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12 Attorneys for Plaintiff,
13 JOSE LOZANO SANDOVAL, and all others similarly situated

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF SAN BERNARDINO**
16 **(UNLIMITED JURISDICTION)**

17
18 JOSE LOZANO SANDOVAL, on behalf of
himself and all others similarly situated, and the
19 general public,

20 *Plaintiff,*

21 vs.

22
23 AMERICAN LANDSCAPE &
MAINTENANCE INC., a California corporation;
24 and DOES 1–50, inclusive,

25 *Defendants.*
26

Case No. CIVDS2011904

**DECLARATION OF DAVID SPIVAK
IN SUPPORT OF PLAINTIFF JOSE
LOZANO SANDOVAL’S MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**



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7. The Parties discussed the possibility of settling the lawsuit without attending mediation because Defendant's counsel indicated that Defendant has financial troubles. The Parties thereafter engaged in an informal, voluntary exchange of information in the context of privileged settlement discussions to facilitate an early resolution of the lawsuit. Defendant produced Plaintiff's entire personnel file (including policies and agreements he signed and acknowledged), and Defendant's confidential financial records including balance sheets and an Internal Revenue Service letter regarding Defendant's unpaid tax obligations. Based on Defendant's financial records, the Parties continued their settlement discussions. On September 8, 2021, the Parties agreed to settle for \$250,000.00, paid in 48 monthly installments of \$5,208.33. The Parties concluded that no other Settlement was possible given Defendant's financial limitations.

Ascertainable and Numerous Class

9. The Settlement Class has sufficiently numerous members to render joinder impractical. No set number is required as a matter of law to maintain a class action. The California

9. The Settlement Class has sufficiently numerous members to render joinder impractical. No set number is required as a matter of law to maintain a class action. The California

4	
<i>Sandoval v. American Landscape & Maintenance Inc., et al.</i>	Spivak Decl. ISO Plaintiff Jose Lozano Sandoval's Motion for Preliminary Approval of Class Action Settlement



Supreme Court has upheld a class of as few as 10 individuals. Defendant estimates that there are approximately 634 Class Members.

Predominant Common Questions

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

Typicality

11. Plaintiff contends that his claims are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that he, like absent Class Members was subject to the same relevant policies and procedures governing his compensation, reimbursement for business expenses, hours of work and meal and rest periods.

Adequacy

12. To the best of my knowledge, neither Plaintiff nor I have any conflicts of interest with the absent Settlement Class members. Plaintiff contends that he is an adequate class



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1 representative. Plaintiff and the Class Members have strong and co-extensive interests in this
2 litigation because they all worked for Defendant during the relevant time period, allegedly
3 suffered the same alleged injuries from the same alleged course of conduct, and there is no
4 evidence of any conflict of interest between Plaintiff and the Class Members. Moreover, Plaintiff
5 has demonstrated his commitment to the Settlement Class by, among other things, retaining
6 experienced counsel, providing counsel with documents and extensively speaking with them to
7 assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as
8 well as exposing himself to the risk of attorneys' fees and costs awards against him if this lawsuit
9 had been unsuccessful. Thus, Plaintiff is adequate to serve as settlement class representative.

10 ***Background of Class Counsel: David G. Spivak of The Spivak Law Firm***

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

14 **14.** In December of 1995, the Supreme Court for the State of California admitted me
15 as an Attorney and Counselor at Law and licensed me to practice law in all the Courts of this
16 State. On May 11, 2012, I also became admitted to the District of Columbia Bar. In February
17 2013, I became admitted to the New York State Bar.

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

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

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

27 a. *Ricardo Sandoval v. Dept. of Treasury*, United States District Court,
28 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
4 Trial: Agent Alleges Corruption, White Supremacist Cabal" by Valerie Alvord, San Diego
5 Union-Tribune, April 29, 1998; "Customs Agent Is Awarded \$200,000: Jury Says He Faced Bias
6 And 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
12 in 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
16 (the Honorable Michael Rutberg presiding), 2001. Plaintiff whistleblower brought civil rights
17 claims and wrongful termination claims against employer in a month-long jury trial. The jury
18 awarded compensatory and punitive damages. See "Activist Says Criticism of Rail Plan Cost His
19 Job" by Dan Weikel, Los Angeles Times, September 28, 2000; "Punitive Damages Awarded to
20 Fired 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
27 was litigated, the State Bar of California awarded me the Wiley W. Manuel Award for Pro Bono
28 Legal Services.



