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11 CARLOS SIMON, and all others similarly situated
12 (additional attorneys listed on next page)

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

16 CARLOS SIMON, on behalf of himself, and
17 all others similarly situated, and as an
18 “aggrieved employee” on behalf of other
19 “aggrieved employees” under the Labor Code
20 Private Attorneys General Act of 2004,

21 *Plaintiff(s),*

22 vs.

23 AIRPORT VAN RENTAL, INC., a California
24 corporation; YAZDAN IRANI, a natural
25 person; and DOES 1 through 50, inclusive,

26 *Defendant(s).*

Case No.: CIV536624

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

Action filed: December 2, 2015
Hearing December 27, 2017
Date:
Hearing 1:30 p.m.
Time:
Hearing 2, Hon. Marie S. Weiner
Dept.:

ADDITIONAL ATTORNEY FOR PLAINTIFF

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1 **DECLARATION OF DAVID SPIVAK IN SUPPORT OF PLAINTIFF’S UNOPPOSED**
2 **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

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
5 an attorney of record for Plaintiff CARLOS SIMON (“Plaintiff” or “Simon”) in his Action
6 against Defendants Airport Van Rental, Inc. (“AVR” or “Airport Van Rental”) and Yazdan
7 “Yaz” Irani (collectively “Defendants”).

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

10 3. A true and correct copy of the executed Stipulation of Class Action Settlement
11 and Release (the “Settlement”) is attached hereto as **Exhibit 1**.

12 ***Factual and Procedural Background***

13 4. AVR, a California corporation, is a vehicle rental business. Defendants
14 employed Plaintiff as a rental agent from approximately November of 2012 to approximately
15 July 12, 2014, and from approximately September of 2014 to approximately August 5, 2015. As
16 set forth in the Action, Plaintiff alleges Defendants failed to correctly pay its hourly non-exempt
17 employees working in California overtime wages at the correct rate; failed to provide lawful
18 meal breaks or pay required premiums; failed to timely pay all wages owed during employment
19 or upon termination; failed to provide lawful itemized wage statements; failed to maintain
20 proper employment records; and by so doing, engaged in unfair competition. Plaintiff has
21 claimed, and continues to claim, that his contentions have merit and give rise to Defendants’
22 liability.

23 5. By a letter dated December 2, 2015, Plaintiff, on behalf of himself and other
24 aggrieved employees, gave written notice by certified mail to the California Labor and
25 Workforce Development Agency (“LWDA”) and Defendant AVR of violations of California
26 Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198. A true
27 and correct copy of this letter is attached as **Exhibit 2**. In his September 17, 2015 letter, Plaintiff
28 defines the aggrieved employees as all of Defendant AVR’s current and former hourly rental
29 agents.

30 6. On December 15, 2015, Plaintiff filed his class action lawsuit against AVR in
31 San Mateo County Superior Court. A true and correct copy of Plaintiff’s lawsuit is attached as

1 **Exhibit 3.** Simon alleged four causes of action: (1) failure to pay for all hours worked at the
2 correct rates of pay, (2) failure to provide rest periods, (3) failure to provide meal periods, (4)
3 failure to provide accurate written wage statements, (5) waiting time penalties, and (6) unfair
4 competition. *Id.* On January 8, 2016, Plaintiff filed a first amended complaint adding a sixth
5 cause of action for civil penalties under the Labor Code Private Attorneys General Action,
6 Labor Code §§ 2698, *et seq.* (“PAGA”). A true and correct copy of Plaintiff’s first amended
7 complaint is attached as **Exhibit 4.** On December 1, 2017, Plaintiff filed a second amended
8 complaint that adds Yazdan “Yaz” Irani, Airport Van Rental’s part owner and chief executive
9 officer, as a Defendant. In the Action, Plaintiff alleges various wage and hour violations and
10 seeks recovery on behalf of himself and “All persons Defendants employed in California as
11 hourly employees, including rental agents, and in other comparable positions at any time during
12 the period beginning four years prior to the filing of this action and ending on the date that final
13 judgment is entered in this action.” A true and correct copy of Plaintiff’s second amended
14 complaint is attached as **Exhibit 5.**

