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13  
14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 FEDERICO VILCHIZ VASQUEZ, JESUS  
17 VILCHEZ VASQUEZ, FRANCISCO  
DOMINGO CLAUDIO, ADA CAÑEZ,  
18 EMIGDIO MENDEZ, and CANDELARIA  
HURTADO for themselves and all others  
similarly situated,

19 Plaintiffs,

20 vs.

21 USM, INC. dba USM SERVICES, INC., a  
Pennsylvania Corporation; Ross Stores, Inc. dba  
22 ROSS DRESS FOR LESS, a Delaware  
Corporation; ROSS STORES, INC. dba dd's  
23 DISCOUNTS, a Delaware Corporation; and  
DOES 1 through 20, inclusive,

24 Defendants.  
25  
26  
27  
28

Case No.: CV-13-05449-JD

CLASS ACTION

**NOTICE OF MOTION AND MOTION FOR  
CLASS CERTIFICATION; MEMORANDUM  
OF POINTS AND AUTHORITIES IN SUPPORT  
THEREOF**

Hon. James Donato

Date: December 3, 2014

Time: 9:30 a.m.

Location: Courtroom 11, 19th Floor

Trial: March 23, 2015

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1 **NOTICE OF MOTION AND MOTION**

2 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

3 YOU ARE HEREBY NOTIFIED THAT on December 3, 2014 at 9:30 a.m., or as soon  
4 thereafter as the matter may be heard in Courtroom 11 of the above-entitled Court, located at 450  
5 Golden Gate Avenue, San Francisco, California 94102, 19th Floor, Plaintiffs will and do seek an Order  
6 certifying a class action under Federal Rule of Civil Procedure 23.

7 Through this Motion, Plaintiffs will and do move this Court as follows:

8 1. For an Order granting class certification under Federal Rule of Civil Procedure 23(a)  
9 and (b)(2) for purposes of injunctive and declaratory relief on behalf of the following class as to all  
10 three Causes of Action:

11 **Injunctive and Declaratory Relief Class:** All persons currently  
12 employed as a janitor providing daily maintenance service at a Ross  
13 Dress for Less and/or dd's DISCOUNTS store in California in  
connection with the performance of a contract or agreement between  
USM and Ross for the provision of janitorial services.

14 2. For an Order granting class certification under Federal Rule of Civil Procedure 23(a)  
15 and (b)(3) for purposes of monetary relief on behalf of the following class as to the First (Labor Code  
16 § 2810) and Third (PAGA) Causes of Action:

17 **Monetary Relief Class:** All persons who have been employed as a  
18 janitor providing daily maintenance service at a Ross Dress for Less  
19 and/or dd's DISCOUNTS store in California in connection with the  
20 performance of a contract or agreement between USM and Ross for the  
provision of janitorial services from September 5, 2009 until the date this  
class is certified.

21 3. For an Order appointing Plaintiffs Federico Vilchiz Vasquez, Jesus Vilchez Vasquez,  
22 Ada Cañez, Emigdio Mendez, Candelaria Hurtado, and Evelia Martinez as class representatives for the  
23 Monetary Relief Class, and Emigdio Mendez, Candelaria Hurtado, and Evelia Martinez as class  
24 representatives for the Injunctive and Declaratory Relief Class.

25 4. For an Order appointing Goldstein, Borgen, Dardarian & Ho, Chavez & Gertler, LLP  
26 and Legal Aid of Marin as class counsel for the proposed classes.

27 5. For an Order issuing class notice with the opportunity to opt out of the Monetary Relief  
28 Class in the form of the notice attached to the Proposed Order submitted herewith.

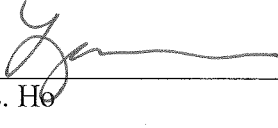


1 This Motion is based upon this Notice, the Memorandum of Points and Authorities in support  
2 thereof; the accompanying Declarations of Laura L. Ho, Jonathan E. Gertler, Paul Cohen, Christian  
3 Schreiber, Megan E. Ryan, David M. Breshears, CPA/CFF, Dr. Marc Bendick, Jr., Chris Waldheim,  
4 the Named Plaintiffs and Proposed Class Representatives, Charles Powell, Janet Little, and various  
5 Class Members; the various exhibits attached thereto; the Proposed Order; the files and records of the  
6 Court; and on such oral and documentary evidence as may be presented at the hearing on this Motion.

7 Dated: October 24, 2014

Respectfully submitted,

8 GOLDSTEIN, BORGEN, DARDARIAN & HO

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10   
Laura L. Ho

11 Attorneys for Plaintiffs  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Federico Vilchiz Vasquez, Jesus Vilchez Vasquez, Ada Cañez, Emigdio Mendez, and  
4 Candelaria Hurtado<sup>1</sup> seek to represent hundreds of janitors who have cleaned Ross Dress for Less and  
5 dd's DISCOUNTS retail stores (collectively "Ross stores") in California since September 5, 2009 ("the  
6 class period") to challenge the sufficiency of the contracts governing their work pursuant to Labor  
7 Code section 2810.

8 Throughout the class period, Ross Stores, Inc. ("Ross") contracted with USM, Inc. ("USM"), a  
9 national facilities maintenance company, to provide janitorial services at its California stores. The  
10 contracts between Ross and USM provided that USM would further subcontract the cleaning of Ross  
11 stores. Beginning in 2008, USM has subcontracted with janitorial businesses to clean the  
12 approximately 300 Ross stores in California. Each of the proposed class representatives was hired by  
13 one or more of these janitorial subcontractors to provide daily cleaning under the Ross/USM and  
14 USM/subcontractor agreements. Each of the proposed class representatives allege that they were not  
15 paid the minimum wage for all of their work, and that the contracts or agreements under which they  
16 worked were not funded sufficiently to allow them to receive all of the protections of the local, state,  
17 and national laws governing their work as required by Labor Code section 2810. Plaintiffs further  
18 allege that Defendants' violations of section 2810 are also violations of California's Unfair  
19 Competition Law ("UCL"), Business and Professions Code section 17200, *et seq.* and entitle Plaintiffs  
20 to seek civil penalties for all aggrieved employees pursuant to the Labor Code's Private Attorneys  
21 General Act ("PAGA").

22 Section 2810 prohibits any person from entering into a contract or agreement for janitorial  
23 services where the person "knows or should know that the contract or agreement does not include  
24 funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws."  
25 Plaintiffs contend that janitors cleaning Ross stores under subcontracts for daily maintenance service  
26

27 <sup>1</sup> Plaintiffs also seek leave to amend the complaint to add Evelia Martinez, who is a current employee, as a  
28 named Plaintiff and class representative.

1 were doing so despite the clear mandate of section 2810. At the time the contracts were executed, and  
2 in the ensuing months in which the contracts were performed, both Ross and USM knew or should  
3 have known that such contracts were insufficiently funded given the number of labor hours required to  
4 clean Ross stores. Ross and USM expected each store to require more than four person-hours to clean  
5 each day, and under section 2810, both Defendants are charged with knowledge about the cost of this  
6 amount of labor. Despite this, USM routinely low-balled its subcontractors into unlawful contracts  
7 that Ross not only permitted in its contract with USM, but which neither Ross nor USM could  
8 reasonably have believed was sufficient under section 2810.

9       Though Ross and USM carefully monitored the work being performed at the stores – and  
10 collected and compiled daily and monthly totals of janitor work hours that routinely exceeded 120 per  
11 month – neither Ross nor USM ensured that there was enough money in the subcontracts to pay for  
12 this labor each month. In fact, *monthly payments for daily maintenance were insufficient more than*  
13 *91% of the time.*

14       Plaintiffs seek to represent a class of janitors who performed daily maintenance under these  
15 underfunded contracts at the approximately 300 Ross stores in California. Plaintiffs' claims should  
16 proceed on a class basis because they meet all of the requirements of Rule 23(a), (b)(2), (b)(3) and/or  
17 (c)(4). The janitors who have worked under the underfunded contracts in California during the class  
18 period can be determined by records kept by USM and the subcontractors who hired them. The  
19 proposed class representative claims are typical of the claims of the putative class members, and they  
20 and their counsel will fairly and adequately protect the interests of the class. Moreover, the  
21 overarching common questions of whether the contracts are underfunded and whether Ross and USM  
22 knew or should have known about the underfunding predominate over any individual issues that may  
23 exist. Indeed, Plaintiffs present expert evidence based on Defendants' own records regarding the  
24 extent and amount of underfunding on a per store/per month basis. *See Declaration of David*  
25 *Breshears, CPA/CFF, filed herewith.* Statutory damages under Labor Code section 2810(g) can be  
26 calculated on a class basis, as well as civil penalties under PAGA. Accordingly, the Court should grant  
27 Plaintiffs' Motion.