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1 e. *Rick Pierce v. Department of Treasury*, Merit Systems Protection Board
2 (1999). Administrative Judge awarded compensatory damages to wrongfully terminated
3 Customs Agent, followed by an award of Attorneys' fees and costs.

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

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

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

25 **19.** In my representation of employees, I have prosecuted several lawsuits on behalf
26 of employees with claims of rest and meal period and overtime violations or other wage claims.



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1 **20.** I have been involved in the prosecution of numerous wage and hour class actions
2 at various stages of litigation. A small sampling of the wage and hour class action cases in which
3 I have recently been counsel of records is as follows:

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

7 b. *Cuellar v. Lovin Oven*, Orange County Superior Court, Case No. 30-2010-
8 000382146 (appointed Class Counsel and granted final approval of class action settlement by the
9 court on behalf of nonexempt employees).

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

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

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

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

23 g. *Huynh v. Carefusion Resources, LLC, et al.*, San Diego Sup.Ct., Case No.
24 37-2009-00103277-CU-OE-CTL (appointed Class Counsel and granted final approval of class
25 action settlement on behalf of medical devices employees).

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



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

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

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

10 l. *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case No. S-
11 1500-CV-282679 (appointed Class Counsel and granted final approval of class action settlement
12 on behalf of dairy and agricultural laborers).

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

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

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

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



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

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

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

10 t. *Valencia v. SCIS Air Security Corp.*, Los Angeles Superior Court, Case
11 No. BC421485 (granted class certification through contested motion and appointed Class
12 Counsel in case on behalf of former security workers based on late final wage payments in
13 violation of Labor Code §§ 201–203).

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

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

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

24 ***Class Action Treatment Is Superior***

25 **21.** A class action is also superior to other means adjudicating the issues in this action.
26 The predominance of common legal and factual questions shows that this Court could fairly
27 adjudicate the claims of Class Members through a single class action. In view of the *theoretical*
28 alternatives that proposed class members could potentially utilize—representative PAGA action



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(where there is less relief available), individual civil lawsuits or wage claims through the Division of Labor Standards Enforcement (where there would be relatively little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly superior to all of them. Thus, this consideration supports conditional class action treatment for purposes of this Settlement only.

The Settlement is Presumptively Fair

22. The class settlement here satisfies all of the *Kullar* factors. The Settlement resulted from thorough, arms' length, negotiations between experienced counsel after sufficient discovery and Defendant's financial documents were exchanged to assess the relative strengths and weaknesses of their respective cases and Defendant's estimated exposure. Both defense counsel 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 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

23. I prepared "damages" estimates in advance of settlement negotiations. Attached as **Exhibit 12** are true and correct copies of the damages spreadsheets I prepare. As part of the settlement negotiations, Plaintiff determined Defendant's maximum exposure for restitution and penalties to be approximately \$58,887,804.66 (consisting of \$4,008,034.80 in unpaid wages, \$4,008,034.80 in liquidated damages, \$3,458,032.70 in missed meal period premium wages, \$3,493,318.75 in missed rest break premium wages, \$13,741,833.60 for reimbursement for business expenses, \$1,217,900.00 for wage statement penalties, \$1,617,000.00 for waiting time penalties, and \$30,011,350.00 for civil penalties). The estimates are in essence "home run" projections that omit data points that will undoubtedly reduce the maximum possible damages award and do not factor in any of the risks involved in litigating this Action. Plaintiff calculated



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1 the damages based on the number of workweeks and pay periods provided by Defendant,
2 Plaintiff's reports, and the sample data. *Id.* Plaintiff also considered the possibility that Defendant
3 could launch a *Pick Up Stix* campaign and pursue individual release agreements from the Class
4 Members. Plaintiff's Counsel applied discounts to the maximum exposure to account for all other
5 risks discussed below. While it is difficult to assign anything but crudely-determined percentages
6 of risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would
7 preclude recovery for such employees is substantial and alone justifies a significant discount
8 because Defendant would likely by trial have gathered releases from the majority of the Class
9 Members.

