

SEYFARTH SHAW LLP
Jon D. Meer (SBN 144389)
jmeer@seyfarth.com
Caitlyn M. Crisp (SBN 294136)
ccrisp@seyfarth.com
Justin J. Jackson (SBN 333687)
jujackson@seyfarth.com
2029 Century Park East, Suite 3500
Los Angeles, California 90067-3021
Telephone: (310) 277-7200
Facsimile: (310) 201-5219

Attorneys for Defendant RALEY'S

THE SPIVAK LAW FIRM
David Spivak, Esq. (SNB 179684)
8605 Santa Monica Bl.
PMB 42554
West Hollywood CA 90069
Telephone: (213) 725-9094
Facsimile: (213) 634-2485

DIAMOND BAKER MITCHELL LLP
Craig A. Diamond (SBN 89361)
cdiamond@diamondbaker.com
149 Crown Point Court, Suite B
Grass Valley, CA 95945-9551
Telephone: (530) 272-9977 Work
Facsimile: (530) 272-8463

Attorneys for Plaintiff and the Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF NEVADA

DONALD E. DELAHUNT, on behalf of himself
and others similarly situated, and the general public,

Plaintiff,

v.

RALEY'S, a California corporation; and DOES 1-
50, inclusive,

Defendants.

CLASS ACTION

Case No. CU21-085853

Hon. Thomas M. Anderson, Dept. 6

**DECLARATION OF DAVID SPIVAK IN
SUPPORT OF JOINT MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

Action Filed: September 29, 2021
Discovery Cutoff: Off Calendar
Motion Cutoff: Off Calendar
Trial: Off Calendar

1 I, DAVID SPIVAK, declare and state as follows:

2 1. I am counsel of record for Plaintiff Donald E. Delahunt (“Plaintiff” in this action. I have
3 personal knowledge of the facts contained in this declaration and, if called as a witness, I could and
4 would testify under penalty of perjury as to their accuracy.

5 **FACTS REGARDING PLAINTIFF’S CLAIMS**

6 2. On July 16, 2021, Plaintiff inquired with Defendant’s payroll department why its payout
7 of his accrued vacation pay upon his resignation was short.

8 3. On August 4, 2021, Plaintiff notified Defendant and the California Labor and Workforce
9 Development Agency (“LWDA”) of his concerns by filing a PAGA claim notice with the LWDA.

10 **FACTS REGARDING SETTLEMENT NEGOTIATIONS**

11 4. After Defendant produced data showing the number of employees that were allegedly
12 underpaid vacation wages, the amount allegedly owed to each employee, and the dates of employment
13 for each employee who was allegedly underpaid, I discussed this payroll data with Mr. Meer, Counsel
14 for Defendant, in order to arrive at a potential settlement.

15 5. Mr. Meer and I discussed the approximate amount owed to each employee covered by the
16 Class Action Complaint and the PAGA Complaint, while taking into account the fact that some
17 employees had already released wage-related claims and penalties, in connection with prior class action
18 settlements.

19 **THE SETTLEMENT IS FAIR AND REASONABLE**

20 6. The Parties reached a settlement through negotiations over the course of several weeks
21 after investigating and discussing the claims, defenses, and potential damages. The Parties exchanged
22 information and data, conducted factual and legal research, and prepared damages analyses. The
23 settlement that has been reached, is the product of effort and expense by the Parties and Counsel.

24 7. The Parties negotiated a non-reversionary settlement of \$346,000 for a class of 1,864
25 Class Members, approximately 70% of whom were underpaid by less than \$100. I believe this to be an
26 excellent settlement for Class Members, when considering the issues and risks related to liability and
27
28

1 class certification, and also considering the case law regarding fair, reasonable, and adequate
2 settlements.

3 8. Plaintiff and I satisfied this settlement figure is reasonable in light of the risks and
4 expense of continued litigation.

5 **THE SETTLEMENT WAS NEGOTIATED AT ARM'S LENGTH AND NOT COLLUSIVE**

6 9. I analyzed the documents produced, including but not limited to vacation wage payroll
7 data for the provisional class members and the vacation wage formulas from the union's collective
8 bargaining agreements. Based thereon, I believe that Plaintiff would have a significant chance of
9 certifying the class for the vacation wages claim.

10 **THE SETTLEMENT IS WELL WITHIN THE RANGE OF REASONABLENESS GIVEN**

11 **PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES**

12 10. Plaintiff contends that Defendant underpaid the correct amount of vacation wages to
13 Class Members, during the time that it used a formula that based the amount of vacation wages on a
14 percentage of the prior year's wages.

15 11. Plaintiff contends that vacation wages should have been calculated based on an
16 employee's hourly rate or salary at the time vacation days were used.

17 12. Plaintiff contends that the Class Members would be entitled to recover "waiting time
18 penalties" for Defendant's failure to issue all earned wages immediately upon termination or within 72
19 hours of resignation under California Labor Code §§ 201, 202 and 203. These penalties are derivative of
20 the vacation wage underpayment claim. As a result of Defendant's alleged failure to pay all earned
21 wages immediately upon termination or within 72 hours of resignation, Plaintiff alleges that each former
22 employee could recover up to a maximum of a 30-day penalty.