14 ***Mediation and Settlement***

15 7. On August 10, 2016, the Parties attended and participated in good faith, arms’
16 length settlement discussions at a mediation session with Jeffrey L. Krivis, Esq., a highly
17 experienced professional mediator, after which they agreed to settlement terms which are
18 encompassed in and superseded by this Settlement. This Settlement was reached after
19 substantial exchanges of data, information and documents before and during the mediation, and
20 is a result of extensive arms-length negotiations. The Parties conducted significant investigation
21 of the facts and law applicable to the Action, including, inter alia, extensive review and analysis
22 of voluminous documents including Defendants’ employment policies, and procedures,
23 interviews of potential witnesses, data analysis including payroll records and records of time
24 worked and work performed by counsel and experts, meetings and conferences between counsel
25 for the Parties before, during and after mediation, as well as the financial position of the
26 Defendant AVR and have diligently pursued investigation of claims alleged against Defendants.

27 8. As part of their settlement negotiations, Defendants disclosed certain financial
28 records to Plaintiff’s Counsel under a declaration under penalty of perjury by Defendant Yazdan
“Yaz” Irani dated December 1, 2017. I have reviewed the declaration and the financial records
attached to it. Based on such records and representations in the declaration, Plaintiff, on his own

1 behalf and on behalf of the Class Members, has agreed to settle the lawsuit on the terms set
2 forth herein.¹

3 9. Counsel for the Parties have further investigated the applicable law as applied to
4 the facts discovered regarding Plaintiff's claims, the defenses thereto, the Defendant AVR's
5 ability to pay any settlement and the damages and penalties claimed by Plaintiff in the Action,
6 and exchanged extensive data, documents and information regarding the claims prior to the
7 mediation and negotiating the Settlement. Based on their own independent investigation and
8 evaluation, Plaintiff and Class Counsel believe that this Settlement is fair, reasonable, and
9 adequate and is in the best interest of the Settlement Class in light of all known facts and
10 circumstances, including the financial position of the Defendant AVR, the risks of significant
11 delay, denial of a motion for class certification, decertification, defenses asserted by
12 Defendants, and potential appellate issues. Now that the Parties have finalized the long-form
13 Settlement, Plaintiff submits it to this Court for preliminary approval.

14 ***Class Definitions in Operative Complaint and Settlement***

15 10. "Class Members" (collectively referred to as the "Class") are all persons
16 Defendants employed in California as hourly employees, including rental agents, and in other
17 comparable positions at any time during the Class Period. For purposes of this Settlement, the
18 "Class Period" means December 15, 2011 through the date of preliminary approval of the
19 Settlement by the Court. The "Settlement Class Members" (collectively referred to as the
20 "Settlement Class") mean those Class Members who do not timely and validly exclude
21 themselves from the Settlement in accordance with the requirements set forth in the Settlement.
22 Settlement, ¶¶ 3, 8. Defendants represent that as of August 10, 2016, there were approximately
23 95 Class Members. Settlement, ¶ 3. There are currently 106 Class Members. The class
24 definition in the operative complaint falls within the Class definition. As such, the Class does
25 not exclude any putative class members or claims currently covered by the operative complaint.

26 ***Ascertainable and Numerous Class***

27 11. The Class is ascertainable because its members may be identified by reference to
28 Defendants' records and Defendants have agreed to share the relevant information from their
29 records to facilitate the process. Settlement, ¶ 34. Therefore, the Settlement Class is

¹ If the Court wishes to examine the financial records, the Parties will produce them with Mr. Irani's declaration under seal for *in camera* review.

ascertainable.

12. Defendants estimate that there are approximately 106 Class Members. It would be impractical and economically inefficient to require each Class Member to separately maintain an individual action or be joined as a named plaintiff in this action. In light of these considerations, the Class' membership is sufficiently numerous.