1 **II. LABOR CODE SECTION 2810**

2 In 2002 and 2003, the California Senate Committee on Labor and Industrial Relations held  
 3 hearings and received testimony, both oral and written, on labor law violations in the janitorial and  
 4 other industries. Declaration of Megan Ryan In Support of Mot. for Class Cert. (“Ryan Decl.”) Ex. 31  
 5 (collecting legislative history).<sup>2</sup> The Committee learned that an “underground economy” had  
 6 developed and flourished in the absence of meaningful regulation in these industries, characterized by  
 7 substandard wages and working conditions and a failure of employers to meet basic obligations such as  
 8 payment of social security and Medicare taxes. In particular, testimony offered before the Committee  
 9 noted that subcontracting practices “have a central role in the creation of conditions of labor  
 10 exploitation, because they bargain down their labor contractors to a level where many cannot fully  
 11 comply with applicable Labor Laws.” *See id.* (Letter from Mark S. Schact, Deputy Director, Cal.  
 12 Rural Legal Assistance Found. to Hon. Darrell Steinberg, Chair, Comm. on Appropriations, Cal. State  
 13 Assembly (July 25, 2002)). As the California Court of Appeal noted, “In illustrating the type of abuses  
 14 targeted by the bill, another supporter cited contracts paying the contractor so little that its  
 15 contributions to mandatory social programs, such as Social Security, workers’ compensation, and  
 16 unemployment, could not be made unless its laborers were paid wages below the legal minimum.”  
 17 *Castillo v. Toll Bros., Inc.*, 197 Cal. App. 4th 1172, 1194 (2011).

18 The Legislature responded by enacting section 2810. Its purpose was “to declare California  
 19 state policy regarding insufficient contracts in the construction, agricultural, garment, janitorial and  
 20 security guard industries and . . . attack [] the hidden use of unfair economic leverage to influence  
 21 labor contractors to enter into contracts that are financially inadequate to permit the contractor to  
 22 comply with applicable local, state and federal laws.” Ryan Decl. Ex. 32 (Sen Analysis, 3d Reading  
 23 analysis of Sen. Bill 179 (2003-2004 Reg. Session), pp. 3-4.) Section 2810 provides in part:

24 A person or entity shall not enter into a contract or agreement for labor  
 25 or services with a construction, farm labor, garment, janitorial, security  
 26 guard, or warehouse contractor, where the person or entity knows or  
 should know that the contract or agreement does not include funds  
 sufficient to allow the contractor to comply with all applicable local,

27 \_\_\_\_\_  
 28 <sup>2</sup> All non-confidential evidence is filed with the Ryan declaration. All confidential evidence is filed with the  
 Declaration of Christian Schreiber In Support of Administrative Motion.

1 state, and federal laws or regulations governing the labor or services to  
2 be provided.

3 Labor Code § 2810(a).

4 Employees aggrieved by underfunded contracts may sue to recover actual or statutory damages,  
5 injunctive relief, fees and costs. Labor Code § 2810(g)(1)-(2).

6 **III. FACTUAL BACKGROUND AND SUMMARY OF THE EVIDENCE**

7 **A. Ross pays USM For Each Service In Each Store in California.**

8 At the urging of its management consultant, Ross decided in 2007 to expand the outsourcing of  
9 its janitorial services to include all its stores in the United States.<sup>3</sup> Ross expected to reduce the cost of  
10 janitorial services while improving the quality of those services. (Voit Dep., 21:19-24:15.) In early  
11 2008, Ross issued a Request for Proposal (“RFP”) for two types of janitorial services: daily  
12 maintenance and semi-annual, overnight floor “wet work,” which entailed scrubbing, stripping, and  
13 waxing its showroom floors. As part of the RFP process, Ross provided a [REDACTED]

14 [REDACTED]

15 [REDACTED] (See Confidential Voit Dep., 63:1-8; 86:11-24; Confidential USM547, 579-596.) [REDACTED]

16 [REDACTED]

17 (Confidential USM581-584.) [REDACTED]

18 [REDACTED]

19 (Confidential USM560, 563, 580.)<sup>4</sup> [REDACTED]

20 [REDACTED]

21 [REDACTED] (Confidential ROSS83-85; Confidential USM19063; Voit. Dep.

22 \_\_\_\_\_  
23 <sup>3</sup> Marjan Voit, Ross’ Vice President of Strategic Sourcing, oversaw the outsourcing initiative recommended  
24 by its consultant, AT Kearney. (Voit Dep., 21:19-22:9.) According to Voit, the outsourcing was part of a  
25 broader sourcing initiative “for various parts of Ross’ operations, including janitorial services.” (Voit Dep.,  
26 21:22-23:3.) [REDACTED]

27 [REDACTED] (Confidential ROSS1-10.) Mr. Voit and all USM and Ross witnesses  
28 cited herein, testified pursuant to Federal Rule of Civil Procedure 30(b)(6). All deposition excerpts are filed  
with the Declaration of Megan Ryan and referenced by last name. All confidential deposition excerpts are  
filed herewith the Declaration of Christian Schreiber In Support of Administrative Motion by last name.

<sup>4</sup> [REDACTED]  
[REDACTED] (Confidential USM585-596.)

1 68:12-15; Confidential Dubow Dep. 34:18-36:22.) [REDACTED]

2 [REDACTED] (Confidential Voit

3 Dep., 86:8-87:2; Confidential USM638-669; Confidential USM19063.)<sup>5</sup> [REDACTED]

4 [REDACTED]. *Id.*

5 [REDACTED]

6 [REDACTED]

7 [REDACTED] (Confidential ROSS83-85.) [REDACTED]

8 [REDACTED]

9 [REDACTED] *Id.* [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED] *Id.*

13 USM ultimately won the contract, which was executed in July 2008 (the “2008 MSA”).

14 (Confidential USM547-669.) The 2008 MSA included an [REDACTED]

15 [REDACTED]

16 [REDACTED] (Confidential USM638-669, Confidential USM19063.)<sup>6</sup>

17 [REDACTED]

18 [REDACTED]. *Id.* [REDACTED]

19 [REDACTED]

20 Between June 2008 and May 2, 2013, Ross and USM executed amendments to the 2008 MSA

21 three times, each time altering the price component for Ross’ per-store payments. [REDACTED]

22 [REDACTED]<sup>7</sup> (Confidential USM541-704.)

23 \_\_\_\_\_

24 <sup>5</sup> [REDACTED]

[REDACTED] (Confidential USM19063.)

25 <sup>6</sup> [REDACTED]

26 [REDACTED]

27 <sup>7</sup> [REDACTED]

[REDACTED]

28 [REDACTED] (Confidential USM541-546;

1 In 2012, Ross again put the janitorial services contract out for bid to “drive vendor  
2 performance” – i.e., to save money. (Berger Dep., 163:7-9; 166:5-167:4.) As it had in 2008, Ross  
3 provided bidders with [REDACTED].  
4 (Confidential USM19065.)<sup>8</sup> [REDACTED]. (Cf.  
5 Confidential USM17-44; Confidential USM579-596). Ross ultimately selected three companies at the  
6 conclusion of the 2012 process, awarding USM a portfolio of 80 percent of Ross’ stores nationwide  
7 (i.e. a 20% reduction). (Berger Dep., 182:8-25.) USM and Ross executed a new MSA that went into  
8 effect on May 1, 2013 (the “2013 MSA”). [REDACTED]

9 [REDACTED]  
10 [REDACTED] (Confidential  
11 USM1-525.)<sup>9</sup>

12 **1. USM Subcontractors Sign Form Subcontracts and Separate Form Contracts for**  
13 **Each Store and Service.**

14 USM requires all subcontractors working on the Ross account to execute a standard form  
15 subcontract (the “Subcontractor Agreement”). Ryan Decl. Ex. 29. The Subcontractor Agreement  
16 contains the terms of USM’s relationship with its subcontractors, but does not include price terms or

17 \_\_\_\_\_  
(continued . . .)

18 Confidential USM28350.) [REDACTED]  
19 [REDACTED] (Confidential USM526-540.)  
20 [REDACTED] Confidential USM670-704.)  
[REDACTED] (Confidential USM541-704.)

21 <sup>8</sup> [REDACTED]  
22 [REDACTED]  
23 [REDACTED] (Confidential USM14-15, 316, 407-410; 420-431)  
24 [REDACTED] (Confidential  
USM19064.)

25 <sup>9</sup> [REDACTED]  
26 [REDACTED] (Confidential USM1-525.)  
[REDACTED] *Id* at USM76 – 98.  
27 [REDACTED] *Id.*; see also (Confidential Berger Dep., 62:23-  
28 65:9).

