

**COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO**

JOSE OLIVAS, OCTAVIO RIOS OLIVAS,
BLAKE CAHILL, and ALVARO BRAVO, as
individuals and class representatives; EL
CENTRO DE IGUALDAD Y DERECHOS,
NM COMUNIDADES EN ACCION Y DE FÉ,
ORGANIZERS IN THE LAND OF
ENCHANTMENT, and SOMOS UN PUEBLO
UNIDO, New Mexico membership-based
organizations representing low-income
workers;

Plaintiffs,

vs.

No. ~~D-101-CV-2017-~~_____

D-101-CV-2017-00139
Case assigned to Thomson, David K.

CELINA BUSSEY, Secretary of the New
Mexico Department of Workforce Solutions,
JASON DEAN, Director of the Labor Relations
Division of the Department of Workforce
Solutions; and the NEW MEXICO
DEPARTMENT OF WORKFORCE
SOLUTIONS, an executive agency;

Defendants.

**CLASS ACTION COMPLAINT SEEKING DECLARATORY
AND INJUNCTIVE RELIEF FOR LOW-WAGE WORKERS
FOR VIOLATIONS OF THE NEW MEXICO WAGE LAWS**

INTRODUCTION

1. This is a class action for declaratory and injunctive relief arising from Defendants' refusal to enforce statutory wage and hour protections for low-income workers who are victims of wage theft.

2. Wage theft – the underpayment or nonpayment of wages – is a significant problem

in New Mexico. In fiscal years 2014 through 2016, over 2,500 New Mexicans filed wage theft claims with the Department of Workforce Solutions, including minimum wage violations, nonpayment of overtime, off-the-clock work, or failure to issue a final paycheck. Approximately 22% of Mexican immigrants working in New Mexico have experienced wage theft at some point. It is well-documented that workers who experience wage theft often live in sub-standard housing and struggle to pay for food, clothes, healthcare, shelter, and other basic necessities. Individual workers are not the only victims; wage theft also leads to increased state spending on food assistance for underpaid workers and their families, and results in millions of dollars in lost payroll and income tax revenues to state and federal governments.

3. New Mexico law contains a comprehensive enforcement scheme to protect workers against wage theft. *See* NMSA 1978 §§ 50-4-1 *et seq.* (the “wage statutes”). The wage statutes exist to safeguard “minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hours standards which do not provide adequate standards of living.”

NMSA 1978 § 50-4-19. Among other protections, they guarantee:

- A minimum wage of \$7.50, which is \$0.25 higher than the current federal minimum wage, and overtime pay for hours over 40 at one-and-one-half times the employee’s regular hourly rate. NMSA 1978 § 50-4-22.
- Mandatory statutory damages to victims of wage theft, calculated as full back wages, plus interest, plus 200% liquidated damages. NMSA 1978 § 50-4-26.
- At least a three year statute of limitations and statutory tolling when the violation is part of a “continuing course of conduct.” NMSA 1978 §§ 37-1-5; 50-4-32.

4. In violation of their statutory duties, Defendants have failed to enforce the wage laws, thereby depriving low-income New Mexicans of wages earned. Specifically:

- Defendants have imposed an illegal \$10,000 cap on wage theft: they do not investigate or take any enforcement action on wage claims worth \$10,000 or more.

- Defendants have imposed an illegal one-year time limit on liability for wage theft: they do not investigate or take any enforcement action on claims for back pay that go back more than one year from the date an employee files a claim.
- Defendants illegally do not hold employers liable for any statutory damages at the administrative enforcement phase of a case, thereby eliminating the financial deterrent for engaging in wage theft.
- Defendants have adopted illegal policies and procedures that require the closure with prejudice of wage claims for procedural reasons, without regard to the merits of the claim.

5. The cumulative effect of Defendants' failure to enforce the wage theft laws is a significant decrease in the wages and damages that employers must pay after cheating their employees of hard-earned wages. Defendants allow unscrupulous employers to pay no back wages to their workers at all, or to pay far less in back wages than they would have paid if they had simply complied with the wage statutes. This creates a perverse incentive for employers to violate the wage statutes, to the detriment of Plaintiffs and other similarly situated class members, and of law-abiding employers undercut by competitors who violate the wage laws.

6. Defendants have violated low-income New Mexicans' statutory right to public enforcement of our state's wage statutes.

7. Pursuant to the New Mexico Declaratory Judgment Act, NMSA 1978 § 44-6-1 to § 44-6-15, Plaintiffs seek declaratory and injunctive relief requiring Defendants to abide by the wage statutes, NMSA 1978, Ch. 50, Arts. 1 and 4.

PARTIES

8. Plaintiff JOSE OLIVAS is a resident of Gallup, New Mexico. Plaintiff Olivas filed a wage claim with Defendants in March 2015. Defendants failed to investigate and resolve his claim in accordance with New Mexico's wage statutes, as discussed in more detail herein. At all

times relevant to this action, he was unable to afford legal counsel as defined in § 11.1.4.8(A) NMAC, in that he earned less than one and one-half times the state's average weekly wages.

9. Plaintiff OCTAVIO RIOS OLIVAS is a resident of Santa Fe, New Mexico and a monolingual Spanish speaker. Plaintiff Rios Olivas filed a wage claim with Defendants in approximately June 2016. Defendants failed to investigate and resolve his claim in accordance with New Mexico's wage statutes, as discussed in more detail herein. At all times relevant to this action, he was unable to afford legal counsel as defined in § 11.1.4.8(A) NMAC, in that he earned less than one and one-half times the state's average weekly wages.

