plaintiff in this action. In light of these considerations,
27 the Class' membership is sufficiently numerous.

Predominant Common Questions

28 10. A question of law or fact is common to the members of a class if it may be resolved
through common proof. In this case, there are many predominant common questions. Plaintiffs



1 assert all class members were subject to the same or similar operations and employment policies,
2 practices, and procedures. The claims arise from Defendants' alleged policy-driven failure to pay
3 wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to
4 indemnify for business expenses, failure to timely pay wages, and related labor law violations, all
5 of which Plaintiffs claim constitute unfair business practices and give rise to PAGA penalties.
6 Plaintiffs assert that common questions include, but are not limited to: (1) Whether Defendants
7 failed to pay all wages earned to class members for all hours worked at the correct rates of pay;
8 (2) Whether Defendants failed to provide the class with all meal and rest periods in compliance
9 with California law; (3) Whether Defendants failed to pay the class one additional hour of pay on
10 workdays they failed to provide the class with one or more meal or rest periods in compliance
11 with California law; (4) Whether Defendants failed to indemnify the class for all necessary
12 business expenditures incurred during the discharge of their duties; (5) Whether Defendants
13 willfully failed to provide the class with timely final wages; and (6) Whether Defendants engaged
14 in unfair competition within the meaning of Business and Professions Code section 17200, *et*
15 *seq.*, with respect to the class.

16 *Typicality*

17 11. Plaintiffs contend that their claims are typical for the purposes of certifying the
18 Settlement Class. Plaintiffs assert that they, like absent Class Members was subject to the same
19 relevant policies and procedures governing their compensation, hours of work and meal and rest
20 periods. Because Plaintiffs contend that they were subject to the same general course of conduct
21 as absent Class Members, resolving the common questions as they apply to Plaintiffs will
22 determine Defendants' *prima facie* liability to all Class Members. Moreover, Plaintiffs' claims
23 could potentially be subject to the same primary affirmative defenses as those of absent Class
24 Members. Accordingly, Plaintiffs' claims are typical of the Class.

25 *Adequacy*

26 12. The adequacy requirement is met where the plaintiff is represented by counsel
27 qualified to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to
28 the class' interests. In other words, where the plaintiff has adequate counsel, the plaintiff may
represent the entire class absent any disabling conflicts of interest that might hinder the plaintiff's
ability to represent the class.



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13. To the best of my knowledge, neither Plaintiffs nor I have any conflicts of interest with the absent Settlement Class Members. Plaintiffs contend that they are adequate class representative. Plaintiffs and the Class Members have strong and co-extensive interests in this litigation because they all worked for Defendants during the relevant time period, allegedly suffered the same alleged injuries from the same alleged course of conduct, and there is no evidence of any conflict of interest between Plaintiffs and the Class Members. Moreover, each Plaintiff has demonstrated his commitment to the Settlement Class by, among other things, retaining experienced counsel, providing counsel with documents and extensively speaking with them to assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as well as exposing himself to the risk of attorneys' fees and costs awards against him if this lawsuit had been unsuccessful. Thus, each Plaintiff is adequate to serve as settlement class representative.

Background of Class Counsel

14. In 1991, I earned a Bachelor of the Arts degree with a major in Political Science from the University of California at Berkeley. In 1995, I earned a Juris Doctor degree from Southwestern University School of Law.

15. In December of 1995, the Supreme Court for the State of California admitted me as an Attorney and Counselor at Law and licensed me to practice law in all the Courts of this State. On May 11, 2012, I also became admitted to the District of Columbia Bar. In February 2013, I became admitted to the New York State Bar.

16. My law practice has always focused on representation of private and public employees with claims of unpaid wages, wrongful termination, harassment, family and medical leave, whistleblowing, discrimination, benefits, and civil rights violations. One of my websites, FightWrongfulTermination.com, provides a further description of my practice.

17. I have tried many cases before California and federal courts, government agencies and neutral arbitrators. I am a member of the California Employment Lawyers Association (CELA).