Predominant Common Questions

13. 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. In this case, Plaintiff asserts that common questions include, but are not limited to: (1) Whether Defendants failed to include their hourly employees' commission in the regular rate of pay for purposes of calculating overtime pay rates; (2) Whether Defendants' meal and rest period policy did not provide timely meal and rest periods to the hourly employees working in California, and failed to pay the required premiums for workdays with unprovided meal and rest periods under the Wage Order §§ 11 and 12 and Labor Code § 512; and (3) Whether Defendants knowingly and intentionally failed to provide accurate wage statements under Lab. Code §§ 226 and willfully failed to pay all wages upon discharge under Lab. Code §§ 201 and 203. In view of the claims asserted, Plaintiff maintains the answers to these and other common questions could determine liability to Settlement Class Members on the core claims in this case, as well as the derivative claims for statutory and civil penalties. Therefore, common questions predominate.

Typicality

14. Plaintiff's claims are typical for the purposes of certifying the Class. Plaintiff, like absent Class Members, worked for Defendants as an hourly employee while subject to the same relevant policies and procedures governing his compensation, hours of work and meal and rest periods. Because Plaintiff contends that he was subject to the same general course of conduct as absent Settlement Class Members, resolving the common questions as they apply to Plaintiff will determine Defendants' *prima facie* liability to the all Settlement Class Members. Moreover, Plaintiff's claims could potentially be subject to the same primary affirmative defenses as those of absent Class Members. Accordingly, Plaintiff's claims are typical of the Class.

Adequacy

15. To the best of my knowledge, neither Plaintiff nor I have any conflicts of interest

1 with the absent Class Members. Plaintiff contends that he is an adequate class representative.
2 Plaintiff and the Class Members have strong and co-extensive interests in this litigation because
3 they all worked for Defendants during the relevant time period, allegedly suffered the same
4 alleged injuries from the same alleged course of conduct, and there is no evidence of any
5 conflict of interest between Plaintiff and the Class Members. Moreover, Plaintiff has
6 demonstrated his commitment to the Class by, among other things, retaining experienced
7 counsel, providing counsel with documents and extensively speaking with them to assist in
8 identifying the claims asserted in this case, assisting them in contacting Class Members and
9 gathering information from them, meaningfully participating in the negotiations that led to the
10 Settlement, and exposing himself to the risk of attorneys' fees and costs awards against him if
11 this lawsuit had been unsuccessful. Thus, Plaintiff is adequate to serve as class representative.
12 Accordingly, this Court should find that Plaintiff and his counsel are adequate to represent the
13 Settlement Class as required under Code of Civil Procedure § 382.

14 ***Background of Class Counsel***

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

18 17. While in Law School, I externed for the Honorable Judith Chirlin (ret.) and the
19 Honorable Bernard Kaufman (ret.), both Judges of the Los Angeles Superior Court, Central
20 District. I also externed for the California Attorney General.

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

24 19. I began practicing law with the Law Offices of David L. Ross after I was
25 admitted to the Bar. The Law Offices of David L. Ross later merged with other law firms to
26 become Ross, Rose & Hammill, LLP. At these firms, my legal work focused primarily on
27 representation of federal employees. I practiced before a variety of tribunals, including the Merit
28 Systems Protection Board, the Equal Employment Opportunity Commission, California State
courts, and several federal courts throughout the country. I represented many individuals with
employment claims against the U.S. Government.

20. I chose to open my own practice in April of 2000. At that time, I formed Spivak

1 & Harrison, LLP with David Harrison. Spivak & Harrison, LLP concentrated in the areas of
2 employment law and investor rights. Until Spivak & Harrison, LLP began to dissolve in about
3 August of 2007, my practice focused on public and private employee rights claims before
4 arbitrators (including the ADR Services, Judicate West, National Association of Securities
5 Dealers (now the Financial Industry Regulatory Authority), the State and federal courts, Merit
6 Systems Protection Board, the California Labor & Workforce Development Agency, the
7 California Division of Labor Standards Enforcement, the California Unemployment Insurance
8 Appeals Board and the Equal Employment Opportunity Commission.