10. Plaintiff BLAKE CAHILL is a resident of Santa Fe, New Mexico. Plaintiff Cahill filed a wage claim with Defendants in January 2015. Defendants failed to investigate and resolve his claim in accordance with New Mexico's wage statutes, as discussed in more detail herein. At all times relevant to this action, he was unable to afford legal counsel as defined in § 11.1.4.8(A) NMAC, in that he earned less than one and one-half times the state's average weekly wages.

11. Plaintiff ALVARO BRAVO is a resident of Aurora, Colorado. Plaintiff Bravo attempted to file a wage claim with Defendants in November 2016 and January 2017. Defendants failed to investigate and resolve his claim in accordance with New Mexico's wage statutes, as discussed in more detail herein. At all times relevant to this action, he was unable to afford legal counsel as defined in § 11.1.4.8(A) NMAC, in that he earned less than one and one-half times the state's average weekly wages.

12. Plaintiff EL CENTRO DE IGUALDAD Y DERECHOS ("El CENTRO") is a domestic nonprofit corporation registered with the New Mexico Secretary of State, with a main office in Albuquerque, New Mexico. El CENTRO is a membership organization representing primarily low-wage Latino immigrant workers and their families in central New Mexico. El

CENTRO conducts policy and organizing campaigns to fight wage theft and improve working conditions in low-wage jobs and helps workers file and pursue claims with Defendant Department of Workforce Solutions' Wage and Hour Bureau. El CENTRO and its members have been harmed by Defendants' failure to investigate and resolve wage theft claims in accordance with New Mexico's wage statutes, as discussed in more detail herein.

13. Plaintiff ORGANIZERS IN THE LAND OF ENCHANTMENT ("OLÉ") is a domestic nonprofit corporation registered with the New Mexico Secretary of State, with a main office in Albuquerque, New Mexico. OLÉ is a membership organization that represents and organizes low-wage workers in their struggle to win respect, living wages, benefits, and enforcement of worker protections against wage theft. OLÉ and its members have been harmed by Defendants' failure to investigate and resolve wage theft claims in accordance with New Mexico's wage statutes, as discussed in more detail herein.

14. Plaintiff SOMOS UN PUEBLO UNIDO ("Somos") is a domestic nonprofit corporation registered with the New Mexico Secretary of State, with a main office in Santa Fe, New Mexico. Somos is a membership organization consisting of low-wage immigrant workers and their supporters in Santa Fe, San Juan, Rio Arriba, Chaves, Curry, Roosevelt, Lea, and McKinley counties. Somos works to improve public policy around workers' and immigrants' rights issues, offers community education on these issues to its members, helps workers file claims with Defendant Department of Workforce Solutions' Wage and Hour Bureau, and provides legal services in support of worker-led organizing campaigns. Somos was a leader in a successful worker-driven lobbying campaign in 2009 to increase worker protections in the wage statutes. Somos and its members have been harmed by Defendants' failure to investigate and

resolve wage theft claims in accordance with New Mexico's wage statutes, as discussed in more detail herein.

15. Plaintiff NM COMUNIDADES EN ACCION Y DE FÉ (“CAFé”) is a domestic nonprofit corporation registered with the New Mexico Secretary of State, with a main office in Las Cruces, New Mexico. CAFé is a non-denominational faith-based organization that trains and builds the capacity of low and moderate-income families to help shape public policies in southern New Mexico. CAFé's advocacy work includes raising the minimum wage and ensuring adequate enforcement of minimum wage protections. CAFé and its members have been harmed by Defendants' failure to investigate and resolve wage theft claims in accordance with New Mexico's wage statutes, as discussed in more detail herein.

16. Defendant the NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS (“DWS”) is an executive branch state agency. The Wage and Hour Bureau of the Labor Relations Division, which is charged with enforcing the wage statutes, is a bureau within the Department of Workforce Solutions.

17. Defendant CELINA BUSSEY is the Cabinet Secretary of Defendant DWS. It is Defendant Bussey's duty to “to manage all operations of the department and to administer and enforce the laws with which the secretary or the department is charged.” NMSA 1978 § 9-26-6. She is sued solely in her official capacity.

18. Defendant JASON DEAN is the Director of the Labor Relations Division of DWS, which is responsible for the Wage and Hour Bureau. In this role, Defendant Dean has statutory responsibility for carrying out the duties the wage statutes assign to the Director of the Labor Relations Division and to the labor commissioner. These responsibilities include investigating alleged violations of the wage statutes and taking enforcement action on any “just, valid, and

enforceable claim” filed by a worker who is unable to afford an attorney. NMSA §§ 50-1-3; 50-4-8; 50-4-26. As a director of an organizational unit of DWS, Defendant Dean carries out his duties “subject to the direction and supervision of the secretary,” who retains “the final decision-making authority and responsibility[.]” NMSA 1978 § 9-26-13. He is sued solely in his official capacity.

JURISDICTION AND VENUE

19. This Court has jurisdiction over the subject matter of this action pursuant to the New Mexico Constitution, Art. III, § 1, Art. VI, § 13, NMSA 1978 § 44-6-2, NMSA 1978 § 44-6-9, and NMSA 1978 § 44-6-13, as well as the Declaratory Judgment Act, NMSA 1978 § 38-3-1.1.

20. Venue is proper in Santa Fe County pursuant to NMSA 1978 § 38-3-1.

LEGAL FRAMEWORK

21. The wage statutes provide for a minimum wage of \$7.50, which is \$0.25 higher than the current federal minimum wage, and overtime pay for hours over 40 at one-and-one-half times the employee’s regular hourly rate. NMSA 1978 § 50-4-22.