10 **24.** My initial estimates do not realistically account for the risks outlined below or the
11 risk that a class will not be certified. Nor do these initial estimates reflect Defendant's financial
12 limitations. Therefore, I believe a class settlement for \$250,000.00 is fair and reasonable.

13 **25. Risks Associated with Defendant's Financial Condition.** Defendant's financial
14 condition was one key factor in reaching this Settlement. Due to Defendant's financial condition,
15 even if Plaintiff prevailed on all claims at trial, he may never recover the damages due to the risk
16 of insolvency. Defendant provided Plaintiff with financial records reflecting its debt. A large
17 class action judgment would almost certainly put the company out of business and/or would
18 interfere with the company's ability to carry out its contractual obligations.

19 **26. Risks Associated with Unpaid Wages Claim.** There is a risk that Plaintiff's
20 recovery for unpaid wages would be limited because Defendant's written policies throughout the
21 relevant time period informed employees that they were not required to report to work prior to
22 the start of their shifts. Off-the-clock claims are difficult where a defendant requires in its written
23 policies that all work must take place while clocked in. In its written Notice to Employees,
24 Defendant states that employees only obligation is to report to work on time. Moreover, while
25 Defendant disputes that off-the-clock work occurred, they contend that any time spent off the
26 clock was *de minimis*. Defendant contends that the *de minimis* doctrine may apply here because
27 the time spent off the clock were minute and insignificant. Accordingly, a large award of
28 penalties seems unlikely with respect to this claim.



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1 27. The difficulty inherent in proving that off-the-clock work occurred poses a
2 significant hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove
3 this claim. There is a significant risk that the Court would consider this evidentiary showing
4 insufficient as a classwide methodology.

5 28. **Risks Associated with the Meal Period Claims.** There are risks to Plaintiff's
6 meal period claim. Defendant contends they did not impede or discourage Plaintiff, or any other
7 employees, from taking their meal or rest periods. Accordingly, there is a risk that the value of
8 Plaintiff's meal period claim would be substantially reduced at trial.

9 29. **Risks Associated with the Rest Break Claims.** There are risks to Plaintiff's rest
10 period claim. Defendant contends they provided non-exempt employees the opportunity to take
11 rest periods in accordance with California law. Unlike meal periods, where there are often records
12 showing whether an employee clocked out or not, there is no such evidence to prove a missed
13 rest period or that the employer refused to authorize and permit one. *Id.* Managing such claims
14 at trial has become exceedingly difficult. Plaintiff will depend on sample witness testimony and
15 surveys to prove the claims. While a victory with such evidence is certainly possible, relevant
16 caselaw makes such claims risky from a trial management and due process perspective. *See*
17 *Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common
18 questions exist to support class certification, it may be possible to manage individual issues
19 through the use of surveys and statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015)
20 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

21 30. **Risks Associated with the Failure to Indemnify Claim.** There is a risk that the
22 Court may consider Plaintiff's claims as to Defendant's alleged failure to indemnify for business
23 expenses to be individual in nature and thus decline to certify the class. Plaintiff alleges that
24 Defendant required Plaintiff and the Class Members to use their personal vehicles to commute
25 to, from, and between job sites and failed to indemnify them for these business expenses.
26 Defendant presented evidence that it has supplied its employees with vehicles to commute to,
27 from, and between job sites. As such, there is a risk that the Court may consider Plaintiff's claims
28 to be individual in nature and unfit for class wide resolution.



