

DAVID G. SPIVAK (SBN 179684)
david@spivaklaw.com
JENICA LEONARD (SBN 245366)
jenica@spivaklaw.com
THE SPIVAK LAW FIRM
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
Telephone: (213) 725-9094
Facsimile: (213) 634-2485

Attorneys for Plaintiff(s),
KIMBERLY DAWN VANDERMOST, and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

**FOR THE COUNTY OF LOS ANGELES
(UNLIMITED JURISDICTION)**

KIMBERLY DAWN VANDERMOST, on
behalf of herself and all others similarly situated,
and the general public, and as an “aggrieved
employee” on behalf of other “aggrieved
employees” and the State of California under the
Labor Code Private Attorneys General Act of
2004,

Plaintiff,

vs.

DYWIDAG SYSTEMS INTERNATIONAL,
USA, INC., a New York corporation; and DOES
1-50, inclusive,

Defendant(s).

Case No. 23STCV06697

CLASS ACTION

**FIRST AMENDED COMPLAINT FOR
WAITING TIME PENALTIES (LAB.
CODE § 203) AND CIVIL PENALTIES
(LAB. CODE §§ 2898, et seq.)**

JURY TRIAL DEMANDED



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EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

FILED
Superior Court of California
County of Los Angeles
06/02/2023
David W. Slayton, Executive Officer / Clerk of Court
By: K. Martinez Deputy

1 Plaintiff, Kimberly Dawn Vandermost (hereafter “Plaintiff” or “Vandermost”), on behalf
2 of herself and all others similarly situated, the general public, and as an “aggrieved employee”
3 on behalf of other “aggrieved employees” and the State of California under the Labor Code
4 Private Attorneys General Act of 2004, complains and alleges as follows:

5 **I. INTRODUCTION**

6 1. Plaintiff brings this class and representative action for alleged violations of the
7 California Labor Code, Industrial Welfare Commission Order No. 4-2001 (hereafter “the Wage
8 Order”), and the California Business and Professions Code against Defendants Dywidag Systems
9 International, USA, Inc., a New York corporation, and Does 1 through 50, inclusive (collectively
“Defendants”).

10 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to her
11 and other similarly situated workers for unpaid wages, statutory penalties, interest, and related
12 relief. These claims are based on Defendants’ failure to timely pay wages upon termination of
13 employment. Accordingly, Plaintiff now seeks to recover statutory and civil penalties, attorneys’
14 fees, costs, and related relief through this class action.

15 **II. THE PARTIES**

16 3. Plaintiff Kimberly Dawn Vandermost is a resident of California. At all relevant
17 times, Plaintiff was an “employee” within the meaning of Title 8 California Code of Regulations
§ 11050 and an “aggrieved employee” within the meaning of Labor Code § 2699(c).

18 4. Defendant Dywidag Systems International, USA, Inc. is a corporation organized
19 and existing under the laws of New York and is also a citizen of California based on Plaintiff’s
20 information and belief.

21 5. Plaintiff is ignorant of the true names, capacities, relationships, and extents of
22 participation in the conduct alleged herein of the Defendants sued as DOES 1-50, inclusive, but
23 is informed and believes and thereon alleges that said Defendants are legally responsible for the
24 wrongful conduct alleged herein and therefore sues these Defendants by such fictitious names.
25 Plaintiff will amend the Complaint to allege the true names and capacities of the DOE Defendants
when ascertained.

26 6. Plaintiff is informed and believes and thereon alleges that, at all relevant times
27 herein, all Defendants were the agents, employees and/or servants, masters or employers of the
28 remaining defendants, and in doing the things hereinafter alleged, were acting or failing to act



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1 within the course and scope of such agency, employment, direction and control, and with the
2 approval and ratification of each of the other Defendants.

3 7. At all relevant times, in perpetrating the acts and omissions alleged herein,
4 Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack
5 of a practice which resulted in Defendants not compensating Plaintiff and the other Class
6 Members or otherwise complying with their rights in accordance with applicable California labor
7 laws as alleged herein.