22. When employers violate the minimum wage and overtime provisions of the wage statutes, they must pay treble statutory damages to employees: the back wages owed plus an additional amount equal to twice the back wages. NMSA 1978 § 50-4-26. The purpose of statutory damages is not only to compensate employees for wage theft, but also to deter employer violations.

23. Wage claims are subject to a three-year statute of limitations. NMSA 1978 §§ 37-1-5; 50-4-32. This statute of limitations is tolled when the violation is part of a “continuing course of conduct.” *Id.* These provisions are meant to prevent employers from escaping liability for years of unchecked wage theft.

24. Prior to 2009, the statute of limitations for wage claims was one year, and the law only provided for double damages rather than treble damages. In the 2009 session, the Legislature strengthened the wage statutes in several ways, two of which are relevant here: by lengthening the period of employer liability (i.e., increasing the statute of limitations to three years) and by providing for treble damages rather than double damages. These amendments passed the New Mexico Senate unanimously and went into effect on June 19, 2009.

25. Defendants have a mandatory duty to investigate wage claims and take legal action to enforce and remedy violations of the wage statutes for workers who are financially unable to employ counsel. NMSA 1978 §§ 50-1-3; § 50-4-8; 50-4-26. Under the wage statutes' implementing regulations, an employee is unable to afford legal counsel when she earns less than one and one-half times New Mexico's average weekly wages. § 11.1.4.8 NMAC.

26. The wage statutes give Defendants several tools to conduct investigations. Defendants have the power to enter any business at any time during working hours to gather information about wage claims. NMSA 1978 § 50-1-5. During these inspections, Defendants may inspect working conditions and interview workers or supervisors. *Id.*; NMSA 1978 § 50-4-9. They may also inspect time and payroll records, which employers are required to maintain for unemployment insurance purposes for at least four years. *Id.*; § 11.3.400.401 NMAC. Defendants also have the power to subpoena witnesses to testify at administrative hearings. NMSA 1978 § 50-1-2.

27. When an investigation shows that a violation of the wage statutes has occurred, but the employer refuses to pay its back wages and statutory damages, Defendants must take enforcement action by pursuing a judgment against the employer through one of two channels. If a wage claim is worth less than the jurisdictional limit of magistrate or metropolitan court, which

is currently \$10,000, the director may file the claim in one of those courts without referring it to a district attorney. NMSA 1978 § 50-4-12. Otherwise, the director must refer the case to a district attorney, who has a statutory duty to civilly or criminally prosecute it. NMSA 1978 §§ 50-4-8; 50-4-12; 50-4-26(B).

FACTUAL ALLEGATIONS

Individual Workers' Wage Claims

28. Defendants have failed to investigate wage claims filed by many low-wage workers as a result of their illegal non-enforcement policies and practices. The facts concerning ten such workers are described below. Four of them, José Olivas, Octavio Rios Olivas, Alvaro Bravo, and Blake Cahill, are plaintiffs and class representatives herein. The other six, Veronica Quintana Peña, Gilberto Campos, Esthela Leon, Norma Vasquez, Francisco Lopez Saucedo, and Simpson Washburn, are members of Organizational Plaintiff groups and/or clients of New Mexico legal services organizations.

Plaintiff José Olivas

29. Plaintiff José Olivas was unable to collect any of the back wages he was owed because DWS's Wage and Hour Bureau refused to investigate his claim.

30. In the summer of 2014, Mr. Olivas was hired to work in a location of 505 Burgers and Wings in Farmington, New Mexico. For approximately three months, Mr. Olivas remodeled the commercial space that would become the fast food restaurant, and continued working in the restaurant after it opened for business in September 2014. Mr. Olivas worked full time, and sometimes worked as many as 80 hours per week. His employer rarely paid him all of the wages due at pay day, but promised to do so once the restaurant opened. However, by February 2015, with unpaid wages that had reached \$15,000, Mr. Olivas decided to leave his employment.

31. Mr. Olivas filed a wage claim with Defendants in March 2015, reporting these violations of the wage statutes. On March 31, 2015, Defendants mailed Mr. Olivas a letter informing him that DWS did not have jurisdiction because it “may not accept Wage Claims over \$10,000.00.” Then, Defendants closed Mr. Olivas’s case without investigating it or taking any enforcement action against the employer, and did not refer the case to the McKinley County district attorney. Instead, Defendants told Mr. Olivas that he would have to file a lawsuit in court himself to enforce the wage statutes.

32. With Somos’ assistance, Mr. Olivas tried to find a private attorney to take his case. However, the only attorney interested in taking the case required a \$5,000 retainer, which Mr. Olivas could not afford.

Plaintiff Octavio Rios Olivas

33. Plaintiff Octavio Rios Olivas was unable to collect any of the overtime wages he was owed because DWS’s Wage and Hour Bureau refused to investigate his claim.

34. Mr. Rios Olivas is legally blind and cannot read. He is also a monolingual Spanish-speaker who understands only limited amounts of spoken English.

35. In April 2015, Mr. Rios Olivas was hired by a company called Universal Janitorial Maintenance to work as a nighttime janitor in a Smith’s grocery store in Santa Fe, NM. He was paid a flat rate of \$900 every two weeks for a minimum of 96 hours of work. Universal Janitorial never paid him time-and-a-half overtime wages for the 16 hours of overtime he worked during the biweekly pay period. A company identified as “Universal Janitorial Maintenance” on his bank statements paid him by direct deposit, and he never received a pay stub or a W-2 form.