23 13. Plaintiff alleges that the Class Members are entitled to recover penalties for "inaccurate
24 wage statements" under California Labor Code §226(e). As a result, each employee could recover up to
25 a maximum of a \$4,000.00 aggregate penalty pursuant to Labor Code §226(e), depending on the number
26 of pay periods she or he was issued a non-compliant wage statement.

1 14. Plaintiff contends that the Aggrieved Employees and the State of California are entitled
2 to recover civil penalties under PAGA for each pay period where vacation wages were underpaid.

3 **THE CLASS REPRESENTATIVE INCENTIVE PAYMENT REQUESTED IS REASONABLE**

4 15. The Class Representative Incentive Payment sought here is justified by the Class
5 Representative taking on the risk of suing his former employer for the benefit of potential class
6 members.

7 **THE PROPOSED ATTORNEY'S FEES AND COSTS ARE REASONABLE AND ROUTINELY**

8 **AWARDED**

9 16. Plaintiff is seeking an attorneys' fees award of up to \$85,000, which is just under 25% of
10 the Gross Settlement Amount.

11 17. At final approval, I will provide briefing to show that the requested fee is fair
12 compensation for undertaking complex, risky, and time-consuming litigation on a contingent fee basis.

13 18. In addition, I will provide adequate documentation for the actual costs expended on this
14 case.

15 **PLAINTIFF IS AN ADEQUATE CLASS REPRESENTATIVE AND I AM AN ADEQUATE**

16 **CLASS COUNSEL**

17 19. I am an experienced class action attorney and achieved a favorable settlement benefiting
18 the Class.

19 20. After a thorough investigation and numerous settlement discussions, the Parties arrived at
20 terms viewed as in the best interests of both the Class Members and the Parties.

21 21. No conflicts, disabling or otherwise, exist between Plaintiff and Class Members because
22 Plaintiff has standing to seek relief from Defendant based on alleged underpayment of vacation wages
23 and has the incentive to fairly represent all Class Members' claims to achieve the maximum possible
24 recovery.

25 22. The adequacy requirement is met where the plaintiff is represented by counsel qualified
26 to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class'
27 interests. In other words, where the plaintiff has adequate counsel, the plaintiff may represent the entire
28

1 class absent any disabling conflicts of interest that might hinder the plaintiff's ability to represent the
2 class.

3 23. To the best of my knowledge, I do not have any conflicts of interest with the absent Class
4 Members. Plaintiff contends that he is an adequate class representative. Plaintiff and the Class Members
5 have strong and co-extensive interests in this litigation because they all worked for Defendant during the
6 relevant time period, allegedly suffered the same alleged injuries from the same alleged course of
7 conduct, and there is no evidence of any conflict of interest between Plaintiff and the Class Members.
8 Moreover, Plaintiff has demonstrated his commitment to the Settlement Class by, among other things,
9 retaining experienced counsel, providing counsel with documents and extensively speaking with them to
10 assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as well as
11 exposing himself to the risk of attorneys' fees and costs awards against him if this lawsuit had been
12 unsuccessful. Thus, Plaintiff is adequate to serve as class representative.

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

16 25. In December of 1995, the Supreme Court for the State of California admitted me as an
17 Attorney and Counselor at Law and licensed me to practice law in all the Courts of this State. On May
18 11, 2012, I also became admitted to the District of Columbia Bar. In February 2013, I became admitted
19 to the New York State Bar.

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

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

26 28. Since I started practicing law, I have tried many cases before courts, arbitrators and
27 government agencies. Some of my cases are:
28

1 a. *Ricardo Sandoval v. Dept. of Treasury*, United States District Court, Southern
2 District of California (the Honorable Judith Keep presiding), 1998. Plaintiffs Special Agent for the U. S.
3 Customs Service alleged discrimination and retaliation in promotions and discipline. The jury awarded
4 compensatory damages. Court subsequently awarded additional back pay and gave Plaintiffs a
5 retroactive promotion. See “Lawsuit Puts Customs Service on Trial: Agent Alleges Corruption, White
6 Supremacist Cabal” by Valerie Alvord, San Diego Union-Tribune, April 29, 1998; “Customs Agent Is
7 Awarded \$200,000: Jury Says He Faced Bias And Retaliation” by Valerie Alvord, San Diego Union-
8 Tribune, May 16, 1998.

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

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

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

1 awarded me the Wiley W. Manuel Award for Pro Bono Legal Services.

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

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

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

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

26 30. In my representation of employees, I have prosecuted several lawsuits on behalf of
27 employees with claims of rest and meal period and overtime violations or other wage claims.
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 ///

24 ///

25 ///

26 ///

27 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

33. I declare under penalty under perjury under the laws of the State of California and the laws of the United States of America that the foregoing is true and correct, based on my own personal knowledge.

David Spivak

David Spivak