8 8. At all relevant times, in perpetrating the acts and omissions alleged herein,
9 Defendants and each of them acted pursuant to and in furtherance of a policy and/or practice, or
10 lack thereof, which resulted in Defendants not paying Plaintiff and other members of the below-
11 described class in accordance with applicable laws as alleged herein.

12 **III. CLASS ALLEGATIONS**

13 9. This action has been brought and may be maintained as a class action pursuant to
14 California Code of Civil Procedure section 382 because there is a well-defined community of
15 interest among the persons who comprise the readily ascertainable class defined below and
16 because Plaintiff is unaware of any difficulties likely to be encountered in managing this case as
17 a class action.

18 10. **Class Definition:** The Class is defined as follows: All persons Defendants
19 employed in California at any time during the period beginning three years prior to the filing of
20 this action and ending on the date that final judgment is entered in this action (“Class” or “Class
21 Members”).

22 11. **Reservation of Rights:** Pursuant to Rule of Court 3.765(b), Plaintiff reserves the
23 right to amend or modify the class definition with greater specificity, by further division into
24 subclasses and/or by limitation to particular issues.

25 12. **Numerosity:** The Class Members are so numerous that the individual joinder of
26 each individual Class Member is impractical. While Plaintiff does not currently know the exact
27 number of Class Members, Plaintiff is informed and believes that the actual number exceeds the
28 minimum required for numerosity under California laws.

13. **Commonality and Predominance:** Common questions of law and fact exist as to
all Class Members and predominate over any questions which affect only individual Class
Members. These questions include, but are not limited to: Whether Defendants willfully failed to



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1 timely pay final wages to Plaintiff and the Class.

2 14. **Typicality:** Plaintiff's claims are typical of the other Class Members' claims.
3 Plaintiff is informed and believes and thereon alleges that Defendants have a policy and/or
4 practice, or lack thereof, which resulted in Defendants failing to comply with the California Labor
5 Code, the Wage Order, and the Business and Professions Code.

6 15. **Adequacy of Class Representative:** Plaintiff is an adequate class representative
7 in that she has no interests that are adverse to, or otherwise in conflict with, the interests of absent
8 Class Members. Plaintiff is dedicated to vigorously prosecuting this action on behalf of Class
9 Members. Plaintiff will fairly and adequately represent and protect the interests of Class

10 16. **Adequacy of Class Counsel:** Plaintiff's counsel are adequate class counsel in that
11 they have no known conflicts of interest with Plaintiff or absent Class Members, are experienced
12 in class action litigation, and are dedicated to vigorously prosecuting this action on behalf of
13 Plaintiff and absent Class Members.

14 17. **Superiority:** A class action is vastly superior to other available means for fair and
15 efficient adjudication of Class Members' claims and would be beneficial to the parties and the
16 Court. Class action treatment will allow a number of similarly situated persons to simultaneously
17 and efficiently prosecute their common claims in a single forum without the unnecessary
18 duplication of effort and expense that numerous individual actions would entail. In addition, the
19 monetary amounts due to many individual Class Members are likely to be relatively small and
20 would thus make it difficult, if not impossible, for individual Class Members to both seek and
21 obtain relief. Moreover, a class action will serve an important public interest by permitting Class
22 Members to effectively pursue the recovery of monies owed to them. Further, a class action will
23 prevent the potential for inconsistent or contradictory judgments inherent in individual litigation.

24 **IV. STATEMENT OF FACTS**

25 18. The Wage Order applies to "all persons employed in professional, technical,
26 mechanical, and similar occupations whether paid on a time, piece rate, commission, or other
27 basis..." Wage Order, § 1. The Wage Order defines "Professional, Technical, Clerical,
28 Mechanical, and Similar Occupations" to include:

professional, semiprofessional, managerial, supervisory, laboratory,
research, technical, clerical, office work, and mechanical occupations . . .



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[And] their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations.

Wage Order, § 2(O). At all relevant times during the applicable limitations period, the Defendants, Vandermost, and all of the Class Members were covered by the Wage Order because Vandermost and all of the Class Members worked for the Defendants as Regional Contract Mangers, their assistants, and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations. Accordingly, Vandermost and all of the other Class Members are entitled to the protections the Wage Order provides.