18. Since I started practicing law, I have tried many cases before courts, arbitrators and government agencies. Some of my cases are:

a. *Ricardo Sandoval v. Dept. of Treasury*, United States District Court, Southern District of California (the Honorable Judith Keep presiding), 1998. Plaintiffs Special



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1 Agent for the U. S. Customs Service alleged discrimination and retaliation in promotions and
2 discipline. The jury awarded compensatory damages. Court subsequently awarded additional
3 back pay and gave Plaintiffs a retroactive promotion. *See* "Lawsuit Puts Customs Service on Trial:
4 Agent Alleges Corruption, White Supremacist Cabal" by Valerie Alvord, San Diego Union-
5 Tribune, April 29, 1998; "Customs Agent Is Awarded \$200,000: Jury Says He Faced Bias And
6 Retaliation" by Valerie Alvord, San Diego Union-Tribune, May 16, 1998.

7 b. *Jorge Guzman v. Department of Justice*, United States District Court,
8 Central District of California (the Honorable Lourdes Baird presiding), 1999. Plaintiffs Special
9 Agent for the Immigration and Naturalization Service alleged racial discrimination, retaliation
10 and police brutality by agents of the Office of the Inspector General. Jury found the Defendants
11 liable. Case settled shortly before the damages phase. *See* "U.S. to Pay \$400,000 to INS Agent in
12 Bias Suit; Courts: Complaint says he suffered 10 years of harassment on the job because he is
13 Latino, including falsified charges" by Patrick J. McDonnell, Los Angeles Times, January 21,
14 1999.

15 c. *Dr. Perry Crouch v. SHIELDS*, Los Angeles Superior Court, Compton (the
16 Honorable Michael Rutberg presiding), 2001. Plaintiff whistleblower brought civil rights claims
17 and wrongful termination claims against employer in a month-long jury trial. The jury awarded
18 compensatory and punitive damages. *See* "Activist Says Criticism of Rail Plan Cost His Job" by
19 Dan Weikel, Los Angeles Times, September 28, 2000; "Punitive Damages Awarded to Fired
20 Social Worker" by Dan Weikel, Los Angeles Times, June 10, 2000; "A Whistleblower's
21 Revenge" by Susan Goldsmith, New Times Los Angeles, June 8, 2000.

22 d. *Imagraph, Inc. (Steve Shiffman) v. Mohamed T. Nehmeh*, Orange County
23 Superior Court, Central Justice Center (the Honorable Kirk H. Nakamura presiding), 2004.
24 Plaintiff, who I represented pro bono sought the return of \$45,000.00 he paid to an attorney
25 escrow officer who subsequently absconded with the money. The jury awarded compensatory
26 damages. The Judgment with interest is now far in excess of that amount. Soon after this case was
27 litigated, the State Bar of California awarded me the Wiley W. Manuel Award for Pro Bono Legal
28 Services.

e. *Rick Pierce v. Department of Treasury*, Merit Systems Protection Board
(1999). Administrative Judge awarded compensatory damages to wrongfully terminated Customs
Agent, followed by an award of Attorneys' fees and costs.



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1 f. *Richard Wamel v. Ocelot Engineering Co.*, Judicate West before the
2 Honorable Robert Polis (ret.) (2008). In that case, I represented a victim of FMLA violations and
3 wrongful termination against his former employer. The Neutral Arbitrator awarded compensatory
4 and liquidated damages. The claims for damages, attorney's fees and costs were resolved shortly
5 thereafter by means of a confidential settlement.

6 g. *Alina Ghrdilyan v. RJ Financial, Inc., et al.*, LA Superior Court case no.
7 BC430633 (2012), the Honorable Ronald Sohigian presiding. To my knowledge, this case is the
8 first and only case to be successfully prosecuted through trial under the Labor Code Private
9 Attorney Generals Act of 2004, Labor Code §§ 2698, et seq. on behalf of plaintiffs and other
10 aggrieved employees against someone other than an employer for civil penalties including unpaid
11 wages. The case involves claims of unpaid overtime, unprovided rest and meal periods, unpaid
12 vacation, untimely interval and final wages, and unreimbursed expenses. For my work in that
13 case, the Court awarded me an hourly rate of \$600.00 hour based on my skill and experience.

14 19. Since 2007, I have prosecuted several traditional wage & hour class actions as the
15 sole or primary attorney for the plaintiffs, including *Pudelwitts v. Regent Parking, Inc.*, *Singery*
16 *v. Quality Vessel Engineering*, *Tesillo v. LA Executive Towing Service, Inc.*, and *Madison v. The*
17 *Limousine Connection*. One such case is *Jose Tapia v. Mangen Group, Inc.*, LASC case no.
18 BC377114, a garden-variety wage & hour class action with many of the same claims at issue in
19 this case. The Honorable Jane Johnson of the Los Angeles Superior Court, presiding over the
20 motion for final approval of the Settlement Class action settlement in *Tapia*, had no quarrel with
21 an hourly rate of \$525.00 for my services.