36. Mr. Rios Olivas’s employment was terminated on June 1, 2016, and he sought to file an overtime claim with Defendants shortly thereafter. When he went to the DWS Wage and

Hour Bureau to file the claim, he was unable to communicate with the English-speaking secretary there, and so his teenage daughter translated for him. They obtained the wage claim form and brought it home to fill out. Since it was in English, and since Mr. Rios Olivas cannot read in any language, a friend filled it out for him. Mr. Rios Olivas did not know the corporate name or address of the “Universal Janitorial Maintenance” that employed and paid him, so Mr. Rios Olivas’s daughter used an address for a Virginia-based company called Universal Janitorial Services, Inc. based on a Google search.

37. When Mr. Rios Olivas and his daughter brought the completed claim form back to the DWS Wage and Hour Bureau, a secretary there informed Mr. Rios Olivas in English that he would have to edit his claim form to remove the request for back wages going back to April 2015, because of the agency’s policy that wage claims can only go back one year. Mr. Rios Olivas’s daughter had to act as the interpreter and make the required revisions in English. The secretary also stated that she would not accept the form because it was not notarized. She instructed Mr. Rios Olivas to have the form notarized elsewhere, which he did.

38. On June 7, 2016, on Mr. Rios Olivas’s third visit to the DWS Wage and Hour Bureau, he successfully submitted his revised claim form.

39. Mr. Rios Olivas’s claim was assigned to a DWS Labor Law Administrator (LLA) named Steven Trujillo. On June 17, 2016, Mr. Trujillo sent Mr. Rios Olivas a letter in English enclosing Universal Janitorial Services, Inc.’s response to the wage claim, which stated that it had no business in New Mexico and had not employed Mr. Rios Olivas. Mr. Trujillo’s letter stated that Mr. Rios Olivas had 10 days to respond in writing or his case would be closed. Because DWS did not provide the letter in Spanish and did not accommodate his vision impairment, Mr. Rios Olivas could not read the letter. His daughter responded in writing for him, requesting a hearing.

40. On July 7, 2016, Mr. Trujillo sent Mr. Rios Olivas a letter in English stating that a hearing had been scheduled in his case for July 21, 2016. Because DWS did not provide the letter in Spanish and did not accommodate his vision impairment, Mr. Rios Olivas could not read the letter. His neighbor read and explained it to him.

41. At the hearing on July 21, 2016, Mr. Rios Olivas submitted bank statements showing that “Universal Janitorial Maintenance” paid him by direct deposit every two weeks. Universal Janitorial Services, Inc. denied that it was the company that had employed or paid Mr. Rios Olivas.

42. After the hearing, Mr. Rios Olivas received a document entitled “Order of the Labor and Industrial Division” dated August 1, 2016. The “Order” stated that the owner of Universal Janitorial Services, Inc. had denied employing Mr. Rios Olivas and that another company named “Universal Janitorial” may have employed him. Then, the “Order” stated that Mr. Trujillo “rule[d] in favor of the Employer,” that the decision was final, and that Mr. Rios Olivas could file a private lawsuit if he disagreed with the outcome. Mr. Rios Olivas could not read the letter; again his neighbor read and explained it to him.

43. Mr. Rios Olivas does not know the full name or address of the corporate entity that employed him, nor does he have any way to find out. Defendants, however, do. The wage statutes give them the power to subpoena bank records to learn the correct name and address of the company that paid Mr. Rios Olivas. NMSA 1978 § 50-1-2. Or, they can call the Smith’s location where Mr. Rios Olivas worked. Here, Defendants did not take any steps at all to identify the employer that violated the overtime laws. Instead, they simply closed the case.

Plaintiff Alvaro Bravo

44. Plaintiff Alvaro Bravo was unable to collect any of the back wages he was owed because DWS's Wage and Hour Bureau refused to investigate his claim.

45. From April 2014 to September 2015, Mr. Bravo was employed as a janitor in Albuquerque for a company called Commercial Maintenance Systems. He usually worked at least eight hours a day, seven days a week, but never received time and a half overtime wages for hours over 40. Instead, the company paid him a flat rate of \$60 per day.

46. After his employment ended, Mr. Bravo went to Plaintiff El Centro de Igualdad y Derechos for help collecting the wages owed. There, an organizer named Mauricio Segovia explained to Mr. Bravo that he should have been paid the Albuquerque city minimum wage and overtime wages under state law. Because Mr. Bravo could not speak or read English, and was not sure how to calculate unpaid overtime wages, Mr. Segovia filled out the DWS claim form for him. Mr. Segovia estimated that Mr. Bravo was owed approximately \$15,000 in minimum and overtime wages, which he wrote on the claim form.

47. On approximately November 22, 2016, Mr. Bravo went to the Albuquerque office of DWS to file the claim form. There, a receptionist told him that he could not file the claim because it was worth over \$10,000 and because his dates of work were more than one year ago. The receptionist did not accept Mr. Bravo's claim form or take any other information from him.

48. On January 4, 2017, Mr. Bravo called the DWS Albuquerque office to ask again about filing a claim. The DWS employee who answered the phone asked him about his dates of work, and he responded that his last day of work was in September 2015. The DWS employee responded that Mr. Bravo could not file a claim because all claims are subject to a one-year time limit. Mr. Bravo told her he thought the time limit was three years. The DWS employee responded that this was incorrect because the time limit was one year. The DWS employee also

asked Mr. Bravo how much money he was owed. Mr. Bravo responded that it was approximately \$12,000. The DWS employee told him that he couldn't file a claim for that reason, either, because the agency doesn't have jurisdiction over claims worth more than \$10,000. The DWS employee did not ask for Mr. Bravo's name or contact information.

49. On January 4, 2017, Mr. Bravo attempted to file a new claim form in-person. This claim form separated out the minimum wages owed under Albuquerque city law from the overtime wages owed under New Mexico state law, resulting in a lower state law claim of \$4,500. Still, the receptionist at the DWS Albuquerque office refused to accept Mr. Bravo's claim form because his last day of work was in September 2015.