1 the services to be provided by the subcontractor. (Confidential Cifelli Dep., 63:3-15; Ryan Decl., Ex.  
 2 29 VASQUEZ957-973.) The Subcontractor Agreement provides only that the subcontractor “must  
 3 perform all the Services per the specifications and to [Ross’s] satisfaction,” and that USM “will set  
 4 forth the specification and pricing on one or more schedules to this Agreement, which you must sign  
 5 and return prior to commencing any Services.” *Id.* The Subcontractor Agreement, and the individual  
 6 pricing schedules later agreed to and executed by USM and the subcontractors, are for an indefinite  
 7 duration. As set forth in the Subcontractor Agreement, the “schedules” provide for month-to-month  
 8 payments that a subcontractor could receive only after submitting a timely “invoice reconciling that  
 9 month’s activity for each customer.” *Id.*

10 USM’s subcontracting process is the same for all subcontractors. [REDACTED]

11 [REDACTED]  
 12 [REDACTED] *Id.* (Confidential Cifelli  
 13 Dep., 50:5-18). [REDACTED]

14 [REDACTED]. (Confidential Cifelli Dep.,  
 15 63:3-15). The procurement specialist then provides a potential subcontractor with the location of the  
 16 store, the size of the store, and, if the subcontractor has never provided daily maintenance at a Ross  
 17 store before, the standard Scope-of-Work.<sup>10</sup>

18 As USM’s corporate designee testified, USM does not establish a “minimum amount of  
 19 payment that must be made to the subcontractor in order to ensure that the subcontractor can comply  
 20 with the California Labor Code and federal labor law.” *Id.* (Cifelli Dep., 128:15-129:1). Nor does  
 21 USM instruct its procurement specialists to consider the cost of a subcontractor’s insurance or other  
 22 standard business expenses when considering a bid. *Id.* (Cifelli Dep., 152:6-16.) With the exception  
 23

24 <sup>10</sup> USM’s process for identifying and vetting subcontractors for the Ross account has been the same during the  
 25 class period. (Cifelli Dep., 14:8-23, 20:5-9; 90:4-106:16; Confidential Cifelli Dep., 28:1-74:25.) USM  
 26 employs a team of procurement specialists, who are assigned to various USM accounts, including Ross.  
 27 These specialists identify potential vendors, which they do either by soliciting current subcontractors  
 performing on the Ross account at other stores or by identifying new vendors through the internet and other  
 search tools. *Id.* (Confidential Cifelli Dep., 34:10-35:6; 50:2-18; 63:3-69:7; Cifelli Dep., 112:10-20). [REDACTED]

28 [REDACTED]. *Id.* (Confidential Cifelli Dep., 35:7-36:13).



1 of a new policy instituted in 2014 that concerned only a few California stores, USM set no floor for the  
2 amount it would pay for daily maintenance. *Id.* (Cifelli Dep., 128:15-129:1; 152:6-16).

3 Upon receipt of a verbal bid from the potential subcontractor, the procurement specialist  
4 compares the bid to the amount that Ross is paying USM under the MSA for that service at that store.  
5 *Id.* (Confidential Cifelli Dep., 37:15-38:9; Cifelli Dep., 95:17-96:8, 101:20-102:6). Once the  
6 procurement specialist obtains a bid less than the amount Ross is paying USM for daily maintenance at  
7 that store, the USM procurement specialist accepts the bid.<sup>11</sup> [REDACTED]

8 [REDACTED] *Id.* (Confidential Cifelli Dep., 42:14-45:25).<sup>12</sup>

9 **2. USM Paid Subcontractors Per Store Per Service.**

10 During the class period, USM has subcontracted with approximately 80 different janitorial  
11 businesses to provide daily maintenance services at California Ross stores in connection with the  
12 Ross/USM contracts. (USM, Inc.’s Responses to Plaintiffs’ First Set of Special Interrogatories – First  
13 Supplemental Response; Breshears Decl. ¶13 & Exh. 1.1; Ryan Decl. Ex. 33.) USM does not require  
14 subcontractors performing daily services at a particular store to provide “wet work,” porter, or other  
15 services at that store, or vice versa. Declaration of Charles Powell (“Powell Decl.”) ¶ 8; Declaration of  
16 Janet Little (“Little Dec.”) ¶ 3-10.

17 USM requires subcontractors to submit an invoice each month for daily services, and requires  
18 them to provide the store number, month of service, service code (*e.g.*, DM for daily maintenance), and  
19 amount for the service. Ryan Decl. Ex. 28. Though the pricing exhibits set a ceiling for the daily  
20 maintenance, they did not set a floor. USM retained the right under the Subcontractor Agreement to  
21 discount individual monthly payments or require additional unpaid work for a variety of reasons, and  
22 routinely did so. *See* Confidential USM21745-21746, 28447; Powell Decl. ¶ 7; Little Dec. ¶11. For  
23 example, the Subcontractor Agreement states that a subcontractor must “immediately correct, without  
24

25 \_\_\_\_\_  
26 <sup>11</sup> (Cifelli Dep. 128:15-129:1; 152:6-16). USM’s corporate designee testified that USM’s internal procedure  
27 required that procurement specialists unable to obtain a bid below the Ross price-per-service would require an  
28 “escalation” for approval by a manager. This occurred (nationally) “more than five percent” of the time.  
(Cifelli Dep., 54:20-56:12.)

<sup>12</sup> (Confidential Cifelli Dep., 40:7-8); (Confidential USM7140. 7955, 9812, 11629).

1 additional charge any Service that does not meet the specifications” outlined by Ross, and that USM is  
 2 allowed to “deduct up to the full amount . . . for any Service that [a subcontractor] does not correct.”  
 3 Ryan Decl. Ex. 29 (VASQUEZ957, ¶ 2; Confidential Cifelli Dep., 63:3-15). Furthermore, if a  
 4 subcontractor fails to submit an invoice within 120 days of service, USM will not pay for that  
 5 service. *Id.*

6 USM also has other means of discounting payments for specific services, which the accounting  
 7 data demonstrates it routinely does. For example, if a subcontractor timely submits an invoice, USM  
 8 sends payment “30 days after the date that [USM] receive[d] and process[ed]” the invoice. *Id.*  
 9 However, under USM’s “Rapid Payment Program,” if a subcontractor requested that USM provide  
 10 payment sooner, then USM discounts the payment by 5%. *Id.* Additionally, under USM’s “Automatic  
 11 Rebate Program,” if a subcontractor’s business with USM exceeds \$10,000 in any twelve-month  
 12 period, USM discounts payment to the subcontractor by 4% of the total amount invoiced. *Id.* Finally,  
 13 USM also established a right to “offset” payments to its subcontractors “for any breach” of the  
 14 Agreement, including a failure to perform services to Ross’ satisfaction. *Id.*<sup>13</sup>

15 **B. USM and Ross Knew How Much Labor Was Required To Complete The Daily**  
 16 **Maintenance Scope Of Work At The Time They Executed The 2008 MSA.**

17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED] (Dubow Dep. 24:9-25:11;  
 20 Confidential Dubow Dep. 35:1-36:17); (Confidential ROSS085.) [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED] (Confidential ROSS83-85); (Dubow  
 23 Dep. 24:9-24; Confidential Dubow Dep. 35:24-36:17); *see* (Voit Dep. 21:19-23:3).

24  
 25  
 26  
 27 <sup>13</sup> In discovery, USM produced data from its accounting systems showing payments made by USM to its  
 28 subcontractors (referred to as “vendors”) for services. USM’s accounting data is coded to track payments  
 made for a particular service, and shows that discounts were routinely made. *See* Breshears Decl. ¶ 18.

1 **C. USM And Ross Have Continuously Monitored The Amount Of Labor Required To**  
 2 **Complete Daily Maintenance Services.**

3 [REDACTED]  
 4 [REDACTED] (Confidential Berger Dep., 85:2-87:13; Confidential USM25, 27, 318,  
 5 336, 355, 373, 559-566.)<sup>14</sup> [REDACTED]

6 [REDACTED]  
 7 [REDACTED].<sup>15</sup> [REDACTED]  
 8 [REDACTED] *Id.* Although Ross directed its store managers to throw away  
 9 their copies of the daily sheet at the end of each month, USM required subcontractors to submit copies  
 10 of the completed sign-off sheets to USM in order to be paid. (Ross Dep., 136:17-137:14; Berger Dep.,  
 11 96:20-97:5; Ryan Decl., Ex. 29 VASQUEZ957.)

12 USM has produced all of the Daily Sign-off Sheets it has retained from daily maintenance work  
 13 performed during the class period. According to these sign-off sheets (representing nearly 6,700  
 14 months at approximately 300 stores in California from January 2011 to December 2013), completion  
 15 of the standard daily maintenance required an average of 125.03 janitorial hours per month at each  
 16 Ross store – an average of 4.22 hours per day, [REDACTED]

17 [REDACTED]  
 18 [REDACTED] Breshears Decl. ¶ 15, n.9; (Confidential ROSS83-85).<sup>16</sup>

19 \_\_\_\_\_  
 20 <sup>14</sup> [REDACTED]  
 21 [REDACTED] (Confidential USM561,  
 22 USM25, 27.) Janitors similarly testify that Ross managers are involved in day to day oversight of their work.  
 23 E. Alarcon Decl. ¶ 6; A. Cañez Decl. ¶ 7; M. Garcia Decl. ¶ 7; N. Guerrero Decl. ¶ 10, 14; A. Guzman Decl.  
 24 ¶ 9; C. Hurtado Decl. ¶ 11; M. Lopez Decl. ¶ 8; A. Martinez Decl. ¶ 6; B. Martinez Decl. ¶ 4; E. Martinez  
 25 Decl. ¶ 8; G. Martinez Decl. ¶ 8; F. Vasquez Decl. ¶ 7; J. Vasquez Decl. ¶ 7; F. Velez Decl. ¶ 9.