19. On approximately October 13, 2003, the Defendants began to employ Vandermost in Long Beach in the position of salaried Regional Contract Manager. The Defendants continuously employed her in that capacity until on or about April 4, 2022 when her employment ended.

20. At all relevant times, the Defendants issued wages to Vandermost and all of the other Class Members on a biweekly (26 paychecks/year) basis and paid them a salary.

21. At all relevant times, the Defendants also failed to timely pay Vandermost and all of the other Class Members all earned wages as described above during and at the conclusion of employment. The Defendants failed to promptly pay Vandermost and all other Class Members with their final wages within the time limits prescribed by Labor Code section 203. Defendants failed to pay her final until May 5, 2022.

22. For the reasons stated herein, Plaintiff alleges that as a result of Defendants' unlawful practices and policies, Plaintiff and the Class Members were not timely paid all earned and unpaid wages at the time their employment ended.

FIRST CAUSE OF ACTION

WILLFUL FAILURE TO TIMELY PAY FINAL WAGES

Lab. Code §§ 201, 202, and 203

(By Plaintiff, on behalf of herself and the Class, against all Defendants)

23. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

24. At all relevant times during the applicable limitations period, Plaintiffs and the Class have been non-exempt employees of Defendants and entitled to the benefits and protections of California Labor Code §§ 201, 202, and 203, and the Wage Order.

25. Labor Code § 201 provides that all earned and unpaid wages of an employee who



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1 is discharged are due and payable immediately at the time of discharge.

2 26. Labor Code § 202 provides that all earned and unpaid wages of an employee who
3 quits after providing at least 72-hours' notice before quitting are due and payable at the time of
4 quitting and that all earned and unpaid wages of an employee who quits without providing at least
5 72-hours' notice before quitting are due and payable within 72 hours.

6 27. The Defendants failed to pay Vandermost and all other Class Members whose
7 employment ended all of the earned but unpaid wages described above by the conclusion of their
8 employment with Defendants, including all earned wages, all accrued vacation time, all accrued
9 sick time, and related compensation.

10 28. By failing to pay such earned wages to Plaintiff and the Class Members at the time
11 of termination, Defendants failed to timely pay them all earned and unpaid wages in violation of
12 Labor Code § 201 or § 202.

13 29. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff
14 and the Class Members all of their earned and unpaid wages (described above) have been willful
15 in that, at all relevant times, Defendants have deliberately maintained policies and practices that
16 violate the requirements of the Labor Code and the Wage Order, even though at all relevant times
17 they have had the ability to comply with those legal requirements.

18 30. Pursuant to Labor Code § 203, Plaintiff seeks waiting time penalties on behalf of
19 themselves and the Class, in amounts subject to proof not to exceed 30 days of waiting time
20 penalties for each Class Member.

21 **SECOND CAUSE OF ACTION**

22 **CIVIL PENALTIES**

23 **Lab. Code §§ 2698, et seq.**

24 **(By Plaintiff, on behalf of herself, the Aggrieved Employees, and the State of California,**
25 **against all Defendants)**

26 31. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

27 32. The "Aggrieved Employees" are all members of the Class defined above who
28 Defendants employed during the period beginning March 27, 2022, and ending on the date that
final judgment is entered in this action.

33. During the applicable time period, Defendants violated California Labor Code §§
201, 202, and 203.



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1 34. California Labor Code §§ 2699(a) and (g) authorize an aggrieved employee, on
2 behalf of themselves and other current or former employees, to bring a civil action to recover
3 civil penalties pursuant to the procedures specified in California Labor Code § 2699.3.

4 35. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff, the State, and the
5 Aggrieved Employees, are entitled to recover civil penalties for each of the Defendants'
6 violations of California Labor Code §§ 201, 202, and 203 during the applicable limitations period
7 in the following amounts: One hundred dollars (\$100.00) for each Aggrieved Employee per pay
8 period for each initial violation and two hundred dollars (\$200.00) for each Aggrieved Employee
9 per pay period for each subsequent violation (penalty amounts established by California Labor
Code § 2699(f)(2)).