22 20. In my representation of employees, I have prosecuted several lawsuits on behalf
23 of employees with claims of rest and meal period and overtime violations or other wage claims.

24 21. I have been involved in the prosecution of numerous wage and hour class actions
25 at various stages of litigation. A small sampling of the wage and hour class action cases in which
26 I have recently been counsel of records is as follows:

27 a. *Alafa v. Custom Built Personal Training, Inc.*, Tulare County Superior
28 Court, Case No. VCU-245496 (appointed Class Counsel and granted final approval class action
settlement on behalf of assistant fitness manager employees).



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1 b. *Cuellar v. Lovin Oven*, Orange County Superior Court, Case No. 30-2010-
2 000382146 (appointed Class Counsel and granted final approval of class action settlement by the
3 court on behalf of nonexempt employees).

4 c. *Cunningham v. DPI Specialty Foods West, Inc.*, Los Angeles Sup.Ct., Case
5 No. BC465017 (appointed Class Counsel and granted final approval by this Court of class action
6 settlement on behalf of merchandiser employees).

7 d. *Deckard v. MSL Community Management LLC*, Riverside County Superior
8 Court, Case No. RIC1204182 (appointed Class Counsel and granted final approval of class action
9 settlement on behalf of caregivers and medical technicians).

10 e. *DiCato v. Francesca's Collections, Inc.*, San Diego County Superior
11 Court, Case No. 37-2012-00094401-CU-OE-CTL (appointed Class Counsel and granted final
12 approval of class action settlement on behalf of boutique manager and assistant manager
13 employees).

14 f. *Evans v. Equinox, et al.*, Los Angeles Sup.Ct., Case No. BC440058
15 (appointed Class Counsel and granted final approval by this Court of class action settlement on
16 behalf of personal trainer employees).

17 g. *Huynh v. Carefusion Resources, LLC, et al.*, San Diego Sup.Ct., Case No.
18 37-2009-00103277-CU-OE-CTL (appointed Class Counsel and granted final approval of class
19 action settlement on behalf of medical devices employees).

20 h. *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case No.
21 BC480808 (appointed Class Counsel and granted final approval of class action settlement on
22 behalf of hourly employees).

23 i. *La Fleur v. Medical Management International, Inc.*, United States District
24 Court, Central District of California, Case No. EDCV13-00398-VAP (appointed Class Counsel
25 and granted final approval of class action settlement on behalf of practice managers).

26 j. *Linder, et al. v. Warehouse Services, Inc.*, San Bernardino Superior Court,
27 Case No. CIVDS1500146 (appointed Class Counsel and granted final approval of class action
28 settlement on behalf of non-exempt hourly employees excluding truck drivers).

 k. *Lynch, et al. v. American Guard Services*, Los Angeles Superior Court,
Case No. BC462681 (appointed Class Counsel and granted final approval of class action
settlement on behalf of security guard employees).



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1 l. *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case No. S-
2 1500-CV-282679 (appointed Class Counsel and granted final approval of class action settlement
3 on behalf of dairy and agricultural laborers).

4 m. *Montes v. Branam Enterprises, Inc.*, Los Angeles Sup.Ct. Case No.
5 BC442608 (appointed Class Counsel and granted final approval by this Court of class action
6 settlement on behalf of call concert rigging employees). *Nardone v. Sequoia Beverage Company,*
7 *LP*, Tulare County Superior Court, Case No. VCU-248370 (appointed Class Counsel and granted
8 final approval of class action settlement by the court on behalf of hourly employees).

9 n. *Ogbuehi v. Comcast of California/Colorado/Florida/Oregon, Inc.*, United
10 States District Court, Eastern District of California, Case No. EDCV13-00672-KJM-KJN
11 (appointed Class Counsel and granted final approval of class action settlement on behalf of virtual
12 customer account executives).

13 o. *Rosen v. Image Transfer*, Los Angeles Superior Court, Case No.
14 BC511072 (appointed Class Counsel and granted final approval of class action settlement on
15 behalf of bobtail truck drivers).

16 p. *Sandoval v. Rite Aid Corp.*, Los Angeles Superior Court, Case No.
17 BC431249 (granted class certification through contested motion and appointed Class Counsel in
18 case on behalf of former pharmacy employees based on late final wage payments in violation of
19 Labor Code §§ 201–203).