Plaintiff Blake Cahill

50. Plaintiff Blake Cahill was unable to collect any of the back wages he was owed because DWS's Wage and Hour Bureau refused to investigate his claim.

51. Mr. Cahill worked as a ski tech at Cottam's Ski Shop in Santa Fe, NM from November 11, 2013 to January 5, 2015. He regularly worked between 45 to 65 hours per week. He was never paid time-and-a-half overtime wages for his hours over 40, in violation of the minimum wage and overtime provisions of the wage statutes, with the exception of his last week of work. That week, after Mr. Cahill asked his employer why he didn't receive time-and-a-half overtime wages, his employer paid him the correct overtime rate for his last week only and then fired him in retaliation for raising the issue.

52. Mr. Cahill filed a wage claim with Defendants the day after he was fired, on January 6, 2015, reporting these violations of the wage statutes. He mistakenly wrote that his date of separation from employment was January 5, 2014 rather than 2015. However, he also submitted paystubs and time records evidencing his work through the end of 2014 and into 2015.

His wage claim form also stated, “I was fired from Cottam’s Ski Shop [] for asking for time and a half on my overtime pay. I was informed that none of Cottam’s employees get paid overtime.”

53. Even though Mr. Cahill filed a wage claim one day after he was fired for raising questions about his pay, Defendants refused to take enforcement action against Mr. Cahill’s employer because of the obvious error on his Statement of Wage Claim form regarding his date of separation. Defendants closed Mr. Cahill’s case, and sent him a letter stating, “your new wage claim does not fall within our jurisdiction. Your wage claim is past the year limit imposed by state statute. This wage claim will be closed with prejudice in this office.”

Somos member Veronica Quintana Peña

54. Somos member Veronica Quintana Peña was unable to collect any of the back wages she was owed because DWS’s Wage and Hour Bureau unlawfully refused to pursue her claim. Ms. Quintana Peña is also a monolingual Spanish-speaker who understands only limited amounts of spoken English, and was unable to communicate with DWS’s Wage and Hour Bureau regarding her claim.

55. Ms. Quintana Peña worked for a now-closed restaurant called the Green Owl Coffee Café in Santa Fe from approximately February 2012 to May 14, 2013. Her employer rarely paid her all wages due on pay day, claiming that he did not have enough money. Ms. Quintana Peña’s unpaid wages had reached \$7,000 by the time she left her employment. She did not file a wage claim over this debt immediately, however, because her employer repeatedly promised to pay her. However, when her employer still had not paid her after a year, despite many conversations about the issue, she went to DWS’s Wage and Hour Bureau to file a claim in May 2014. The claim form Ms. Quintana Peña filled out was a bilingual English/Spanish version that she obtained from Somos, which was developed and used by Defendants’ predecessors in

office. Defendants have discontinued the use of this form and now only accept the current English version.

56. All of the form letters Defendants sent to Ms. Quintana Peña during the pendency of her claim were in English, a language she cannot read. When Ms. Quintana Peña's employer did not pay his wage debt to her, Defendants scheduled a hearing on her claim. Afterwards, the assigned LLA issued a decision letter stating that Defendants had closed the case with prejudice because Ms. Quintana Peña had filed the claim more than one year after her last date of work. The letter also stated that Ms. Quintana Peña could "file a civil action, on your own in Metropolitan or Magistrate Court."

El CENTRO member Gilberto Campos

57. El CENTRO member Gilberto Campos was only able to collect a small fraction of the wages his employer owed to him – approximately 2% – because DWS's Wage and Hour Bureau refused to pursue several years of his claim or to apply statutory damages to it.

58. Mr. Campos worked for a landscaping company in Albuquerque from June 2012 to September 2014. Even though he regularly worked more than 40 hours per week, his employer never paid him time-and-a-half overtime wages.

59. Mr. Campos filed a wage claim with Defendants on June 25, 2015, reporting these violations of the wage statutes. His claim form stated that he was owed back minimum and overtime wages of \$3,133.75 over 27 months of work during the three-year statute of limitations period, from June 26, 2012 to September 25, 2014, and \$6,267.50 in statutory damages (\$3,133.75 times two), for a total of \$9,401.25.

60. Because of Defendants' illegal one-year statute of limitations, Defendants only enforced the wage statutes against Mr. Campos's employer for the three-month period from June

25, 2014 to the end of Mr. Campos's employment on September 25, 2014, which amounted to back wages of \$189.00. This is approximately 2% of the total amount owed over the three-year statute of limitations period. Defendants also did not seek or collect any statutory damages from Mr. Campos's employer.

El CENTRO members Esthela Leon and Norma Vasquez

61. Defendants illegally closed the wage claims of El CENTRO members Esthela Leon and Norma Vasquez because, as monolingual Spanish speakers who understand only limited amounts of spoken English, Ms. Leon and Ms. Vasquez were unaware of a procedural deadline that Defendants communicated to them in an English-language form letter. When Ms. Leon and Ms. Vasquez missed the deadline, Defendants closed their claims with prejudice.

62. Ms. Leon and Ms. Vasquez worked as housekeepers at a Clarion Hotel franchise in Albuquerque. Ms. Vasquez worked there for approximately two years, and Ms. Leon worked there for approximately six years. Even though they each routinely worked between 43 to 60 hours per week, their employer never paid them time-and-a-half overtime pay, in violation of the wage statutes.