9 21. In August of 2007, I formed The Spivak Law Firm. With the Spivak Law Firm,
10 my practice is focused on representation of private and public employees with claims of unpaid
11 wages, wrongful termination, harassment, family and medical leave, whistleblowing,
12 discrimination, benefits, and civil rights violations. One of my websites,
13 *FightWrongfulTermination.com*, provides a further description of my practice. I am also of-
14 counsel to the law firm of Aidikoff, Uhl & Bakhtiari and frequently advise them on matters
15 involving employment law.

16 22. I am experienced in handling employment law matters and specifically wage and
17 hour cases. I have been practicing law since 1995. My experience has been almost exclusively
18 in the area of employment law representing employees with claims of wrongful termination,
19 harassment, whistleblower retaliation, discrimination, wage and hour, and family and medical
20 leave violations. I have tried many cases before California and federal courts, government
21 agencies and neutral arbitrators. I am a member of the California Employment Lawyers
22 Association (CELA).

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

25 A. *Ricardo Sandoval v. Dept. of Treasury*, United States District Court,
26 Southern District of California (the Honorable Judith Keep presiding), 1998. Plaintiffs Special
27 Agent for the U. S. Customs Service alleged discrimination and retaliation in promotions and
28 discipline. The jury awarded compensatory damages. Court subsequently awarded additional
back pay and gave Plaintiffs a retroactive promotion. See "Lawsuit Puts Customs Service on
Trial: Agent Alleges Corruption, White Supremacist Cabal" by Valerie Alvord, *San Diego
Union-Tribune*, April 29, 1998; "Customs Agent Is Awarded \$200,000: Jury Says He Faced

1 Bias And Retaliation" by Valerie Alvord, *San Diego Union-Tribune*, May 16, 1998.

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

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

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

24 E. *Rick Pierce v. Department of Treasury*, Merit Systems Protection Board
25 (1999). Administrative Judge awarded compensatory damages to wrongfully terminated
26 Customs Agent, followed by an award of Attorneys' fees and costs.

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

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

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

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

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

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

24 B. *Cuellar v. Lovin Oven*, Orange County Superior Court, Case No. 30-
25 2010-000382146 (appointed Class Counsel and granted final approval of class action settlement
by the court on behalf of nonexempt employees).

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

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

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

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

10 G. *Huynh v. Carefusion Resources, LLC, et al*, San Diego Sup.Ct., Case No.
11 37-2009-00103277-CU-OE-CTL (appointed Class Counsel and granted final approval of class
12 action settlement on behalf of medical devices employees).

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

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

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

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

23 L. *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case No. S-
24 1500-CV-282679 (appointed Class Counsel and granted final approval of class action
25 settlement on behalf of dairy and agricultural laborers).

26 M. *Montes v. Branam Enterprises, Inc.*, Los Angeles Sup.Ct. Case No.
27 BC442608 (appointed Class Counsel and granted final approval by this Court of class action
28 settlement on behalf of call concert rigging employees).

1 N. *Nardone v. Sequoia Beverage Company, LP*, Tulare County Superior
2 Court, Case No. VCU-248370 (appointed Class Counsel and granted final approval of class
3 action settlement by the court on behalf of hourly employees).

4 O. *Ogbuehi v. Comcast of California/Colorado/Florida/Oregon, Inc.*, United
5 States District Court, Central District of California, Case No. EDCV13-00672-KJM-KJN
6 (appointed Class Counsel and granted final approval of class action settlement on behalf of
7 virtual customer account executives).

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

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

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

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

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

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

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

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

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

7 ***Class Action Treatment Is Superior***

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

17 ***Exposure & Risk Analysis***

18 28. I prepared damages estimates in connection with the settlement negotiations.
19 Attached hereto as **Exhibit 6** are true and correct copies of the spreadsheets I prepared. I
20 initially estimated that Defendants' exposure was about \$1.6 million, of which interest and
21 statutory and civil penalties accounted for approximately \$1.25 million. However, I am aware of
22 no significant awards under the PAGA and in my personal experience, PAGA penalty awards
23 are small even for egregious, intentional violations of the Labor Code. I also estimated that
24 Defendants' liability for unpaid overtime and meal and rest period premium wages was at best
25 approximately \$406,000. This estimate does not account for the risks outlined below or the risk
26 that a class will not be certified.