20 q. *Shaw, et al. v. Interthinx, Inc.*, United States District Court for the District
21 of Colorado, Case No. 13-CV-01229-REB-BNB (appointed Class Counsel and granted final
22 approval of class action settlement by the court on behalf of auditor employees).

23 r. *Stucker v. L'Oreal*, Los Angeles Sup.Ct. Case No. BC456080 (appointed
24 Class Counsel and granted final approval by this Court of class action settlement involving alleged
25 misclassification of sales employees and unpaid vacation pay).

26 s. *Valdez v. Healthcare Services Group, Inc.*, Los Angeles Sup.Ct., Case No.
27 BC462917 (appointed Class Counsel and granted final approval by this Court of class action
28 settlement on behalf of service account manager employees).

t. *Valencia v. SCIS Air Security Corp.*, Los Angeles Superior Court, Case
No. BC421485 (granted class certification through contested motion and appointed Class Counsel

1 in case on behalf of former security workers based on late final wage payments in violation of
2 Labor Code §§ 201–203).

3 u. *Vang v. Burlington Coat Factory Corporation*, United States District Court
4 Central District of California, Case No. 09-CV-08061-CAS-JCx (appointed Class Counsel and
5 granted final approval of class action settlement by the court on behalf of assistant store manager
6 employees).

7 v. *Volney-Parris v. Southern California Edison Company*, Los Angeles
8 Superior Court, Case No. BC493038 (appointed Class Counsel and granted final approval of class
9 action settlement on behalf of customer specialist employees).

10 w. *White v. 20/20 Communications, Inc.*, San Bernardino County Superior
11 Court, Case No. CIVRS1301718 (appointed Class Counsel and granted final approval of class
12 action settlement on behalf of hourly employees).

13 ***Class Action Treatment Is Superior***

14 22. A class action is also superior to other means adjudicating the issues in this action.
15 The predominance of common legal and factual questions shows that this Court could fairly
16 adjudicate the claims of Class Members through a single class action. In view of the *theoretical*
17 alternatives that proposed class members could potentially utilize—representative PAGA action
18 (where there is less relief available), individual civil lawsuits or wage claims through the Division
19 of Labor Standards Enforcement (where there would be relatively little money at stake, but the
20 claims would be time-consuming to litigate)—a class action is plainly superior to all of them.
21 Thus, this consideration supports conditional class action treatment for purposes of this
22 Settlement only.

23 ***The Settlement is Presumptively Fair***

24 23. The class settlement here satisfies all of the *Kullar* factors. The Settlement resulted
25 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a
26 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
27 weaknesses of their respective cases and Defendants’ estimated exposure. Both defense counsel
28 and I are particularly experienced in employment law and wage and hour class actions. We are
experienced and qualified to evaluate the class claims, the viability of the defenses, and the risks
and benefits of settlement versus trial on a fully informed basis. I have negotiated many wage and
hour class settlements, including many involving the same issues presented here. Counsel on both



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sides share the view that the Settlement is a fair and reasonable settlement in light of the complexities of the case and uncertainties of class certification and litigation, and a fair result for the Class Members.

Exposure & Risk Analysis

24. Plaintiffs claim that Defendants failed to pay all wages at the correct rates of pay, failed to provide timely, duty free, 30-minute meal periods, failed to authorize and permit rest periods, failed to indemnify for business expenses, failed to timely pay wages, and related claims. I prepared “damages” estimates in advance of the mediation. True and correct copies of these spreadsheets are attached hereto as **Exhibit 6**. I determined Defendants’ maximum exposure for restitution and penalties to be approximately \$4,471,084.01 (consisting of \$1,290,206.33 in unpaid wages, \$882,102.86 in missed meal period premium wages, \$1,764,205.71 in missed rest break premium wages, and \$88,200.00 for waiting time penalties.). Plaintiffs calculated the damages based on the number employees provided by Defendants, Plaintiffs’ reports, and the sample data. Plaintiffs also considered the possibility that Defendants could launch a *Pick Up Stix* campaign and pursue individual release agreements from the Class Members. Defendants also represented that they had interviewed all of Defendants’ current employees regarding Plaintiffs’ claims, all of whom would provide declarations, under penalty of perjury, that were favorable to Defendants with respect to the relevant factual issues at issue in Plaintiffs’ action. Plaintiffs’ Counsel applied discounts to the maximum exposure to account for all other risks discussed below. While it is difficult to assign anything but crudely-determined percentages of risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude recovery for such employees is substantial and alone justifies a significant discount because Defendants would likely by trial have gathered releases from the majority of the Class Members. A settlement for approximately 16.77% of the potential recovery is a proportion substantially in excess of recovery proportions sanctioned by existing case law.