26 <sup>15</sup> These sign-off sheets are consistent with the testimony of individual janitors regarding their hours worked.  
 27 *See* E. Alarcon Decl. ¶ 8; A. Cañez Decl. ¶ 9; M. Garcia Decl. ¶ 8; N. Guerrero Decl. ¶ 14; A. Guzman Decl. ¶  
 28 ¶ 9; M. Lopez Decl. ¶ 9; S. Marquez Decl. ¶ 9; A. Martinez Decl. ¶ 8; B. Martinez Decl. ¶ 7; E. Martinez Decl.  
 ¶ 10; G. Martinez Decl. ¶ 10; G. Valadez Decl. ¶ 8; F. Vasquez Decl. ¶ 8; J. Vasquez Decl. ¶ 8; F. Velez Decl.  
 ¶ 10.

29 <sup>16</sup> Even though in 2008 USM had estimated an average of 4.19 hours for cleaning the Ross stores and the sign-  
 off sheets completed since show an average of 4.19 hours, USM responded to Ross' 2012 RFP by estimating  
 3.5 labor hours per store for daily maintenance at the 301 Ross stores covered by the RFP. (USM19065  
 [column E].) [REDACTED]

*Id.*;

1 In addition to the direct supervision of Ross store managers, Ross and USM have also actively  
 2 monitored, in-person, the labor performed during the class period. According to Defendants' 30(b)(6)  
 3 witnesses, USM Area Managers, supervised by a USM Regional Manager for California, visited each  
 4 Ross store in California on a regular basis to speak with the store managers and examine the work of  
 5 the janitors. (Ross Dep., 11:17-12:16.) After each store visit, Area Managers submit a report to  
 6 USM's corporate office. *Id.* (Ross Dep., 18:15-24:20.) The report includes a cleanliness rating and the  
 7 Area Manager's comments. *Id.* (Ross Dep., 21:4-24:20.) USM also maintains a hotline that Ross store  
 8 managers may call to complain about janitorial services. *Id.* (Ross Dep. 53:14-54:12.) Based on these  
 9 reports, USM submits a monthly "Janitorial Scorecard" to Ross, (Berger Dep., 27:24-28:8), [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED] *Id.* (Confidential Berger Dep., 87:15-88:15.)

12 **D. The Contracts and Agreements for Daily Maintenance Are Underfunded.**

13 The actual insufficiency of the monthly daily maintenance contracts at issue can be determined  
 14 through the common evidence discussed above. Using the time entries collected each day by Ross on  
 15 the Daily Sign-off Sheets, Plaintiffs have calculated the amount of work performed by janitors on daily  
 16 maintenance each month. Using USM accounting data, Plaintiffs have also calculated the actual  
 17 amounts paid each month for daily maintenance.

18 Finally, to determine whether the contracts were sufficiently funded at the time they were  
 19 executed, Plaintiffs have calculated the reasonable cost per labor hour in the janitorial services  
 20 industry. As set forth in the accompanying expert declarations, a per-hour labor cost here includes not  
 21 only the minimum wage,<sup>17</sup> but other legally-mandated costs such as payroll taxes, workers'

22 \_\_\_\_\_  
 23 (continued . . .)

24 *see also*, (Confidential Gosling Dep., 58:1-81:10; 79:6-80:12; 80:21 – 81:10). [REDACTED]  
 25 [REDACTED]

(Confidential Dubow Dep., 55:22-62:18.) Ross did not assess the accuracy of USM's estimates or how USM  
 arrived at them. (Confidential Gosling Dep., 81:2-5; Gosling Dep. 101:25-108:8.)

26 <sup>17</sup> From September 2009 until July 1, 2014, the California minimum wage was \$8 dollars per hour in most  
 27 jurisdictions. *See* <http://www.dir.ca.gov/iwc/minimumwagehistory.htm>. In those jurisdictions with higher  
 28 minimum wage, such as San Francisco and San Jose, Plaintiffs have accounted for the higher minimum wage.  
*See* <http://sfgsa.org/index.aspx?page=411>; <http://www.sanjoseca.gov/minimumwage>.

1 compensation insurance premiums, and other costs required by law or imposed by Ross or USM under  
 2 the terms of the MSAs or the Subcontractor Agreements. The minimum wage plus these payments  
 3 therefore reflects the “True Minimum Labor Cost” per hour.

4 Plaintiffs offer the testimony and analysis of three experts. Dr. Marc Bendick, Jr., Ph.D., is a  
 5 labor economist who has performed a review of the literature regarding labor costs associated with the  
 6 provision of janitorial services. David M. Breshears, CPA/CFF, is a forensic accountant who has  
 7 reviewed and analyzed Ross and USM’s accounting data, as well as the time records collected on the  
 8 Daily Sign-Off Sheets. Chris Waldheim, who has 30 years of experience in the janitorial services  
 9 industry and is the vice president and chief financial officer of a California-based janitorial services  
 10 provider, offers testimony regarding the pricing of such contracts.

11 The True Minimum Labor Cost reflects the cost of legally required minimum wage, workers’  
 12 compensation premiums, payroll taxes, and unemployment insurance premiums, plus overhead.  
 13 Breshears Decl. ¶ 10; Waldheim Decl. ¶¶ 23-35. Plaintiffs have conservatively accounted for costs  
 14 commonly associated with the provision of janitorial services work, including costs imposed under the  
 15 terms of the contracts here (such as general liability insurance). Bendick Decl. ¶¶ 7-25; Waldheim  
 16 Decl. ¶¶ 36-42. Together, these costs come to \$5.15 per labor hour. Breshears Decl. ¶ 27.<sup>18</sup> Bendick  
 17 Decl. ¶ 25. Thus, the True Minimum Labor Cost per labor hour is \$13.15 per labor hour. When this  
 18 hourly rate is multiplied by the average number of hours worked by janitors on daily maintenance each  
 19 month, the cost of a legally-sufficient payment – i.e., a payment that properly accounts for the True  
 20 Minimum Labor Cost and the number of hours worked each month – is \$1,644 per month, on average,  
 21 without profit.<sup>19</sup> On average, however, USM paid subcontractors just \$1,179 per month for daily

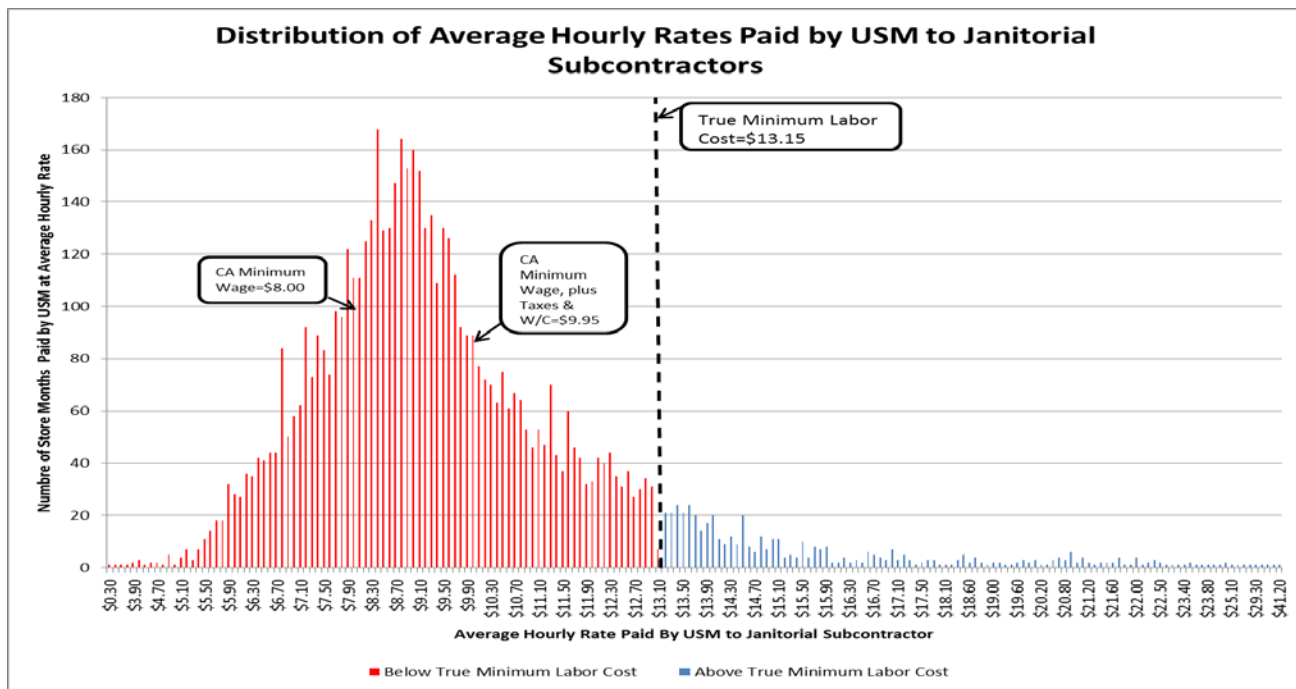
22 \_\_\_\_\_  
 23 <sup>18</sup> Plaintiffs’ estimates are intended to be conservative. For example, Plaintiffs have excluded any expectation  
 24 of profit. Bendick Decl. ¶ 24. Furthermore, Plaintiffs’ calculation of payroll taxes includes a significant  
 25 discount on the assumption that workers will exceed the cap on such payments each year. Breshears Decl.  
 26 ¶24, n.13; Waldheim Decl. ¶ 25, n.1.