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1 **31. Risks Associated with the Statutory “Wage Statement” Penalty Claims.**

2 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and PAGA
3 penalties. Here, Plaintiff’s wage statement claim has the same underlying risks as the above
4 claims, as it is derivative of them. *Id.* On their face, the wage statements issued by Defendant
5 comply with the requirements of Labor Code § 226. *Id.* Further, to the extent that Plaintiff claims
6 Defendant’s wage statements were inaccurate because they did not include wages or premium
7 payments that Plaintiff contends Defendant should have paid, Plaintiff’s claims were subject to
8 additional risk at the time the Parties negotiated this Settlement, as case law suggested that such
9 premium payments were not to be considered wages, and therefore do not give rise to claims
10 under section 203. *Id.* See *Jones v. Spherion Staffing, LLC*, 2012 U.S. Dist. LEXIS 112396 at *
11 26 (C.D. Cal. Aug. 7, 2012) (no claim for Labor Code section 203 penalties based on meal period
12 claims because “the underlying violation that gives rise to a section 226.7 [meal period] claim is
13 not the nonpayment of wages”); *Nguyen v. Baxter Healthcare Corp.* 2011 U.S. Dist. LEXIS
14 141135 at * 24 (C.D. Cal. Nov. 28, 2011) (holding that Section 226(a) does not even cover meal
15 period premium pay). Accordingly, the *Jones* and *Nguyen* decisions will likely foreclose this
16 claim.⁶

17 **32. Risks Associated with The Waiting Time Penalties Claim.** Plaintiff’s claims
18 for untimely wages is predicated on Labor Code §§ 201, 202, and 203. At the time the Parties
19 negotiated the Settlement, Defendant argued that based on the *Jones* and *Nguyen* decisions,
20 *supra*, that meal or rest premium pay is not a “wage” for purposes of Labor Code section 203
21 penalties.

22 **33. Risks Associated With the PAGA Claim.** Regarding PAGA, a court has
23 discretion to award a lesser amount than the maximum penalty. As set forth above, Defendant
24 has posed valid defenses to the Labor Code claims underlying Plaintiff’s PAGA allegations.

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⁶ Moreover, the Court of Appeal’s decision in *Naranjo v. Spectrum Security Services, Inc.* (2019)
40 Cal.App.5th 444, holding that a defendant’s failure to pay meal premiums does not give rise
to violations of Labor Code sections 226 or 203, was pending before the California Supreme
Court when the Parties negotiated this Settlement. *Naranjo v. Spectrum Security Services, Inc.*
2020 Cal. LEXIS 167.



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1 Thus, the PAGA claims likewise face significant uncertainty. There is a risk that the Court would
2 consider the maximum civil penalty available to be confiscatory. Moreover, the current COVID-
3 19 pandemic could motivate the Court to further reduce the penalty award to avoid what it may
4 consider a confiscatory taking.

5 **34.** This uncertainty increases Plaintiff’s risk of pursuing the PAGA claims and
6 required a significant discount for settlement purposes. For settlement negotiation purposes,
7 Plaintiff’s counsel estimated a maximum exposure of approximately \$30,011,350.00 in civil
8 penalties. This estimate did not take into account any of the risks discussed above and assumed
9 a violation for every single pay period. *Id.* Plaintiff’s counsel also assessed multiple penalties for
10 the same pay period for the same alleged violations of different Labor Code provisions and
11 derivative violations. Although two federal district court decisions held that “stacking” PAGA
12 penalties in this fashion may be appropriate to determine the amount in controversy for purposes
13 of removal jurisdiction, Plaintiff’s counsel is not aware of any California state courts awarding
14 plaintiffs multiple PAGA penalties for the same violation for the same pay period under different
15 Labor Code provisions. This may be because the PAGA does not provide for what many
16 employers characterize as claim splitting and not merely stacking.

17 **35.** I am aware of only two significant awards under the PAGA in a contested
18 proceeding, both issued by federal district courts.⁸ PAGA penalty awards are often small even
19

20 ⁸ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded
21 civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from
22 plaintiff’s claim for approximately \$33 million. *Bernstein* represents a unique set of
23 circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein*
24 suffered a particularly sizeable injury – the court found that the defendant’s policies caused
25 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in
26 *Bernstein*, who the court noted had received “millions of dollars from the state of California” to
27 train their flight attendants, engaged in glaring violations of the labor code, such as failing to
28 compensate its flight attendants for work performed outside of “block time” (time during which
the aircraft is moving), including time spent participating in pre-flight briefings, boarding
passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049,
1055-1058. Indeed, the defendant’s liability was so clear in *Bernstein* that the case was resolved
on the plaintiffs’ motion for summary judgment. *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019)
U.S. Dist. LEXIS 13253.