25. My initial estimates do not realistically account for the risks outlined below or the risk that a class will not be certified. Therefore, I believe a class settlement for \$750,000.00 is fair and reasonable.



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26. **Risks Associated with Unpaid Wages Claim.** There is a risk that Plaintiffs' recovery for unpaid wages would be extremely limited at best, largely because Defendants required the employees to sign each of their time sheets and certify that they had accurately recorded their hours on their time sheets and had the opportunity to take all their rest and meal periods. Off-the-clock claims are difficult where a defendant requires that all hours worked be reported on time sheets. *See Jong v. Kaiser Foundation Hospital* (2012) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to be compensable). *Id.* Moreover, while Defendants dispute that off-the-clock work occurred, they contend that any time spent off the clock was *de minimis*. The California Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular and minute periods of time may still be subject to a *de minimis* defense even if compensable (stating that "We do not decide whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded."). Following *Troester*, Defendants contend that the *de minimis* doctrine may apply here because the time spent off the clock were minute and insignificant. Accordingly, a large award of penalties seems unlikely with respect to this claim. The difficulty inherent in proving that off-the-clock work occurred poses a significant hurdle to Plaintiffs. Plaintiffs will rely on declarations and witness statements to prove this claim. Generally, a court will not certify a class unless it can determine an appropriate classwide methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiffs may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given the lack of records indicating when such off-the-clock work may have taken place. Individualized inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual in fact worked "minutes" off-the-clock on a "regular" basis. Accordingly, there is a significant risk that the Court would consider this evidentiary showing insufficient as a classwide methodology.

27. **Risks Associated with the Meal Period Claims.** There are risks to Plaintiffs' meal period claim. Defendants contend that, to establish a violation for missed meal periods, a plaintiff must do more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a "reasonable opportunity" to take a duty-free meal period, it has no further duty to "police meal breaks and ensure no work thereafter is performed." *Id.* at 1040-41. Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the employee from taking a proper break, or otherwise failed to release the employee

1 of all control. *Id.* “Thus, the crucial issue with regard to the meal break claim is the reason that a
2 particular employee may have failed to take a meal break.” *Washington v. Joe’s Crab Shack* (N.D.
3 Cal. 2010) 271 F.R.D. 629, 641.

4 28. Defendants contend they did not impede or discourage Plaintiffs, or any other
5 employees, from taking their meal or rest periods. Further, as discussed above, Defendants
6 required employees to certify the fact that they received all their meal periods at the end of each
7 pay period. The time records that comprise the random sample Defendants produced to Plaintiffs
8 for purposes of mediation show that meal periods were taken the vast majority of the time. Of the
9 time records that show a late, short or no lunch, individualized evidence may be necessary to
10 determine whether they occurred due to conduct of the Defendants or each of the employees
11 concerned. Accordingly, there is a significant risk that the value of Plaintiffs’ meal period claim
12 would be substantially reduced at trial.

13 29. **Risks Associated with the Rest Break Claims.** There are risks to Plaintiffs’ rest
14 period claim. Employers are not required to record rest periods and such periods are paid. *Id.*
15 Defendants contend they provided non-exempt employees the opportunity to take rest periods in
16 accordance with California law. Further, as discussed above, Defendants required employees to
17 certify the fact that they received all their meal periods at the end of each pay period. Thus, unlike
18 meal periods, where there are often records showing whether an employee clocked out or not,
19 there is no such evidence to prove a missed rest period or that the employer refused to authorize
20 and permit one. Managing such claims at trial has become exceedingly difficult. Plaintiffs will
21 depend on sample witness testimony and surveys to prove the claims. While a victory with such
22 evidence is certainly possible, relevant caselaw makes such claims risky from a trial management
23 and due process perspective. *See Duran v. U.S. Bank National Assn.*, (2014) 59 Cal. 4th 1, 31
24 (explaining “[I]f sufficient common questions exist to support class certification, it may be
25 possible to manage individual issues through the use of surveys and statistical sampling.”); *Tyson*
26 *Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133
27 S.Ct. 1426.