63. They went to DWS's Albuquerque Wage and Hour Bureau office in approximately July 2012 to file a wage claim. There were no bilingual staff available to explain the claims process to them or to assist them with filing a claim. The English-speaking employee who attended them did not offer any translation or interpretation assistance. Ms. Leon's then-12 year old niece interpreted their conversation and helped them fill out documents in English, and they left without a clear understanding of what would happen next in the claims process.

64. On approximately Thursday, August 23, 2012, they returned to the Albuquerque DWS Wage and Hour Bureau office to request information about the status of their claims. They

spoke with a Spanish-speaking employee of DWS's Wage and Hour Bureau, who only told them a letter had been mailed to them but did not describe its contents. That afternoon, they each received letters from DWS in the mail, which were in English. Because they could not speak or read the English language, Ms. Leon and Ms. Vasquez scheduled an appointment with Mauricio Segovia, an organizer with El CENTRO, for the afternoon of Monday, August 27, 2012. During the appointment, Mr. Segovia told them that DWS's letter contained a deadline that required them to submit written rebuttals to their employer's answer form that same day, or their cases would be closed with prejudice. At that point, it was nearly 5:00 p.m. and impossible to submit rebuttals on time. Their employer's answer, which was enclosed with DWS's letter, admitted that the company had not paid Ms. Leon and Ms. Vasquez overtime wages.

65. The next day, Mr. Segovia spoke with a representative from DWS's Wage and Hour Bureau to explain that Ms. Leon and Ms. Vasquez could not read the letters in English without assistance and that they were prepared to submit responses that day. The representative responded that their two claims had already been closed with prejudice for failure to respond by the deadline, per DWS Wage and Hour Bureau policy.

66. On September 3, 2012, the two women went to DWS's Wage and Hour Bureau to request that it re-open their claims, but an employee told them the agency would not do so. Plaintiff El CENTRO then wrote to DWS to again request that the agency re-open their claims. In a response on November 20, 2012, Defendant Dean refused to do so.

Francisco Lopez Saucedo

67. Francisco Lopez Saucedo is a resident of Las Cruces, New Mexico. From 2006 to approximately March 2015, Mr. Lopez Saucedo worked as a laborer for D E Ready Mix in Las Cruces, NM, a concrete company. He was paid \$200 per week for approximately 70 hours of work, a rate of approximately \$2.85 per hour. With the assistance of an English-speaking acquaintance, Mr. Lopez Saucedo filled out and filed a wage claim with DWS in March 2015, reporting his employer's minimum wage and overtime violations. At an administrative hearing on April 16, 2015, Mr. Lopez Saucedo testified that he was owed over \$16,900 for work performed in the past year. His employer attended the hearing and did not present any evidence to contradict Francisco's testimony. Nonetheless, the assigned LLA closed Mr. Lopez Saucedo's case, claiming the agency had no jurisdiction because the case was worth more than \$10,000.

NMCLP Client Simpson Washburn

68. Simpson Washburn worked as a security guard in Farmington, NM for A&M Investigations, LLC d/b/a Chief Building Services, for \$8.00 per hour. He filed a wage claim with DWS'S Wage and Hour Bureau in October 2015, with assistance from the NM Center on Law and Poverty ("NMCLP"), because his employer had failed to pay him any wages for the month of August and part of September 2015, a total of approximately 190 hours of work. When his paychecks for these time periods bounced, Mr. Washburn had no income and therefore no way to pay for his basic necessities. Mr. Washburn filed a wage claim after multiple attempts to resolve the issue with the company. On his claim form, he requested the back wages owed and statutory damages equal to twice the minimum wages owed, which the wage laws require employers to pay in these situations.

69. Unbeknownst to Mr. Washburn, he was the 30th employee to file a wage claim with Defendants against Chief Building Services in the previous three years, according to DWS

records. The LLAs handling these prior claims did not apply statutory damages to any of them at the administrative enforcement phase, consistent with Defendants' unlawful policy. In Mr. Washburn's case, as in these earlier ones, Defendants determined that Chief Building Services owed Mr. Washburn back wages, but did not include any statutory damages in the administrative decision ordering the company to pay the wages owed.

70. The deterrent effect of paying statutory damages as a consequence for engaging in wage theft is exactly why the legislature increased statutory damages in 2009. Defendants' decision not to apply this law has allowed bad actors like Chief Building Services to get away with wage theft unchecked, and has forced employees to file wage claims and wait months just to get paid for an honest day's work.

Class Action Allegations

71. Plaintiffs José Olivas, Octavio Rios Olivas, Alvaro Bravo, and Blake Cahill (the "Individual Plaintiffs") bring the Four Claims for Relief under Rule 1-023(A) and (B)(2) NMRA, on behalf of themselves and all persons who have experienced a violation of the wage statutes and are unable to afford counsel as set forth in § 11.1.4.8 NMAC (the "Claimant Class").

72. The members of the Claimant Class are so numerous that joinder of all members is impracticable.

73. There are questions of law and fact common to the class. These include, but are not limited to, the following:

- Whether Defendants' refusal to investigate or take any enforcement action on wage claims worth \$10,000 or more violates their statutory duty to enforce the wage statutes.
- Whether Defendants' refusal to investigate or take any enforcement action on claims for back pay that go back more than one year from the date the employee filed a claim violates their statutory duty to enforce the wage statutes.

- Whether Defendants' refusal to hold employers who violate the minimum wage and overtime provisions of the wage statutes liable for statutory damages at the administrative enforcement phase of a claim violates their statutory duty to enforce the wage statutes.
- Whether Defendants' refusal to investigate or take enforcement action on valid wage claims pursuant to deadlines and other internal claims processing rules violates their statutory duty to enforce the wage statutes.
- Whether the Claimant Class is entitled to injunctive relief to remedy Defendants' violations of law.