27 <sup>19</sup> Subcontractors incur standard expenses associated with running their businesses, many of which are costs  
 28 that the MSAs and the Subcontractor Agreements required that the subcontractor assume. (USM1-13, 312-  
 315, 547-552.) Indeed, such costs are accounted for in USM’s “proprietary internal historical information”  
 with which USM analyzes a subcontractor’s cost. As COO Ivan Dubow testified, “We look to ensure that the  
 rates we are paying our subcontractors can cover the minimum wage, the corresponding associated costs  
 related to payroll, Workers Compensation insurance, et cetera, supplies and equipment.” (Dubow Dep. 42:18-  
 21; 46:8-12.)

1 maintenance, while Ross contracted to pay \$1,425 per month to USM.

2 By comparing USM’s monthly payment for daily maintenance at a single store, in a single  
 3 month to the True Minimum Labor Cost, it is possible to see each month in which the True Minimum  
 4 Labor Cost for daily maintenance exceeded the payment made for such service – i.e. whether the  
 5 contract was actually underfunded. In fact, this common evidence of actual underfunding for the  
 6 challenged contracts is overwhelming: *USM’s daily maintenance subcontracts were underfunded in*  
 7 *91% of the store months for which there was usable time data, while Ross’ payments to USM were*  
 8 *underfunded in 75% of the store months.* Breshears Decl. ¶11-12. Daily maintenance contracts funded  
 9 at these levels were virtually assured to be insufficient at the time they were executed, given the  
 10 number of labor hours that both Ross and USM expected to be expended for daily maintenance. In  
 11 practice, USM’s monthly payments to its subcontractors were insufficient to cover the cost of each  
 12 labor hour in 5,843 of the 6,396 months for which Daily Sign-Off Sheets provided usable time data.  
 13 Breshears Decl. ¶ 28.

14 As the chart below shows, the average hourly rate paid by USM for daily maintenance is, in  
 15 fact, often lower than even the basic minimum wage.



27 Breshears Decl. ¶ 20, Exh. 2.1.

1 Based on the daily sign off sheets and the Ross store managers' daily assessment of the  
 2 janitors' work, USM and Ross should have known how many hours the janitors worked each day, and  
 3 that the subcontractors' month-to-month agreements were underfunded. Even without the sign off  
 4 sheets, USM and Ross should have known the monthly amounts that they contracted to pay and did  
 5 pay to subcontractors for daily maintenance were insufficient; based on their own estimates of 4.19 or  
 6 4.21 hours per day per store required for daily maintenance and even conservative estimates of known  
 7 costs, such as the minimum wage, taxes, and insurance, the average payment being made for daily  
 8 services was far from enough to enable the subcontractor to comply with all local, state, and federal  
 9 laws. Breshears Decl. ¶¶ 10-13.

10 Based on this analysis, Plaintiffs assert that USM and Ross knew or should have known, based  
 11 on information reasonably available to them and for which knowledge is imputed under section 2810,  
 12 that a subcontractor would need to be paid at least \$1,644 for daily maintenance per month per store  
 13 just to cover minimum wages, workers' compensation, payroll taxes, and costs at a rate of \$13.15/labor  
 14 hour. Because USM and Ross entered into daily maintenance contracts below this threshold, and then  
 15 routinely failed to pay sufficient amounts for the work, they have both violated section 2810.

16 **E. There Is Common Evidence of Widespread Minimum Wage and Labor Code**  
 17 **Violations.**

18 The experience of janitors working in California is consistent with the findings described  
 19 above. Janitors employed by different subcontractors at different Ross stores across California  
 20 experienced routine violations of the Labor Code. Janitors testify that they worked seven days per  
 21 week;<sup>20</sup> were not paid their minimum wages;<sup>21</sup> were not indemnified for business expenses as required  
 22 by Labor Code section 2802;<sup>22</sup> were paid late,<sup>23</sup> or not at all,<sup>24</sup> and without lawful wage statements;<sup>25</sup>

23 <sup>20</sup> E. Alarcon Decl. ¶ 5; A. Cañez Decl. ¶ 5; M. Garcia Decl. ¶ 5; N. Guerrero Decl. ¶ 8; A. Guzman Decl. ¶ 7;  
 24 C. Hurtado Decl. ¶ 9; M. Lopez Decl. ¶ 7; S. Marquez Decl. ¶ 5; A. Martinez Decl. ¶ 5; B. Martinez Decl. ¶ 3;  
 25 E. Martinez Decl. ¶ 7; G. Martinez Decl. ¶ 7; E. Méndez Decl. ¶ 9, 11; G. Valadez Decl. ¶ 5; F. Vasquez Decl.  
 ¶ 6; J. Vasquez Decl. ¶ 6; F. Velez Decl. ¶ 6.

26 <sup>21</sup> E. Alarcon Decl. ¶ 9; A. Cañez Decl. ¶ 11-12; F. Claudio Decl. ¶ 6-7; N. Guerrero Decl. ¶ 12,16; A. Guzman  
 27 Decl. ¶ 13; C. Hurtado Decl. ¶ 13-14; M. Lopez Decl. ¶ 10; S. Marquez Decl. ¶ 11; A. Martinez Decl. ¶ 9; B.  
 Martinez Decl. ¶ 9-10, 13; E. Martinez Decl. ¶ 11; G. Martinez Decl. ¶ 11; E. Méndez Decl. ¶ 15-17; G.  
 Valadez Decl. ¶ 6, 9; F. Velez Decl. ¶ 13.

28 <sup>22</sup> A. Guzman Decl. ¶ 18; C. Hurtado Decl. ¶ 19; B. Martinez Decl. ¶ 12; E. Méndez Decl. ¶ 22.

1 and failed to receive the benefits of employer contributions to payroll taxes<sup>26</sup> and the protection of  
 2 workers' compensation insurance.<sup>27</sup> Not surprisingly, the janitors report working off the clock,<sup>28</sup> or in  
 3 excess of two hours per day, a fact consistent with Ross and USM's estimates of the time required for  
 4 daily maintenance, and the violation rates found by Plaintiffs.<sup>29</sup>

5 Beyond the testimony of janitors submitted in support of this Motion, scores of janitors have  
 6 complained about such violations during the class period. Plaintiff Velez, like approximately 200  
 7 other janitors, filed wage claims with the State Labor Commission against USM subcontractors that  
 8 cleaned Ross stores. For instance:

- 9 • 24 workers filed claims against Spotless Janitorial
- 10 • 11 workers filed claims against Garcia's Janitorial
- 11 • 11 workers filed claims against JanPro
- 12 • 6 workers filed claims against BNB Janitorial
- 13 • 5 workers filed claims against Empire Assets and Investments
- 14 • 19 workers filed claims against Royal Janitorial
- 15 • 20 workers filed claims against R.C. Maintenance

16 (continued . . .)

17 <sup>23</sup> E. Alarcon Decl. ¶ 11; A. Cañez Decl. ¶ 11-12; F. Claudio Decl. ¶ 8; M. Garcia Decl. ¶ 11; N. Guerrero  
 18 Decl. ¶ 18-19; A. Guzman Decl. ¶ 16; M. Lopez Decl. ¶ 13; S. Marquez Decl. ¶ 13; A. Martinez Decl. ¶ 11; B.  
 19 Martinez Decl. ¶ 10; E. Martinez Decl. ¶ 13-14; G. Martinez Decl. ¶ 13-14; J. Vasquez Decl. ¶ 12.

20 <sup>24</sup> A. Cañez Decl. ¶ 12; F. Claudio Decl. ¶ 9; M. Garcia Decl. ¶ 4, 12; N. Guerrero Decl. ¶ 19; A. Guzman  
 21 Decl. ¶ 17; B. Martinez Decl. ¶ 15; G. Valadez Decl. ¶ 11; F. Vasquez Decl. ¶ 14; J. Vasquez Decl. ¶ 14; F.  
 22 Velez Decl. ¶ 16-17.

23 <sup>25</sup> E. Alarcon Decl. ¶ 10; A. Cañez Decl. ¶ 10; N. Guerrero Decl. ¶ 15; A. Guzman Decl. ¶ 12; C. Hurtado  
 24 Decl. ¶ 16; M. Lopez Decl. ¶ 11; S. Marquez Decl. ¶ 12; A. Martinez Decl. ¶ 10; B. Martinez Decl. ¶ 11; E.  
 25 Martinez Decl. ¶ 12; G. Martinez Decl. ¶ 12; E. Méndez Decl. ¶ 19; G. Valadez Decl. ¶ 10; F. Vasquez Decl. ¶  
 26 10; J. Vasquez Decl. ¶ 10; F. Velez Decl. ¶ 15.