28 30. **Risks Associated with the Failure to Indemnify Claim.** There is a risk that the
Court may consider Plaintiffs’ claims as to Defendants’ alleged failure to indemnify for business
expenses to be individual in nature and thus decline to certify the class. Plaintiffs allege that
Defendants required Plaintiffs and the Class Members to use their personal items including



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cellular phones, vehicles, and tools, and failed to indemnify them for these business expenses. Defendants contend that they have supplied their employees with tools, equipment, and other supplies. As such, there is a risk that the Court may consider Plaintiffs' claims to be individual in nature and unfit for class wide resolution.

31. **Risks Associated with The Waiting Time Penalties Claim.** Plaintiffs' claim for untimely wages is predicated on Labor Code section 201 to 203. Plaintiffs must establish that the late payments were willful. The evidence of good faith that Defendants could put forth will defeat this claim.

32. **Risks Associated With A Pick-Up Stix Campaign.** An employer enjoys the right to settle a putative class member's disputed wage claims individually, without the consent or involvement of class counsel. See *Chindarah v. Pick Up Stix, Inc.* 171 Cal. App. 4th 796 (2009). As discussed above, Defendants may launch a "pick off" settlement campaign to pursue individual release agreements from the Class Members, thereby potentially narrowing the size of the Class – 83 members - until it is no longer numerous enough for class certification. *Id.* Plaintiffs, then, may not have sufficient number of employees to represent. This led to a significant reduction of claim value in settlement negotiations.

33. While the evidence gathered through Plaintiffs' discovery supports the merits of the claims asserted in this lawsuit, Plaintiffs and their counsel recognize that continued litigation presents significant risks that support a downward departure from Defendants' estimated liability exposure. In view of the risks, the Settlement reflects my estimate of the total amount of damages, monetary penalties or other relief that the Class could reasonably expect to be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. It also represents a fair, adequate, and reasonable compromise amount for these claims and warrants preliminary approval. *Id.*, *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (the financial condition of defendant predominated in assessing the reasonableness of settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty concerning defendant's financial stability "strongly supports the reasonableness of the settlement"); *See Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014 WL 2465049, * 3.

Attorneys' Fees and Costs

34. I intend to request Class Counsel Attorneys' Fees of \$250,000.00 (one-third of the GSA) and Class Counsel's litigation costs incurred in prosecuting this Action, which I currently



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1 estimate to be approximately \$16,157.05 and will be no more than \$20,000.00 at the conclusion
2 of matters related to the Settlement. In view of my efforts and risks in pursuing this case these
3 amounts are well within the range of reasonableness and thus warrant this Court's preliminary
4 approval. In addition, based on my experience in wage and hour class action matters, fee awards
5 of approximately one-third of the settlement fund are routinely approved as reasonable. I have
6 been awarded attorneys' fees equaling approximately one-third of the fund in several recent wage
7 and hour class actions, including: *Alvarez v. Gary Grace Enterprises, LP*, Marin County Superior
8 Court, Case No. CIV1002553 (one-third of fund); *Calderon v. Greatcall, Inc.*, San Diego Superior
9 Court, Case No. 37-2010-00093743-CU-OE-CTL (one-third of fund); *Butler v. Lexxiom, Inc.*,
10 San Bernardino County Superior Court, Case No. CIVRS1001579 (one-third of fund); *Perez v.*
11 *Southwest Dealer Services, Inc.*, Los Angeles County Superior Court, Case No. BC439253 (one-
12 third of fund); *O'Brien v. Optima Network Services, Inc.*, San Bernardino County Superior Court,
13 Case No. CIVRS1107056 (one-third of fund); *Noyd v. The Cristcat Group, et al.*, Los Angeles
14 County Superior Court, Case No. BC439558 (one-third of fund); *Huynh v. Carefusion Resources,*
15 *LLC, et al*, San Diego Sup.Ct., Case No. 37-2009-00103277-CU-OE-CTL (one-third of fund);
16 *Cunningham v. DPI Specialty Foods West, Inc.*, Los Angeles Sup.Ct., Case No. BC465017 (one-
17 third of fund); *Stucker v. L'Oreal USA S/D, Inc.*, Los Angeles Sup. Ct., Case No. BC456080 (one-
18 third of fund); *Valdez v. Healthcare Services Group, Inc.*, Los Angeles Sup.Ct., Case No.
19 BC462917 (one-third of fund); *Hernandez, et al v. HSBC*, U.S. District Court, Central District of
20 California, Case No. 10-CV-4753 (one-third of fund); *Sandoval, et al. v. Thrifty Payless, Inc.*, et
21 al. Los Angeles Sup.Ct., Case No. BC431249 (one-third of fund); *Alafa v. Custom Built Personal*
22 *Training, Inc.*, Tulare County Superior Court, Case No. VCU-245496 (one-third of fund);
23 *Nardone v. Sequoia Beverage Company, LP*, Tulare Sup.Ct., Case No. VCU-248370 (one-third
24 of fund); *Rosen v. Image Transfer*, Los Angeles Sup.Ct., Case No. BC511702 (one-third of fund);
25 *Tucker v. Maly's West, Inc.*, Los Angeles Sup.Ct., Case No. BC483920 (one-third of fund); *King*
26 *v. Build.com*, Butte Sup.Ct., Case No. 159985 (one-third of fund); *Clifford v. Anderson Hay &*
27 *Grain*, Los Angeles Sup.Ct., Case No. BC517625 (one-third of fund); *Nichols, et al. v. Vitamin*
28 *Shoppe*, Contra Costa Sup.Ct., Case No. CIVMSC13-01136 (one-third of fund); *Clarke v. Insight*
Global, U.S. District Court, Southern District of California, Case No. 13-CV-0357 (one-third of
fund); *Fischer, et al. v. National Distribution Centers LP, et al.*, Riverside Sup.Ct., Case No.
RIC1114952 (one-third of fund); *Shaw, et al. v. Interthinx, Inc.*, United States District Court for