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1 for egregious, intentional violations of the Labor Code.⁹

2 **36.** For instance, on October 24, 2017, the Los Angeles County Superior Court
3 awarded a prevailing PAGA plaintiff, represented by very experienced counsel, civil penalties
4 totaling only \$50.00. *Shields v. Security Paving Company, Inc.*, LA Superior Court case no.
5 BC492828. Further, in *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018), the Court
6 of Appeal affirmed judgment which provided for a PAGA penalty of only \$5 per pay period for
7 the defendant's meal period violations. A similar result could occur here.

8 **37. Risks Associated With A Pick-Up Stix Campaign.** An employer enjoys the
9 right to settle a putative class member's disputed wage claims individually, without the consent
10 or involvement of class counsel. (See *Chindarah v. Pick Up Stix, Inc.* 171 Cal. App. 4th 796
11 (2009). As discussed above, Defendant may launch a "pick off" settlement campaign to pursue
12 individual release agreements from the Class Members, thereby potentially narrowing the size of
13 the Settlement Class –approximately 634 members - until it is no longer numerous enough for
14 class certification. *Id.* Plaintiff, then, may not have sufficient number of employees to represent.
15 This led to a significant reduction of claim value in settlement negotiations.

16 **38.** While the evidence gathered through Plaintiff's discovery supports the merits of
17 the claims asserted in this lawsuit, Plaintiff and his counsel recognize that continued litigation
18 presents significant risks that support a downward departure from Defendant's estimated liability
19 exposure. In view of the risks, the Settlement reflects my estimate of the total amount of damages,
20 monetary penalties or other relief that the Class could reasonably expect to be awarded at trial,
21 taking into account the likelihood of prevailing and other attendant risks. It also represents a fair,
22

23 ⁹ In 2012, I tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles County Superior Court case
24 number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. A true
25 and correct copy of the complaint is attached as **Exhibit 10**. The plaintiff sought in excess of \$9
26 million in civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M.
27 Sohigian awarded approximately \$325,000 in civil penalties under the PAGA. A true and correct
28 copy of the statement of decision is attached as **Exhibit 11**, 19:8-20:19. Also, on October 24,
2017, the Los Angeles County Superior Court awarded a prevailing PAGA plaintiff civil,
represented by very experienced counsel, penalties totaling only \$50.00. *Shields v. Security
Paving Company, Inc.*, LA County Superior Court case no. BC492828. A similar result could
occur here.



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adequate, and reasonable compromise amount for these claims and warrants preliminary approval. *Id.*

Allocation of the PAGA Payment

39. The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00) will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is reasonable and appropriate under the circumstances. The Parties negotiated a good faith amount for PAGA penalties to be paid to the LWDA and to the Class. The portion to be paid to the LWDA was not the result of self-interest at the expense of other Class Members.

40. As required under Labor Code section 2699(1)(2), Plaintiff will provide notice of this settlement to the LWDA.

41. If the settlement is preliminarily approved, Class Members will be provided with the Notice of Proposed Settlement and an opportunity to object to or request exclusion from the Settlement. The Parties' proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and will allow Class Members to make informed responses to the proposed settlement.

Attorneys' Fees and Costs

42. I intend to request Class Counsel's attorneys' fees of \$83,333.00 (one-third of the Gross Settlement Amount) for the attorneys representing Plaintiff in the Action, myself Walter L. Haines of United Employees Law Group. I further intend to request litigation costs, which were incurred in prosecuting this Action. I currently estimate these litigation costs to be approximately \$12,500.00 at the conclusion of matters related to the Settlement. In view of my efforts and risks in pursuing this case these amounts are well within the range of reasonableness and thus warrant this Court's preliminary approval. In addition, based on my experience in wage and hour class action matters, fee awards of approximately one-third of the settlement fund are routinely approved as reasonable. I have been awarded attorneys' fees equaling approximately one-third of the fund in several recent wage and hour class actions, including: *Alvarez v. Gary Grace Enterprises, LP*, Marin County Superior Court, Case No. CIV1002553 (one-third of fund); *Calderon v. Greatcall, Inc.*, San Diego Superior Court, Case No. 37-2010-00093743-CU-OE-