27 <sup>26</sup> E. Alarcon Decl. ¶ 10; N. Guerrero Decl. ¶ 15; A. Guzman Decl. ¶ 12; C. Hurtado Decl. ¶ 16; M. Lopez  
 28 Decl. ¶ 11; S. Marquez Decl. ¶ 12; A. Martinez Decl. ¶ 10; B. Martinez Decl. ¶ 11,14; E. Martinez Decl. ¶ 12;  
 29 G. Martinez Decl. ¶ 12; E. Méndez Decl. ¶ 19; G. Valadez Decl. ¶ 10; J. Vasquez Decl. ¶ 10; F. Velez Decl. ¶  
 30 15.

31 <sup>27</sup> E. Alarcon Decl. ¶ 14; A. Cañez Decl. ¶ 13; F. Claudio Decl. ¶ 11; M. Garcia Decl. ¶ 13; N. Guerrero Decl.  
 32 ¶ 21; C. Hurtado Decl. ¶ 8, 18; M. Lopez Decl. ¶ 15; S. Marquez Decl. ¶ 14; A. Martinez Decl. ¶ 14; B.  
 33 Martinez Decl. ¶ 11, 14; E. Martinez Decl. ¶ 16; G. Martinez Decl. ¶ 16; E. Méndez Decl. ¶ 21; G. Valadez  
 34 Decl. ¶ 13; F. Vasquez Decl. ¶ 15; F. Velez Decl. ¶ 19.

35 <sup>28</sup> A. Guzman Decl. ¶ 8; M. Lopez Decl. ¶ 7; S. Marquez Decl. ¶ 6-7; F. Vasquez Decl. ¶ 6; J. Vasquez Decl. ¶  
 36 6.

37 <sup>29</sup> A. Cañez Decl. ¶ 6; M. Garcia Decl. ¶ 5; N. Guerrero Decl. ¶ 12; A. Guzman Decl. ¶ 11; C. Hurtado Decl. ¶  
 38 9; M. Lopez Decl. ¶ 7; E. Martinez Decl. ¶ 9; G. Martinez Decl. ¶ 9; E. Méndez Decl. ¶ 11; F. Vasquez Decl.  
 ¶ 6; J. Vasquez Decl. ¶ 6; F. Velez Decl. ¶ 6.



- 6 workers filed claims against First Call Contracting
- 9 workers filed claims against New Generation Maintenance
- 7 workers filed claims against Beyond Building Maintenance
- 15 workers filed claims against 911 Janitorial

Ryan Decl. Ex. 30 (VASQUEZ974-10604).

*See, e.g.*, (Confidential ROSS8550)

#### IV. ARGUMENT

Plaintiffs' challenge to the sufficiency of the contracts to clean Ross stores is ideally suited for class treatment. The overarching common question on liability is whether Ross and USM knew or should have known that the contracts for daily maintenance cleaning were not sufficiently funded. That common question can be answered on a class basis using common evidence in the form of Defendants' contracts and agreements, Defendants' estimates and records of the amount of time necessary to complete the daily maintenance, Defendants' accounting and payment records, Defendants' corporate representative testimony, and the testimony from janitor class members and subcontractors with knowledge of the Labor Code violations flowing from the underfunding of the daily maintenance contracts.

Certification of the Declaratory and Injunctive Relief classes requires no further showing. The Monetary Relief class also should be certified as the common liability questions predominate over any potential individual issues. Alternatively, the Court may certify certain issues pursuant to Federal Rule of Civil Procedure 23(c)(4).

Rule 23 permits a class to be certified when it satisfies the elements of Rule 23(a) and one of the subsections of Rule 23(b). *Ellis v. Costco Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2011). The Rule 23(a) elements are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. *Id.* Here, Plaintiffs seek certification of an injunctive and declaratory relief class of current employees under Rule 23(b)(2) and a separate monetary relief class under Rule 23(b)(3). Under Rule 23(b)(2), Plaintiffs must show that Defendant has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a

1 whole.” Fed. R. Civ. P. 23(b)(2). Under Rule 23(b)(3), the Court must find that “the questions of law  
2 or fact common to class members predominate over any questions affecting only individual members,  
3 and that a class action is superior to other available methods for fairly and efficiently adjudicating the  
4 controversy.” *Id.* at 23(b)(3).

5 The Ninth Circuit has confirmed that courts may grant hybrid certification of a Rule 23(b)(2)  
6 injunctive relief class for current employees only and a separate Rule 23(b)(3) damages class for all  
7 employees. *See Ellis*, 657 F.3d at 987-88 (confirming the ability to certify a Rule 23(b)(2) class for  
8 equitable relief and a separate Rule 23(b)(3) class for damages due to Rule 23(b)(2)’s focus on the  
9 indivisible nature of the relief sought); *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544-45 (9th  
10 Cir. 2013) (same). Accordingly, courts in this circuit have routinely granted such hybrid certification.  
11 *See, e.g., Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 545 (N.D. Cal. 2012) (granting hybrid Rule  
12 23(b)(2) and Rule 23(b)(3) certification); *Brazil v. Dole Packaged Foods, LLC*, 12-CV-01831-LHK,  
13 2014 WL 2466559, at \*20 (N.D. Cal. May 30, 2014) (same); *Beal v. Lifetouch, Inc.*, CV 10-8454-JST  
14 (MLGx), 2012 WL 3705171, at \*4 (C.D. Cal. Aug. 27, 2012) (confirming ability to grant hybrid  
15 Rule 23(b)(2) and Rule 23(b)(3) certification after *Ellis*, 657 F.3d 970).

16 **A. Plaintiffs Satisfy the Elements of Rule 23(a).**

17 **1. The Class Members are Sufficiently Numerous.**

18 Courts in the Ninth Circuit presume numerosity when the putative class has at least 40  
19 members. *Rannis v. Recchia*, No. 09-55859, 2010 WL 2124096, at \*4 (9th Cir. May 27, 2010).

20 Ross and USM required subcontractors to provide an employee list as an exhibit to the  
21 Subcontractor Agreement, and to submit the names of employees for a criminal background check.  
22 These records indicate that more than 2,400 janitors have cleaned nearly 300 Ross stores in California  
23 during the class period. Thus, the class is sufficiently numerous under Rule 23.

24 **2. The Proposed Class Meets the Commonality Requirement.**

25 Plaintiffs must demonstrate that their claims “depend upon a common contention . . . that [] is  
26 capable of classwide resolution . . . .” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).  
27 This means that “determination of its truth or falsity will resolve an issue that is central to the validity  
28 of each one of the claims in one stroke.” *Id.* “Plaintiffs need not show that every question in the case,

1 or even a preponderance of questions, is capable of classwide resolution. So long as there is “even a  
2 single common question,” a would-be class can satisfy the commonality requirement of Rule 23(a)(2).  
3 *Wang*, 737 F.3d at 544 (quoting *Wal-Mart*, 131 S. Ct. at 2556) (alteration and internal quotation marks  
4 omitted).

5 The Ninth Circuit has routinely found that wage and hour claims based on uniformly applied  
6 policies satisfy commonality. *See, e.g., Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 963-64 (9th  
7 Cir. 2013) (affirming Rule 23(b)(3) certification of meal break class); *Jimenez v. Allstate Ins. Co.*, 765  
8 F.3d 1161, 1165-67 (9th Cir. 2014) (affirming district court’s finding commonality based on alleged  
9 off-the-clock claims); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512-13 (9th Cir. 2013) (noting that  
10 district court correctly found Rule 23(a) elements satisfied in action alleging time shaving and  
11 miscalculated bonus wages).

12 The requisite commonality is indisputably present here. Plaintiffs allege that janitors working  
13 pursuant to underfunded MSAs and subcontracts for daily maintenance constitute a common wrong,  
14 *i.e.*, a violation of Labor Code section 2810(a), which prohibits “a person or entity” from entering into  
15 a contract or agreement for janitorial services “where the person or entity knows or should know that  
16 the contract or agreement does not include funds sufficient to allow the contractor to comply with all  
17 applicable local, state, and federal laws or regulations governing the labor or services to be provided.”

18 Plaintiffs have introduced common evidence of timekeeping and accounting records that  
19 demonstrate near uniformity in underfunding at Ross stores for the daily maintenance contracts.  
20 Though Ross and USM may challenge elements of Plaintiffs’ analysis, even such challenges present  
21 common questions. For example, Plaintiffs’ experts have set forth a variety of costs that must be  
22 considered when determining whether contracts are sufficient under section 2810. What costs are  
23 appropriately considered at the time the contracts were executed is a common question that has  
24 classwide application – as is the amount of such costs.

25 In addition, as Plaintiffs allege and the evidence shows, additional common legal and factual  
26 questions may be resolved on a class-wide basis, including:

- 27 (a) What information must Ross and USM consider in assessing whether the value of  
28 (b) What constitutes sufficiency under section 2810?

- 1 (c) What constitutes a “contract or agreement” under section 2810?  
 2 (d) Whether Ross and USM violate the California Unfair Competition Law,  
 3 California Business and Professions Code section 17200 *et seq.*, through their  
 4 violations of section 2810;  
 (e) Whether Ross and USM owe civil penalties under PAGA for their violations of  
 section 2810.