74. The claims of the Individual Plaintiffs are typical of the class, in that all filed or attempted to file wage claims with Defendants and were subject to one or more of Defendants' unlawful policies and practices.

75. The Individual Plaintiffs will fairly and adequately represent and protect the interests of the Claimant Class and have retained competent and experienced counsel. There is no conflict between these plaintiffs and the members of the Claimant Class.

76. Defendants have acted or refused to act on grounds generally applicable to the Claimant Class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

Organizational Plaintiffs

77. The majority of the members and people served by the Organizational Plaintiffs work in low-wage industries, such as retail, home health care, janitorial, hospitality, and construction. Defendants have unlawfully limited the amounts of wages and damages Organizational Plaintiffs' constituencies may recover from their employers, and have prevented them from filing or pursuing claims at all. Furthermore, many low-wage employers and workers in New Mexico know that there are rarely any legal or financial consequences for violating the wage statutes. In the low-wage industries in which the Organizational Plaintiffs' constituencies

work, many employers understand that they may violate the law without incurring any effective enforcement actions against them by Defendants.

78. When Defendants fail to investigate the Organizational Plaintiffs' constituencies' claims, the Organizational Plaintiffs' only alternatives, because most of them do not employ any attorneys, are to help with the challenging process of locating an attorney to file a private lawsuit, or negotiating with employers themselves. More often than not, private attorneys will not take low-dollar or individual claims without upfront payment. For example, with Somos' help, Plaintiff Olivas sought private counsel in Farmington and Gallup after Defendants refused to investigate his case, but the only attorney interested in taking the case required a \$5,000 retainer, which Mr. Olivas could not afford to pay. The Organizational Plaintiffs cannot represent everyone needing assistance, and their members should not be forced to pay private attorneys to take on Defendants' statutory obligations.

79. For years, Plaintiffs El CENTRO, CAFé and Somos have tried to resolve the problems with Defendants' investigation policies and practices through negotiation and advocacy.

80. In mid-2012, Plaintiff El CENTRO wrote to Defendants expressing concerns about the legality of Defendants' policy of only pursuing enforcement action for one year ("one-year lookback policy") and the refusal to impose statutory damages. These policies are described in the second and third causes of action, below.

81. On September 10, 2012, NMCLP wrote to Defendants reiterating El CENTRO's concerns about the one year lookback policy and the refusal to impose statutory damages, and raising concerns about Defendants' refusal to translate Wage and Hour Bureau forms and correspondence into Spanish.

82. On November 2, 2012, NMCLP wrote to Defendant Dean regarding the language access problems at DWS for Spanish-speaking claimants. The letter explained that these problems led to the improper closure of El CENTRO members Norma Vasquez and Esthela Leon's claims, and requested that Defendants re-open and investigate them.

83. On November 20, 2012, Defendant Dean wrote to El CENTRO and NMCLP responding to the previous three letters. He denied that any of DWS's policies or practices were unlawful, and declined to re-open the El CENTRO members' claims.

84. On January 11, 2013, NMCLP wrote to the DWS General Counsel reiterating the requests in the November 2, 2012 letter regarding the improper closure of the El CENTRO members' claims. On February 28, 2013, Defendant Dean, rather than the DWS General Counsel, responded to this letter. His response was substantively identical to his November 20, 2012 letter concerning re-opening the El CENTRO members' claims.

85. In approximately 2014, CAFé met with Richard Wagner, an employee in the DWS Las Cruces office, to raise concerns about the DWS Wage and Hour Bureau's lack of Spanish forms and correspondence and claimants' difficulties accessing the claims process. Mr. Wagner responded that these were policy matters that he did not have the power to address.

86. On August 19, 2014, in collaboration with Plaintiff Somos, New Mexico House Representative Miguel P. Garcia wrote to the New Mexico Attorney General to request an opinion on the legality of the \$10,000 cap, the one year lookback policy and Defendants' failure to make their services available to Spanish-speaking claimants.

87. On June 22, 2015, Defendants responded to the Attorney General's request for information regarding enforcement of wage and hour complaints. In their letter, Defendants admitted that they enforce a \$10,000 cap even though they are "not precluded from accepting

larger wage claims for investigation.” They also acknowledged that they enforce a one year lookback policy even though it does not appear in the wage statutes, and denied any problems concerning Spanish speakers.

88. The Attorney General has taken no action in response to these admissions of illegal conduct.

FIRST CAUSE OF ACTION
Defendants’ Illegal \$10,000 Cap

89. Defendants do not investigate or take any enforcement action on wage claims worth more than \$10,000.

90. Defendants do not allow claimants to file wage claims worth more than \$10,000.

91. When Defendants believe an employer has underpaid a claimant class member by more than \$10,000, it is Defendants’ policy and practice to administratively close the wage claim with prejudice even when the agency has found that the wage claim is valid.

92. The DWS Wage and Hour Bureau Statement of Wage Claim form informs potential claimants: “This office will not accept Statement of Wage Claims over \$10,000.”

93. The \$10,000 cap has prevented and will continue to prevent Claimant Class members from filing meritorious claims. Moreover, Claimant Class members with claims of over \$10,000 have been denied wages and statutory damages as a result of Defendants’ unlawful policy and practice.

94. Defendants have unlawfully imposed a \$10,000 cap on wage theft enforcement, in violation of the wage statutes. No statute authorizes Defendants to refuse to accept or dismiss claims of more than \$10,000 or limits Defendants’ jurisdiction to investigate claims worth more than \$10,000.