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1 CTL (one-third of fund); *Butler v. Lexxiom, Inc.*, San Bernardino County Superior Court, Case
 2 No. CIVRS1001579 (one-third of fund); *Perez v. Southwest Dealer Services, Inc.*, Los Angeles
 3 County Superior Court, Case No. BC439253 (one-third of fund); *O'Brien v. Optima Network*
 4 *Services, Inc.*, San Bernardino County Superior Court, Case No. CIVRS1107056 (one-third of
 5 fund); *Noyd v. The Cristcat Group, et al.*, Los Angeles County Superior Court, Case No.
 6 BC439558 (one-third of fund); *Huynh v. Carefusion Resources, LLC, et al.*, San Diego Sup.Ct.,
 7 Case No. 37-2009-00103277-CU-OE-CTL (one-third of fund); *Cunningham v. DPI Specialty*
 8 *Foods West, Inc.*, Los Angeles Sup.Ct., Case No. BC465017 (one-third of fund); *Stucker v.*
 9 *L'Oreal USA S/D, Inc.*, Los Angeles Sup. Ct., Case No. BC456080 (one-third of fund); *Valdez*
 10 *v. Healthcare Services Group, Inc.*, Los Angeles Sup.Ct., Case No. BC462917 (one-third of
 11 fund); *Hernandez, et al v. HSBC*, U.S. District Court, Central District of California, Case No. 10-
 12 CV-4753 (one-third of fund); *Sandoval, et al. v. Thrifty Payless, Inc.*, et al. Los Angeles Sup.Ct.,
 13 Case No. BC431249 (one-third of fund); *Alafa v. Custom Built Personal Training, Inc.*, Tulare
 14 County Superior Court, Case No. VCU-245496 (one-third of fund); *Nardone v. Sequoia*
 15 *Beverage Company, LP*, Tulare Sup.Ct., Case No. VCU-248370 (one-third of fund); *Rosen v.*
 16 *Image Transfer*, Los Angeles Sup.Ct., Case No. BC511702 (one-third of fund); *Tucker v. Maly's*
 17 *West, Inc.*, Los Angeles Sup.Ct., Case No. BC483920 (one-third of fund); *King v. Build.com*,
 18 Butte Sup.Ct., Case No. 159985 (one-third of fund); *Clifford v. Anderson Hay & Grain*, Los
 19 Angeles Sup.Ct., Case No. BC517625 (one-third of fund); *Nichols, et al. v. Vitamin Shoppe*,
 20 Contra Costa Sup.Ct., Case No. CIVMSC13-01136 (one-third of fund); *Clarke v. Insight Global*,
 21 U.S. District Court, Southern District of California, Case No. 13-CV-0357 (one-third of fund);
 22 *Fischer, et al. v. National Distribution Centers LP, et al.*, Riverside Sup.Ct., Case No.
 23 RIC1114952 (one-third of fund); *Shaw, et al. v. Interthinx, Inc.*, United States District Court for
 24 the District of Colorado, Case No. 13-CV-01229-REB-BNB (one-third of fund); *Ogbuehi v.*
 25 *Comcast of California/ Colorado/ Florida/ Oregon, Inc.*, United States District Court, Eastern
 26 District of California, Case No. EDCV13-00672-KJM-KJN (one-third of fund); *Lynch, et al. v.*
 27 *American Guard Services*, Los Angeles Superior Court, Case No. BC462681 (one-third of fund);
 28 *Volney-Parris v. Southern California Edison Company*, Los Angeles Superior Court, Case No.



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1 BC493038 (one-third of fund); *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case No.
2 BC480808 (one-third of fund); *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case
3 No. S-1500-CV-282679 (one-third of fund); *Linder, et al. v. Warehouse Services, Inc.*, San
4 Bernardino Superior Court, Case No. CIVDS1500146 (one-third of fund).