5 These legal and factual issues have previously been recognized by other courts as valid  
 6 prerequisites to a finding of commonality.<sup>30</sup> *See, e.g., Jimenez*, 2014 WL 4338841, at \*3-4.

7 **3. Plaintiffs’ Claims are Typical of the Class Claims.**

8 Under Rule 23(a)(3), class certification is proper when the claims or defenses of the  
 9 representative parties are typical of the claims or defenses of the class, thereby ensuring that the named  
 10 plaintiffs’ litigation interests are coextensive with those of the other class members. “The test of  
 11 typicality ‘is whether other members have the same or similar injury, whether the action is based on  
 12 conduct which is not unique to the named plaintiffs, and whether other class members have been  
 13 injured by the same course of conduct.’” *Gaudin v. Saxon Mortg. Servs., Inc.*, 297 F.R.D. 417, 425  
 14 (N.D. Cal. 2013) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)); *see*  
 15 *Brazil*, 2014 WL 2466559, at \*9 (“Typicality is satisfied ‘when each class member’s claim arises from  
 16 the same course of events, and each class member makes similar legal arguments to prove the  
 17 defendants’ liability.’”) (quoting *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir.2010)). Thus, this  
 18 permissive factor is satisfied where “plaintiffs’ claims [] ‘arise from the same remedial and legal  
 19 theories’ as the class claims” and does not require that these claims “be identical to the claims of the  
 20 class to satisfy typicality.” *Bates v. United Parcel Serv.*, 204 F.R.D. 440, 446 (N.D. Cal. 2001)  
 21 (internal citations omitted).

22 Here, typicality is satisfied for the same reasons as commonality. Plaintiffs make the same  
 23 claims and legal arguments, including: (1) they all performed daily maintenance services at Ross stores  
 24 under underfunded contracts; (2) they all experienced minimum wage and other violations of the Labor  
 25 Code attributable to the underfunded contracts; and (3) Ross and USM are prohibited from entering

26 \_\_\_\_\_  
 27 <sup>30</sup> Plaintiffs’ claims also raise common issues as to damages. Under section 2810(g), each aggrieved  
 28 employee is entitled to actual or statutory damages for “initial” and “subsequent” violations of section  
 2810(a). What these terms mean are common questions capable of classwide resolution.

1 into underfunded contracts for the daily maintenance janitorial services at issue.

2 Because these named Plaintiffs and the putative class members suffered the same injury arising  
3 from the same contracts and form agreements, typicality is satisfied. *See also Gaudin*, 297 F.R.D. at  
4 426; *Brazil*, 2014 WL 2466559 at \*10.

5 **4. The Interest of the Classes Will be Fairly and Adequately Represented.**

6 Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the  
7 interests of the class.” Representation is adequate if (a) the named representatives appear able to  
8 prosecute the action vigorously through qualified counsel; and (b) there is no antagonism or conflict of  
9 interest between the named representatives and the other members of the class. *Ellis*, 657 F.3d at 985.  
10 The named Plaintiffs have demonstrated that they will prosecute this action vigorously.<sup>31</sup> They have  
11 no conflict of interest with the other members of the Class; indeed, their interests are the same as those  
12 of the Classes and they seek the same remedies. Accordingly, Plaintiffs Emigdio Mendez and  
13 Candelaria Hurtado, and Evelia Martinez, as current employees, may serve as the representative for the  
14 declaratory and injunctive relief class, while Plaintiffs Mendez, Hurtado, Cañez, and Martinez, as either  
15 current or former employees, may serve as representatives for the monetary relief class.

16 Plaintiffs have likewise chosen accomplished attorneys with significant experience in both  
17 complex class action litigation and substantive labor and employment law, as well as a non-profit  
18 organization that has litigated numerous wage claims and substantial cultural competency given the  
19 composition of the class. Declaration of Laura L. Ho (“Ho Decl.”) ¶¶ 2-6, Ex. A; Declaration of  
20 Jonathan E. Gertler (“Gertler Decl.”) ¶¶ 5-6; Declaration of Paul Cohen (“Cohen Decl.”) ¶¶ 4-5, Ex. A.  
21 Accordingly, these law firms and organizations should be appointed class counsel pursuant to  
22 Rule 23(g).

23 **B. The Declaratory and Injunctive Relief Class Should Be Certified Under Rule 23(b)(2).**

24 Rule 23(b)(2) applies when “the party opposing the class has acted or refused to act on grounds  
25 generally applicable to the class, thereby making appropriate final injunctive relief or corresponding  
26

27 \_\_\_\_\_  
28 <sup>31</sup> J.Vasquez Decl. ¶ 17; F.Vasquez Decl. ¶ 17; F. Claudio Decl. ¶ 12; A. Cañez Decl. ¶ 15; C. Hurtado Decl. ¶  
20; E. Martinez Decl. ¶ 18; E. Méndez Decl. ¶ 23.

1 declaratory relief with respect to the class as a whole.” For a class to be certified under Rule 23(b)(2),  
2 “it is sufficient if class members complain of a pattern or practice that is generally applicable to the  
3 class,” even if not all class members have been injured by the challenged practice. *Walters v. Reno*,  
4 145 F.3d 1032, 1047 (9th Cir. 1998); *see also Bates*, 204 F.R.D. at 447. Thus, “[c]lass certification  
5 under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive.”  
6 *Ellis*, 657 F.3d at 987 (internal citation omitted).

7 Here, Plaintiffs seek certification of a declaratory and injunctive relief class of current  
8 employees under Rule 23(b)(2). Plaintiffs’ claims for injunctive and declaratory relief fit squarely  
9 under Rule 23(b)(2) because both Ross and USM have entered into underfunded contracts, which  
10 remain operative, and there is currently nothing to prevent them from continuing to do so in the future.  
11 Ross and USM have utilized a standard “Scope of Work” for daily maintenance activities across Ross’  
12 California stores, and such work has been governed by the Ross-USM MSAs and the standard form  
13 Subcontractor Agreement. There is currently nothing in the Ross-USM MSA, or in the Subcontractor  
14 Agreement, that prevents a contract for daily maintenance to be funded at an amount sufficient for the  
15 subcontractor to be allowed to follow the law. Neither USM nor Ross requires subcontracts for daily  
16 maintenance services to be funded at *any* level, though each purports to require “compliance with all  
17 laws” from their respective counterparty. Plaintiffs request, on behalf of all current employees, for a  
18 declaration that the Defendants’ failure to comply with section 2810 is illegal, and for an injunction  
19 that prohibits both Ross and USM from entering into underfunded contracts. The threat of ongoing or  
20 future violations is sufficient to warrant certification under Rule 23(b)(2). *See Ries v. Ariz. Beverages*  
21 *USA LLC*, 287 F.R.D. 523, 541 (N.D. Cal. 2012) (holding that Rule 23(b)(2) certification clearly  
22 appropriate where “plaintiffs request: (1) declaratory relief that the alleged practices are unlawful, and  
23 (2) injunctive relief prohibiting defendants from continuing them.”).

24 The Court should certify the proposed declaratory and injunctive relief class under Rule  
25 23(b)(2).

26 **C. The Monetary Relief Class Should Be Certified Under Rule 23(b)(3).**

27 This Court may certify the class seeking monetary relief under Rule 23(b)(3) as it meets all of  
28 the requirements.

1           **1.       Common Questions Predominate.**

2           Rule 23(b)(3)'s predominance inquiry tests "whether proposed classes are sufficiently cohesive  
3 to warrant adjudication by representation." *Abdullah*, 731 F.3d at 964 (citation omitted). "The main  
4 concern of the predominance inquiry under Rule 23(b)(3) is 'the balance between individual and  
5 common issues.'" *Wang*, 737 F.3d at 545-46 (citation omitted). "Considering whether questions of  
6 law or fact common to class members predominate begins . . . with the elements of the underlying  
7 causes of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, \_\_U.S. \_\_, 131 S. Ct. 2179, 2184  
8 (2011).

9           The Ninth Circuit has made clear that predominance is met where common questions of  
10 liability are present and damages can be feasibly and efficiently calculated. *See, e.g., Leyva*, 716 F.3d  
11 at 514 (finding predominance where wage and hour claims presented common legal questions and  
12 damages could be calculated using company documents and testimony); *Abdullah*, 731 F.3d at 964-67  
13 (predominance satisfied where plaintiffs' claims would prevail or fail in unison given the common  
14 legal questions and ability to calculate class damages).