27 29. The most important factor favoring the Settlement amount is Defendants'
28 financial condition. As discussed above, during settlement negotiations, Defendants informed
Plaintiff that they were experiencing great difficulty meeting their onerous financial obligations.
Plaintiff also reviewed Defendants' financial statements which show significant income
problems. Defendants are also facing other lawsuits, including one against Mr. Irani for sexual

1 harassment by the former chief financial officer. One of the causes of Defendants' financial
2 problems is the CFO's alleged embezzlement of over one million from AVR.

3 30. Further, there are great risks that Plaintiff will not recover an award of premium
4 wages against Defendants for unprovided rest and meal periods. Defendants had meal and rest
5 period policies at least for a portion of the Class Period. Though Plaintiff contends Defendants'
6 policies are silent on many requirements of the applicable Wage Order, there is a risk that
7 Plaintiff would recover little or no premium wages under Labor Code § 226.7. Further risk
8 arises from the absence of evidence that Defendants forbade meal and rest periods. As part of
9 the settlement negotiations, Defendants provided several declarations from Class Members
10 stating that they received their meal and rest periods.

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

22 32. There is also the risk that Plaintiff will not recover statutory penalties for the
23 class members if he prevails on the meal and rest periods claims in view of the decisions of
24 other courts that statutory penalties under Labor Code §§ 203 (waiting time penalties) and 226
25 (pay stubs penalties) are not derivative of a successful claim for premium wages under Labor
26 Code § 226.7. *Nguyen v. Baxter Healthcare Corp.*, 2011 U.S. Dist. LEXIS 141135, *24-25
27 (C.D. Cal. 2011); *Elliot v. Spherion Pacific Work* (C.D. Cal. 2008) 572 F. Supp. 2d 1169, 1179-
28 1180. As is evident from Plaintiff's damages model (Exhibit 6), the vast majority of the
potential relief available to Plaintiff and the Class Members are civil and statutory penalties. In
light of the great difficulties involved in proving that wage and hour violations are knowing,
intentional, or willful – predicates for recovery of penalties, Plaintiff had to dramatically

1 discount the value of the penalties claims in settlement negotiations. It is difficult to imagine a
2 Court awarding substantially more in penalties than the restitution it awards. The PAGA
3 expressly counsels against such awards. *See* Lab. Code § 2699(e)(2) (“...a court may award a
4 lesser amount than the maximum civil penalty amount specified by this part if, based on the
5 facts and circumstances of the particular case, to do otherwise would result in an award that is
6 unjust, arbitrary and oppressive, or confiscatory.”). Under the PAGA, penalties can accrue per
7 pay period (as with Labor Code § 226), at rates of \$50, \$100, \$250, and even \$1,000 per
8 employee, plus unpaid wages. *See* Lab.Code §§ 226.3, 558, 1197.1, and 2699(f). There are no
9 decisions under the PAGA to date with substantial awards of civil penalties. There is a
10 substantial risk that the Court could reduce civil penalties to an insignificant amount if it is
11 unpersuaded by Plaintiff’s evidence of willful and intentional conduct. *Id.* It could also award
12 no civil penalties if it determines that an award of premium wages (which many view as a
13 penalty) is sufficient to punish Defendants’ conduct. For similar reasons, a large award of
14 penalties seems unlikely with respect to the rounding, regular rate, or uniform deduction claims
15 because the amount Defendants allegedly underpaid or deducted is small.

16 33. While the evidence gathered through Plaintiff’s discovery supports the merits of
17 the claims asserted in this lawsuit, Plaintiff recognizes that continued litigation presents
18 significant risks that support a downward departure from Defendants’ estimated liability
19 exposure. In view of the risks, the Settlement reflects Class Counsel’s estimate of the total
20 amount of damages, monetary penalties or other relief that the class could reasonably expect to
21 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. It
22 also represents a fair, adequate, and reasonable compromise amount for these claims and
23 warrants preliminary approval. *See Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th
24 Cir. June 3, 2014) 2014 WL 2465049, * 3.