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

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

19 **45.** The Settlement provides that Plaintiff may seek a Class Representative Payment
20 of \$15,000.00. This amount is entirely reasonable given Plaintiff’s efforts in this Action and the
21 risks he undertook on behalf of Class Members. Plaintiff has devoted many hours advancing the
22 interests of the Settlement Class. Plaintiff has done this by, among other things, retaining
23 experienced counsel, providing them with information about his work history with Defendant
24 and Defendant’s policies and practices with respect to the wage and hour claims at issue, assisting
25 counsel in identifying witnesses, participating in settlement negotiations, and being actively
26 involved in the settlement process to ensure a fair result for the Settlement Class as a whole. In
27 doing this, Plaintiff has been exposed to significant risks, including the risk of an order to pay
28 Defendant’s attorneys’ fees and costs if this action had been unsuccessful (*See* Labor Code §§



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218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of the Settlement Class shows that the proposed is fair, adequate, and reasonable, and thus warrant preliminary approval.

Each Settlement Class member's allocated share of the Net Settlement Amount as provided by this Agreement and any payment a PAGA Member is eligible to receive from the employee portion of the PAGA Penalties

46. The Individual Settlement Payments will be paid to each Participating Class Member based on his or her eligible Work Weeks compared to the total Work Weeks of all Participating Class Members. The Settlement Administrator shall assign to each Class Member a "Settlement Ratio," which shall be a fractional number comprised of (a) that Class Member's Individual Workweeks as the numerator, and (b) the aggregate total of all Class Members' Individual Workweeks as the denominator. Because this method compensates Class Members based on the extent of their potential injuries, in that Class Members who worked for Defendant longer would have been subject to more alleged violations, it is fair, adequate, and reasonable.

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

47. The Settlement requires distribution of the Notice by First Class U.S. mail only. As such, notice by mail alone is fair, adequate, and reasonable. The Notice Packet (attached as Exhibits A through C to the Settlement) provides Class Members with all pertinent information that they need to fully evaluate their options and exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among other things: (1) what the Settlement is about; (2) who is a Settlement Class member; (3) how Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the estimated Individual Settlement Payment for each Class Member. Additionally, the Notice will include the number of Eligible Workweeks a Class Member had during the Class Period. Accordingly, the Notice should be approved because it 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, the Parties' proposed Notice fully complies with California Rules of Court



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1 3.766(d) and 3.769(f) and will allow Class Members to make informed responses to the proposed
2 settlement.

3 ***Settlement Administration Duties***

4 **48.** The duties of the Settlement Administrator are spelled out in section III(C) of the
5 Settlement and in the bid provided by Phoenix Class Action Administration Solutions, a true and
6 correct copy of which is attached hereto as **Exhibit 6**.

7 ***Settlement Administration Costs***

8 **49.** With regard to the settlement administration costs provision (Settlement §
9 I(N)(3)), it is reasonable. Before agreeing to Phoenix Class Action Administration Solutions the
10 Parties sought and reviewed bids from other reputable third-party administrators: (A) CPT
11 Group, Inc. = \$25,500; (B) Phoenix Class Action Administration Solutions = \$16,000; and C)
12 ILYM Group, Inc. = \$32,925.70. A true and correct copy of the bid from CPT Group, Inc. is
13 attached hereto as **Exhibit 7**. A true and correct copy of the bid from ILYM Group, Inc. is
14 attached to the Settlement as **Exhibit 8**. The bid provided by Phoenix Class Action
15 Administration Solutions was comparable. Thus, settlement administration costs provision
16 should be given preliminary approval.

17 ***Notice of Settlement to the LWDA***

18 **50.** Pursuant to Labor Code § 2699(1)(2), Plaintiff submitted a copy of the Settlement
19 with the Labor and Workforce Development Agency (“LWDA”) at the same time Plaintiff’s
20 Motion is being filed with the Court. A true and correct copy of Plaintiff’s submission with the
21 LWDA and a confirmation email is attached hereto as **Exhibit 9**.

22 I declare under the penalty of perjury of the laws of the State of California that the
23 foregoing is true and correct to the best of my knowledge.

24 Executed on August 19, 2022, at Los Angeles, California.

25 

26 **DAVID SPIVAK,**
27 **Declarant**



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