15           The key legal dispute is whether the challenged contracts for daily maintenance services were  
16 insufficient under section 2810. That question can be answered on a class basis with common  
17 evidence. Class members worked under uniform contracts – the operative MSA, the Subcontractor  
18 Agreement, and a Pricing Schedule for daily maintenance – that were insufficient both at the time they  
19 were executed and in the ensuing months of performance. The MSA applies to all work performed in  
20 California, while the subcontracts incorporate the requirements of the MSAs and were sourced using  
21 the same policies and practices. Additionally, Plaintiffs seek only statutory damages for class  
22 members for all but the first year of the class period. Thus, there are no individualized inquiries as to  
23 individual damages for this period.<sup>32</sup> Moreover, whether the challenged contracts violated section

24 \_\_\_\_\_  
25 <sup>32</sup> Defendants may rely upon *Comcast Corp. v. Behrend*, \_\_ U.S. \_\_, 133 S. Ct. 1426 (2013) to claim that  
26 individualized damages issues defeat predominance, *Comcast* is inapposite. As the Ninth Circuit has made  
27 clear, even after *Comcast*, individualized "damage calculations alone cannot defeat certification." *Leyva*, 716  
28 F.3d at 513, citing *Yokoyama v. Midland Nat'l Life Ins., Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010); *Jimenez*,  
765 F.3d at 1168 (noting that as "long as the plaintiffs were harmed by the same conduct, disparities in how or  
by how much they were harmed did not defeat class certification"). In *Leyva*, the Ninth Circuit certified a  
Rule 23(b)(3) class despite the fact that the damages inquiry would be highly individualized because it  
recognized that "damages determinations are individual in nearly all wage- and-hour class actions." 716 F.3d

1 2810, or whether class members were aggrieved from the underfunding, requires no individual  
2 inquiries.<sup>33</sup>

3 **2. The Class Is Ascertainable.**

4 Rule 23(b)(3) certification is also appropriate because the proposed class is ascertainable.  
5 Ascertainability is an “inherent” requirement under Rule 23(b)(3). *Lilly v. Jamba Juice Co.*, No. 13-  
6 cv-02998-JST, 2014 WL 4652283, at \*3 (N.D. Cal. Sept. 18, 2014).<sup>34</sup> “Although there is no explicit  
7 requirement concerning the class definition in FRCP 23, courts have held that the class must be  
8 adequately defined and clearly ascertainable before a class action may proceed.” *Chavez v. Blue Sky*  
9 *Natural Beverage Co.*, 268 F.R.D. 365, 376 (N.D. Cal. 2010) (quoting *Schwartz v. Upper Deck Co.*,  
10 183 F.R.D. 627, 679-80 (S.D. Cal. 1999)). “An identifiable class exists if its members can be  
11 ascertained by reference to objective criteria, but not if membership is contingent on a prospective  
12 member’s state of mind.” *Schwartz*, 183 F.R.D. at 679-80 (internal citation omitted). It must be  
13 administratively feasible to determine whether a particular person is a class member. *Lee v.*  
14 *Stonebridge Life Ins. Co.*, 289 F.R.D. 292, 294 (N.D. Cal. 2013). However, “the class need not be so  
15 ascertainable that every potential member can be identified at the commencement of the action.”  
16 *Mazur v. eBay Inc.*, 257 F.R.D. 563 (N.D. Cal. 2009) (internal citation omitted).

17 The class members are readily ascertainable here by reference to objective criteria. The class  
18 consists of all janitors who cleaned Ross stores in California under a daily maintenance contract.  
19 Defendants’ Employee Lists and I-9s (which have already been produced), provide objective criteria

20  
21 \_\_\_\_\_  
(continued . . .)

22 at 513-14. The *Levy* court found predominance so long as the class damages could be calculated from  
23 common forms of proof, such as company records and testimony of company witnesses. *Id.* Here, just as in  
24 *Levy*, the class damages can be computed using Defendant’s own records and testimony and therefore  
satisfies predominance. See Breshears Decl. ¶32.

25 <sup>33</sup> Similarly, Plaintiffs’ derivative claims for UCL restitution and PAGA civil penalties can all be resolved on  
26 a class basis. See *Mendez v. R+L Carriers, Inc.*, No. C 11-2478 CW, 2012 WL 5868973, at \*18-19 (N.D. Cal.  
27 Nov. 19, 2012) (finding predominance for derivative Section 203 and UCL claims after determining the  
underlying unpaid wage claims); *Abdullah*, 731 F.3d at 966-67 (in light of defendant’s own records it would  
not be difficult to determine liability to individual plaintiffs, nor would it be overly-burdensome to calculate  
damages).

28 <sup>34</sup> Because ascertainability is a component of Rule 23(b)(3), it has no bearing on Rule 23(b)(2) certification.



1 for identifying class members.

2 **3. A Class Action is the Superior Method for Resolving this Dispute.**

3 Rule 23(b)(3) also is satisfied because a class action is the superior method for resolving  
 4 Plaintiffs' and the Class' claims. Class members have little interest "in individually controlling . . .  
 5 separate actions." Fed. R. Civ. P. 23(b)(3)(A). Many of them still are employed by a subcontractor  
 6 cleaning Ross stores, and the concern for possible employer reprisal exists if they institute their own  
 7 lawsuits. *See Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 605 (N.D. Cal. 2008).  
 8 Further, "[t]he policy at the very core of the class action mechanism is to overcome the problem that  
 9 small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his  
 10 or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (internal citation omitted);  
 11 *see also, Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (1998). "Even if proposed Class Members  
 12 could still maintain individual actions not barred by the applicable statute of limitations, it would not  
 13 be fairer or more efficient for them to do so." *Gaudin*, 297 F.R.D. at 431.

14 Class member's individual monetary damages are likely to be small, given that the janitors  
 15 were working part time (often just 3 hours/ day) and they are seeking only statutory damages. The  
 16 modest damages at issue do not justify the cost of individual litigation. *Ching v. Siemens Indus., Inc.*,  
 17 No. C 11-4838 MEJ, 2013 WL 6200190, at \*5 (N.D. Cal. Nov. 27, 2013) ("first and third factors are  
 18 satisfied because the case involves multiple claims for relatively small sums and it would not be  
 19 economically viable for class members to seek compensation individually.").<sup>35</sup>

20 Finally, a class action is superior because it is manageable. *See* Fed. R. Civ. P. 23(b)(3)(D).  
 21 As demonstrated *supra*, the common question in this case predominates over any individual questions.  
 22 While Plaintiffs do not anticipate any trial management issues, should any arise later the Court has  
 23 numerous tools at its disposal to effectively manage them, including bifurcation.

24  
 25  
 26 \_\_\_\_\_  
 27 <sup>35</sup> Scarce few claims under section 2810 are likely to proceed in any administrative proceeding, much less in  
 28 litigation. "Courts have not hesitated to certify class actions for wage and hour claims simply because  
 California law provides for administrative relief." *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 614  
 (C.D. Cal. 2005).

1 **D. The Court Should Certify Particular Issues Under Rule 23(c)(4).**

2 As an alternative to Rule 23(b)(3) certification, the Court may certify an issue class pursuant to  
3 Rule 23(c)(4) to determine Defendants' liability under section 2810. *See Lilly*, 2014 WL 4652283, at  
4 \*11 (certifying class under Rule 23(c)(4) for purposes of determining liability); *McReynolds v. Merrill*  
5 *Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490-92 (7th Cir. 2012) (certifying injunctive and  
6 class-wide liability claims under Rule 23(c)(4)).

7 Rule 23(c)(4)(A) permits a class to be certified for specific issues or elements of claims raised  
8 in the litigation. "Selectively used, this provision may enable a court to achieve the economies of class  
9 action treatment for a portion of a case, the rest of which may either not qualify under Rule 23(a) or  
10 may be unmanageable as a class action . . . Certification of an issues class is appropriate only if it  
11 permits fair presentation of the claims and defenses and materially advances the disposition of the  
12 litigation as a whole. *Manual for Complex Litigation* (4th ed. 2004) at 272-73. For the reasons  
13 outlined above, Plaintiffs' class-wide liability claims may be appropriately certified under  
14 Rule 23(c)(4), and would facilitate the management of an individualized damages claims for those  
15 class members seeking actual damages for the first year of the class period and if the Court has any  
16 concerns regarding the ability to calculate statutory damages.

17 **E. The Court Should Approve the Proposed Notice of Class Certification.**

18 If the Court certifies the monetary relief class as requested, it should also approve the  
19 proposed Notice to be sent via first class mail and posting as set forth in the proposed order. *See*  
20 Proposed Notice, attached as Ex. 1 to the Proposed Order; *Adams v. Inter-Con Sec. Sys., Inc.*, 242  
21 F.R.D. 530, 542 (N.D. Cal. 2007) (notice and posting ordered in class involving several thousand  
22 members and 500 locations).

23 **V. CONCLUSION**

24 For the foregoing reasons, the Court should grant Plaintiffs' Motion.  
25  
26  
27  
28

1 Dated: October 24, 2014

Respectfully submitted,

2 GOLDSTEIN, BORGEN, DARDARIAN & HO

3  
4 /s/ Laura L. Ho

Laura L. Ho

5 Attorneys for Plaintiffs

6 Dated: October 24, 2014

CHAVEZ & GERTLER LLP

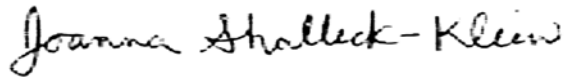
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8 Christian Schreiber

9 Attorneys for Plaintiffs

10 Dated: October 24, 2014

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