Attorneys’ Fees and Costs

25 34. Class Counsel request attorneys’ fees of up to \$100,000 (1/3 of the GSF) and
26 reasonable litigation expenses incurred which Class Counsel currently estimates will be
27 approximately \$11,442.71 and will be no more than \$15,000 at the conclusion of matters related
28 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

1 approximately one-third of the settlement fund are routinely approved as reasonable. I have
2 been awarded attorneys' fees equaling approximately one-third of the fund in several recent
3 wage and hour class actions, including: *Alvarez v. Gary Grace Enterprises, LP*, Marin County
4 Superior Court, Case No. CIV1002553 (one-third of fund); *Calderon v. Greatcall, Inc.*, San
5 Diego Superior Court, Case No. 37-2010-00093743-CU-OE-CTL (one-third of fund); *Butler v.*
6 *Lexxiom, Inc.*, San Bernardino County Superior Court, Case No. CIVRS1001579 (one-third of
7 fund); *Perez v. Southwest Dealer Services, Inc.*, Los Angeles County Superior Court, Case No.
8 BC439253 (one-third of fund); *O'Brien v. Optima Network Services, Inc.*, San Bernardino
9 County Superior Court, Case No. CIVRS1107056 (one-third of fund); *Noyd v. The Cristcat*
10 *Group, et al.*, Los Angeles County Superior Court, Case No. BC439558 (one-third of fund);
11 *Huynh v. Carefusion Resources, LLC, et al*, San Diego Sup.Ct., Case No. 37-2009-00103277-
12 CU-OE-CTL (one-third of fund); *Cunningham v. DPI Specialty Foods West, Inc.*, Los Angeles
13 Sup.Ct., Case No. BC465017 (one-third of fund); *Stucker v. L'Oreal USA S/D, Inc.*, Los
14 Angeles Sup. Ct., Case No. BC456080 (one-third of fund); *Valdez v. Healthcare Services*
15 *Group, Inc.*, Los Angeles Sup.Ct., Case No. BC462917 (one-third of fund); *Hernandez, et al v.*
16 *HSBC*, U.S. District Court, Central District of California, Case No. 10-CV-4753 (one-third of
17 fund); *Sandoval, et al. v. Thrifty Payless, Inc., et al.* Los Angeles Sup.Ct., Case No. BC431249
18 (one-third of fund); *Alafa v. Custom Built Personal Training, Inc.*, Tulare County Superior
19 Court, Case No. VCU-245496 (one-third of fund); *Nardone v. Sequoia Beverage Company, LP*,
20 Tulare Sup.Ct., Case No. VCU-248370 (one-third of fund); *Rosen v. Image Transfer*, Los
21 Angeles Sup.Ct., Case No. BC511702 (one-third of fund); *Tucker v. Maly's West, Inc.*, Los
22 Angeles Sup.Ct., Case No. BC483920 (one-third of fund); *King v. Build.com*, Butte Sup.Ct.,
23 Case No. 159985 (one-third of fund); *Clifford v. Anderson Hay & Grain*, Los Angeles Sup.Ct.,
24 Case No. BC517625 (one-third of fund); *Nichols, et al. v. Vitamin Shoppe*, Contra Costa
25 Sup.Ct., Case No. CIVMSC13-01136 (one-third of fund); *Clarke v. Insight Global*, U.S. District
26 Court, Southern District of California, Case No. 13-CV-0357 (one-third of fund); *Fischer, et al.*
27 *v. National Distribution Centers LP, et al.*, Riverside Sup.Ct., Case No. RIC1114952 (one-third
28 of fund); *Shaw, et al. v. Interthinx, Inc.*, United States District Court for the District of
Colorado, Case No. 13-CV-01229-REB-BNB (one-third of fund); *Ogbuehi v. Comcast of*
California/ Colorado/ Florida/ Oregon, Inc., United States District Court, Central District of
California, Case No. EDCV13-00672-KJM-KJN (one-third of fund); *Lynch, et al. v. American*

1 *Guard Services*, Los Angeles Superior Court, Case No. BC462681 (one-third of fund); *Volney-*
2 *Parris v. Southern California Edison Company*, Los Angeles Superior Court, Case No.
3 BC493038 (one-third of fund); *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case
4 No. BC480808 (one-third of fund); *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court,
5 Case No. S-1500-CV-282679 (one-third of fund); *Linder, et al. v. Warehouse Services, Inc.*, San
6 Bernardino Superior Court, Case No. CIVDS1500146 (one-third of fund).