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1 the District of Colorado, Case No. 13-CV-01229-REB-BNB (one-third of fund); *Ogbuehi v.*
2 *Comcast of California/ Colorado/ Florida/ Oregon, Inc.*, United States District Court, Eastern
3 District of California, Case No. EDCV13-00672-KJM-KJN (one-third of fund); *Lynch, et al. v.*
4 *American Guard Services*, Los Angeles Superior Court, Case No. BC462681 (one-third of fund);
5 *Volney-Parris v. Southern California Edison Company*, Los Angeles Superior Court, Case No.
6 BC493038 (one-third of fund); *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case No.
7 BC480808 (one-third of fund); *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case
8 No. S-1500-CV-282679 (one-third of fund); *Linder, et al. v. Warehouse Services, Inc.*, San
Bernardino Superior Court, Case No. CIVDS1500146 (one-third of fund).

9 35. The amount of fees and costs requested are commensurate with (1) the risk Class
10 Counsel took in bringing the case, (2) the extensive time, effort and expense dedicated to the case,
11 (3) the skill and determination Class Counsel has shown, (4) the results Class Counsel achieved,
12 (5) the value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel
13 turned down to devote time to this matter. Class Counsel also interviewed and obtained
14 information from putative class members, met and conferred with Defendants' counsel on
15 numerous occasions, reviewed and analyzed hundreds of pages of data and documents provided
16 by Defendants and obtained through other sources, researched applicable law, and estimates of
"damages" for purposes of settlement discussions, among other tasks.

17 36. Class Counsel have borne all the risks and costs of litigation and will receive no
18 compensation until recovery is obtained. Class Counsel are well-experienced in wage-and-hour
19 class action litigation and used that experience to obtain a fair result for the Class. Considering
20 the amount of the attorney fees requested, the work performed, and the risks incurred, the
21 requested fees and costs are reasonable and should be awarded.

Class Representative Service Payments

22 37. The Settlement provides that each Plaintiff may seek a Class Representative
23 Service Payments of \$15,000.00. This amount is entirely reasonable given each Plaintiff's efforts
24 in this Action and the risks each Plaintiff undertook on behalf of Class Members. Here, each
25 Plaintiff has devoted many hours advancing the interests of the Settlement Class. Each Plaintiff
26 has done this by, among other things, retaining experienced counsel, providing them with
27 information about his work history with Defendants and Defendants' policies and practices with
28 respect to the wage and hour claims at issue, assisting counsel in identifying witnesses,



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1 participating in mediation, and being actively involved in the settlement process to ensure a fair
2 result for the Settlement Class as a whole. In doing this, Each Plaintiff has been exposed to
3 significant risks, including the risk of an order to pay Defendants' attorneys' fees and costs if this
4 action had been unsuccessful (*See* Labor Code §§ 218.5-218.6). The efforts and risks that each
5 Plaintiff undertook on behalf of the Settlement Class shows that the proposed Class
6 Representative Service Payments is fair, adequate, and reasonable, and thus warrant preliminary

7 ***Individual Class Payment***

8 38. The Individual Class Payment will be paid to each Class Member based on his or
9 her eligible Paychecks compared to the total Paychecks. Settlement § 3.2.4. Because this method
10 compensates Class Members based on the extent of their potential injuries, in that Class Members
11 who worked for Defendants longer would have been subject to more alleged violations, it is fair,
12 adequate, and reasonable.