10 36. Plaintiff has complied with the procedures for bringing suit specified in California
11 Labor Code § 2699.3. By letter dated March 27, 2023, Plaintiff filed written notice online with
12 the Labor and Workforce Development Agency ("LWDA") and gave written notice by certified
13 mail to Defendants of the specific provisions of the California Labor Code alleged to have been
14 violated, including the facts and theories to support the alleged violations. A true and correct
15 copy of the notice to the LWDA dated March 27, 2023 is attached as Exhibit A. Plaintiff
16 submitted her LWDA notice with a fee in the amount of \$75.00. The LWDA has failed to take
17 action in response within 65 calendar days of the date of Plaintiff's notice, but Plaintiff anticipates
18 that the LWDA will provide written notice to Plaintiff informing her that it does not intend to
investigate these allegations.

19 37. Pursuant to California Labor Code § 2699(g), Plaintiff and the Aggrieved
20 Employees are entitled to an award of civil penalties, reasonable attorney's fees and costs in
21 connection with their claims for civil penalties.

22 **V. PRAYER FOR RELIEF**

23 38. WHEREFORE, Plaintiff, on behalf of herself and the Class Members, prays for
24 relief and judgment against Defendants as follows:

- 25 A. An order that the action be certified as a class action with respect to
26 Plaintiff's claims for violations of California law;
27 B. An order that Plaintiff be appointed class representative;
28 C. An order that counsel for Plaintiff be appointed class counsel;
D. Statutory penalties, including waiting time penalties;



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PMB 42554
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- E. Civil penalties;
F. Declaratory relief;
G. Pre-judgment interest;
H. Costs of suit;
I. Reasonable attorneys' fees; and
J. Such other relief as the Court deems just and proper.

VI. DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and all other Class Members, hereby demands a jury trial on all issues so triable.

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: June 1, 2023

By: 

DAVID G. SPIVAK,
JENICA P. LEONARD, Attorneys for
Plaintiff(s), KIMBERLY DAWN
VANDERMOST, and all others
similarly situated



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Mail:
8605 Santa Monica Bl
PMB 42554
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EXHIBIT A



THE SPIVAK LAW FIRM

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8605 Santa Monica Bl PMB 42554 West Hollywood CA 90069 Mail
1801 Century Park East 25th Fl Los Angeles CA 90067 Office
(213) 725-9094 Tel
(213) 634-2485 Fax
spivaklaw.com Web

SENT BY ELECTRONIC SUBMISSION

March 27, 2023

Attn: PAGA Administrator
Labor and Workforce Development Agency
<http://dir.tflaforms.net>
Via Electronic Submission

Re: Kimberly Dawn Vandermost / Dywidag Systems Employers

To Whom It May Concern:

Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.*, Kimberly Dawn Vandermost (hereafter “Vandermost” or “Complainant”) provides notice that Dywidag Systems International, USA, Inc., a New York corporation, and related entities (collectively “the Dywidag Systems Employers” or “the Employers”) violated her rights and those of all other individuals the Dywidag Systems Employers have employed or otherwise contracted with in California as Regional Contract Managers, individuals performing work comparable to the aforementioned, and individuals in similar positions (hereafter the “Aggrieved Employees”) under Labor Code section 203 and other Labor Code statutes. On behalf of herself and all other Aggrieved Employees, Vandermost hereby provides this notice to the Labor & Workforce Development Agency and the Dywidag Systems Employers and their agents and representatives.

At all relevant times, the Dywidag Systems Employers have employed persons, conducted business, and engaged in illegal payroll practices and policies throughout California. Vandermost and all of the other Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 4-2001 (hereafter “the Wage Order”) section 2, subdivision (F) and “Aggrieved Employees” within the meaning of Labor Code section 2699(c).

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Statement of Facts

On approximately October 13, 2003, the Dywidag Systems Employers began to employ Vandermost in Long Beach in the position of salaried Regional Contract Manager. The Dywidag Systems Employers continuously employed her in that capacity until on or about April 4, 2022 when her employment ended.

At all relevant times, the Dywidag Systems Employers issued wages to Vandermost and all of the other Aggrieved Employees on a biweekly (26 paychecks/year) basis. At all relevant times, the Dywidag Systems Employers classified Vandermost and all other Aggrieved Employees as exempt employees entitled to some protections of the Labor Code and the Wage Order.