6 ***Enhancement Award***

7 35. The Settlement provides that Plaintiff may seek an Enhancement Award of up to
8 \$5,000 (approximately 1.6% of the GSF). This amount is entirely reasonable given Plaintiff's
9 efforts in the Action and the risks he undertook on behalf of the Class Members. Here, Plaintiff
10 has devoted many hours advancing the interests of the Class. Plaintiff has done this by, among
11 other things, retaining experienced counsel, providing them with information about his work
12 history with Defendants and Defendants' policies and practices with respect to the wage and
13 hour claims at issue, assisting in contacting absent Class Members to gather information, and
14 being actively involved in the settlement process to ensure a fair result for the Class as a whole.
15 In doing this, Plaintiff has been exposed to significant risks, including the risk of an order to pay
16 Defendants' attorneys' fees and costs if this action had been unsuccessful (*see* Lab. Code §§
17 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of Class shows that the
18 proposed Enhancement Award is fair, adequate, and reasonable, and thus warrant preliminary
19 approval.

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

20 36. The Settlement requires distribution of the Notice Packet by First Class U.S. mail
21 only. Settlement, ¶ 35. Although there are current employee Class Members, it is uncertain
22 whether Defendants' records of their contact information include email addresses and Class
23 Members might not be in a position to check their emails. As such, notice by mail alone is fair,
24 adequate, and reasonable.

24 ***Objections Need Only Be Mailed To The Administrator***

25 37. To avoid unnecessary costs and challenges to potential objectors, the Settlement
26 does not require an objector to file his objection with the Court or serve it on Counsel for the
27 Parties. Instead, it merely requires the objector to mail the objection to the Claims Administrator
28 for distribution. Settlement, ¶ 40.

Settlement Administration Duties

38. The duties of the Settlement Administrator are spelled out in section III of the Settlement and in the bid Phoenix Class Action Administrative Solutions submitted, a true and correct copy of which is attached as **Exhibit 7**.

Settlement Administration Costs

39. With regard to the Settlement Administration Costs provision (Settlement, ¶ 24), it is reasonable. Before agreeing to Phoenix Class Action Administrative Solutions, the Parties sought and reviewed bids from four reputable third party administrators, one of which was over \$23,000:

- A. Phoenix Class Action Administration Solutions = \$9,000.00;
- B. CPT Group, Inc. = \$15,500.00;
- C. Dahl Administration = \$23,365.00; and
- D. ILYM Group, Inc. = \$8,858.53.

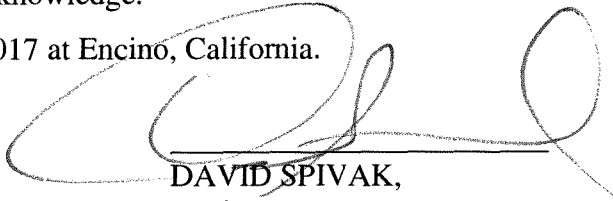
A true and correct copy of the bid from Dahl Administration is attached hereto as **Exhibit 8**. A true and correct copy of the bid from ILYM Group, Inc. is attached hereto as **Exhibit 9**. A true and correct copy of the bid from CPT Group, Inc. is attached hereto as **Exhibit 10**. Thus, Settlement Administration Costs provision should be given preliminary approval.

Notice of Settlement to the LWDA

40. Pursuant to Lab. Code § 2699(1)(2), Plaintiff submitted a copy of the Settlement with the Labor and Workforce Development Agency ("LWDA") at the same time Plaintiff's Motion is being filed with the Court. A true and correct copy of Plaintiff's submission with the LWDA and a confirmation email is attached as **Exhibit 11**.

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

Executed on Monday, December 04, 2017 at Encino, California.


DAVID SPIVAK,
Declarant