13 ***Notice By First Class U.S. Mail Only (No Email)***

14 39. The Settlement requires distribution of the Notice by First Class U.S. mail only.
15 Settlement, § 4.4.1. Although there are current employee Class Members, it is uncertain whether
16 Defendants' records of their contact information include email addresses and Class Members,
17 who perform all of their work away from a desk, are not in a position to check their emails. As
18 such, notice by mail alone is fair, adequate, and reasonable. The Notice Packet (attached as
19 Exhibits A-C to the Settlement) provides Class Members with all pertinent information that they
20 need to fully evaluate their options and exercise their rights under the Settlement. Specifically, it
21 clearly and concisely explains, among other things: (1) what the Settlement is about; (2) who is a
22 Settlement Class Member; (3) how Class Counsel will be paid; (4) how to submit an exclusion
23 request not to be bound by the Settlement; (5) how to object to the Settlement; (6) how the
24 Settlement will be allocated; (7) how payments to Class Members will be calculated; (8) how the
25 disputes will be resolved; and (9) the estimated Individual Settlement Payment for each Class
26 Member. Additionally, the Notice will include the number of Eligible Workweeks a Class
27 Member had during the Class Period. Accordingly, the Notice should be approved because it
28 describes the Settlement with sufficient clarity and specificity to explain to Class Members what
this action is about, their rights under the Settlement, and how to exercise those rights. As such,



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1 the parties' proposed Notice fully complies with California Rules of Court 3.766(d) and 3.769(f)
2 and will allow Class Members to make informed responses to the proposed settlement.

3
4 ***Settlement Administration Duties***

5 40. The duties of the Settlement Administrator are spelled out in the Settlement and in
6 the bid provided by ILYM Group, Inc. a true and correct copy of which is attached hereto as
7 **Exhibit 7.**

8 ***Settlement Administration Costs***

9 41. With regard to the settlement administration costs provision, it is reasonable.
10 Before agreeing to ILYM Group, Inc. the Parties sought and reviewed bids from other reputable
11 third-party administrators: (A) Phoenix Class Administration Solutions = \$6,000.00; (B) ILYM
12 Group, Inc. = \$5,850.00; and C) CPT Group, Inc. = \$9,000.00. A true and correct copy of the bid
13 from Phoenix Class Administration Solutions is attached hereto as **Exhibit 8.** A true and correct
14 copy of the bid from CPT Group, Inc is attached hereto as **Exhibit 9.** The bid provided by ILYM
15 Group, Inc. was comparable. Thus, settlement administration costs provision should be given
16 preliminary approval.

17 I declare under the penalty of perjury of the laws of the State of California that the
18 foregoing is true and correct.

19 Executed on Thursday, September 12, 2024 at Los Angeles, California.



20
21 DAVID SPIVAK,
22 Declarant



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PROOF OF SERVICE

State of California,
County of Los Angeles

1. I am a citizen of the United States and am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and not a party to the within action. My business address is 1801 Century Park East, 25th Fl, Los Angeles CA 90067.

2. I am familiar with the practice of The Spivak Law Firm, for collection and processing of correspondence for mailing with the United States Postal Service. It is the practice that correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On Thursday, September 12, 2024, I served the foregoing document described as **AMENDED DECLARATION OF DAVID SPIVAK IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** on interested parties by electronic mail, addressed as follows:

Paul Robert Burns, Esq.
Law Offices of Paul R. Burns, P.C.
2700 Gibraltar Rd
Santa Barbara, CA 93105
paulburnslaw@gmail.com

XXXX (BY EMAIL) I caused the documents to be sent to the persons at the electronic service addresses listed above from my electronic service address nazie@spivaklaw.com.

EXECUTED on Thursday, September 12, 2024, at Fresno, California.

XXXX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



NAZIE ELENA BAHARLOO