The Dywidag Systems Employers failed to timely pay Vandermost and all of the other Aggrieved Employees all earned wages at the conclusion of employment. The Dywidag Systems Employers failed to promptly pay Vandermost and all other Aggrieved Employees their final wages within the time limits prescribed by Labor Code section 203. The Dywidag Systems Employers failed to pay Vandermost and all other Aggrieved Employees their final wages at the time of termination of employment.

For the reasons stated herein, Vandermost alleges the following violations of the Labor Code and the Wage Order on behalf of herself and all of the other Aggrieved Employees: The Dywidag Systems Employers willfully failed to timely pay Vandermost and all other Aggrieved Employees all earned wages when their employment ended.

Accordingly, Vandermost now seeks civil penalties on behalf of herself and all of the other Aggrieved Employees based on the Dywidag Systems Employers' alleged violations of the Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to “all persons employed in professional, technical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis. . . .” Wage Order, § 1. The Wage Order defines “Professional, Technical, Clerical, Mechanical, and Similar Occupations” to include “professional, semiprofessional, managerial, supervisory, and mechanical occupations . . . their

assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations. Wage Order, § 2(O).

At all relevant times during the applicable limitations period, the Dywidag Systems Employers, Vandermost, and all of the Aggrieved Employees, were covered by the Wage Order because the Dywidag Systems Employers operated, and Vandermost and all of the Aggrieved Employees worked for, the Dywidag Systems Employers as Regional Contract Managers, their assistants, and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations. Accordingly, Vandermost and all other Aggrieved Employees are entitled to the protections the Wage Order provides.

Failure to Timely Pay Wages Upon Termination of Employment
(Lab. Code §§ 201, 202, and 203)

Under Labor Code § 201, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. Under § 202, if an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours' previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. *Id.* The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting. *Id.*

Under Labor Code § 203, if an employer willfully fails to pay without abatement or reduction, in accordance with §§ 201 and 202, the wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

The Dywidag Systems Employers failed to pay Vandermost and all other Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of their employment with Dywidag Systems Employers, including all regular wages, accrued vacation, accrued sick leave, and other

compensation. By failing to pay Vandermost and all of the other Aggrieved Employees as set forth above at the end of employment, the Dywidag Systems Employers are liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of herself and all other Aggrieved Employees, Vandermost seeks civil penalties from the Dywidag Systems Employers as follows:

1. For violations of Labor Code § 201, \$100 per aggrieved employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per aggrieved employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per aggrieved employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per aggrieved employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per aggrieved employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 for per aggrieved employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

Conclusion

As noted above, this letter constitutes the required notice under the Labor Code Private Attorneys General Act of 2004. Please be advised that Kimberly Dawn Vandermost will seek both reasonable attorneys' fees and costs under Labor Code section 2699(g)(1) in a civil action should the LWDA decline to pursue this matter. This letter also serves as a formal notice under the catalyst theory and Code of Civil Procedure section 1021.5 to resolve this matter before litigation.

Sincerely,



David Spivak, Esq.

David@spivaklaw.com

cc: Kimberly Dawn Vandermost

LWDA / The Dywidag Systems Employers
Re: Kimberly Dawn Vandermost
March 27, 2023
Page 5 of 5

John F. Kuentler, Esq.
Barnes & Thornburg LLP
2029 Century Park East, Suite 300
Los Angeles, CA 90067
jkuentler@btlaw.com

PROOF OF SERVICE

State of California,
County of Los Angeles

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

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

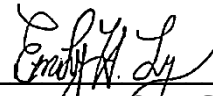
On Friday, June 2, 2023, I served the foregoing document described as **FIRST AMENDED COMPLAINT** on interested parties by electronic mail, addressed as follows:

John F. Kuenstler, Esq.
BARNES & THORNBURG LLP
2029 Century Park East, Suite 300
Los Angeles, CA 90067
john.kuenstler@btlaw.com

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

EXECUTED on Friday, June 2, 2023 at Los Angeles, California.

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



EMILY HOUNG LY



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8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
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