95. Defendants do not refer any wage claims, regardless of their value, to district attorneys, in violation of NMSA 1978 § 50-1-3 (upon finding violation of the wage statutes, the Director “shall present the facts to the district attorney of the county in which such violation occurred or wage claim accrued”) and NMSA 1978 § 50-1-7 (“It is the duty of the [Director] to report to the district attorney of the district in which such violations occur, any violation of labor and industrial laws of New Mexico”).

96. As a result of the illegal \$10,000 cap, employers’ responsibility for compliance with the wage statutes has been significantly limited, and their financial liability for violations of law curtailed.

97. Defendants’ illegal \$10,000 cap violates the NM wage statutes.

98. Defendants’ illegal \$10,000 cap has harmed the Plaintiff Olivas, Plaintiff Bravo, the Claimant Class, the Organizational Plaintiffs, and the communities of low-wage workers they represent.

SECOND CAUSE OF ACTION
Defendants’ Illegal One Year Lookback Policy

99. Defendants have illegally failed to implement the Legislature’s 2009 decision to increase the statute of limitations for violations of the wage statutes from one year to three years, or indefinitely when the violation is part of a continuing course of conduct.

100. Instead, Defendants do not allow Claimant Class members to file wage claims that arose more than one year prior to the attempted filing date.

101. When Defendants believe that an employer has underpaid a Claimant Class member entirely outside of the illegal one-year lookback period, it is Defendants’ policy and practice to administratively close the wage claim with prejudice without any further investigation or enforcement action.

102. When a claimant performed undercompensated work partially within and partially outside of the illegal one-year lookback period, it is Defendants' policy and practice to pursue back wages going back only one year from the claimant's filing date, which is often only a fraction of the total wages owed for the full statute of limitations period. When a prospective claimant tries to file such a claim, it is Defendants' policy and practice to refuse to accept the claim form unless the claimant revises it to state that the period of underpayment began exactly one year prior to the filing date.

103. Defendants' illegal one-year lookback policy and practice violates the wage statutes.

104. Pursuant to their illegal one-year lookback policy and practice, Defendants have illegally restricted employers' responsibility for compliance with the wage statutes to one year.

105. Defendants' illegal one-year lookback policy and practice has prevented and will continue to prevent Claimant Class members from filing meritorious claims. Moreover, Claimant Class members with claims falling partially or entirely outside of Defendants' illegal one-year lookback period have been denied wages and statutory damages.

106. Pursuant to this illegal one-year lookback policy and practice, Defendants have failed to carry out their statutory duty to investigate and enforce violations of the wage statutes when they are more than a year old.

107. Defendants have unlawfully imposed a one-year limit on employers' liability for violations of the wage statutes. Defendants' illegal policy and practice violates the New Mexico legislature's 2009 statutory mandate to increase the statute of limitations applicable to employers who engage in wage theft.

108. Defendants' illegal one-year lookback policy and practice has harmed Plaintiff Cahill, Plaintiff Bravo, the Claimant Class, the Organizational Plaintiffs, and the communities of low-wage workers they represent.

THIRD CAUSE OF ACTION
Defendants' Illegal No Damages Policy

109. Defendants have refused to implement the Legislature's 2009 amendment doubling the mandatory statutory damages that employers must pay for violations of the Minimum Wage Act.

110. Instead, when Defendants make a formal administrative determination that an employer has underpaid an employee, it is Defendants' policy and practice to waive any statutory damages in all cases. If an employer pays the back wage amount upon receipt of the administrative determination, it is Defendants' policy and practice to close the case with prejudice with no further enforcement action.

111. Defendants' illegal policy and practice of waiving statutory damages in all administrative decisions eviscerates the power of the Minimum Wage Act and sends a message to employers that they may violate it at little or no financial cost.

112. Defendants' illegal policy and practice of refusing to seek statutory damages in its administrative decisions violates the wage statutes.

113. Defendants' illegal policy and practice of refusing to impose or collect statutory damages undermines the New Mexico legislature's mandate to strictly enforce the wage laws by doubling the price an employer must pay for engaging in wage theft.

114. Defendants' illegal refusal to impose or collect statutory damages has harmed Plaintiff Olivas, Plaintiff Rios Olivas, Plaintiff Cahill, Plaintiff Bravo, the Claimant Class, the Organizational Plaintiffs, and the communities of low-wage workers they represent.

FOURTH CAUSE OF ACTION
Defendants' Illegal Closure of Wage Claims

115. Defendants have put up administrative barriers and deadlines that illegally mandate closure of wage claims for procedural reasons, regardless of the claim's merit. Defendants' data show that approximately 25% of cases opened and resolved in fiscal years 2014 through 2016 were closed for one of the unlawful procedural reasons detailed in this Cause of Action.

116. Under Defendants' policies and practices, DWS Wage and Hour Bureau Labor Law Administrators (LLAs) process wage claims through an exchange of forms and letters between employer and employee, followed by a hearing over which the LLA presides. During this process, there are several points at which Defendants require an LLA to close claims with prejudice without regard to the merits of the claim.

117. According to Defendants' procedures, an employee must submit a wage claim form to initiate a claim. The claim form is written entirely in English, and the instructions portion of the claim form states that it must be filled out in English. Before 2010, a bilingual English-Spanish claim form was in use at the DWS Wage and Hour Bureau. After Defendants assumed their roles within DWS, they replaced that claim form with the English-only version.

118. If a claimant makes an obvious error, as when Plaintiff Blake Cahill wrote that his last day of employment was in January 2014 rather than January 2015, the LLA must close the case rather than investigate to determine its validity. Similarly, if a claimant writes that his claim is worth more than \$10,000 or falls outside of the one-year lookback period, Defendants either require the claimant to alter the dates of the wage claim, as occurred in the case of Plaintiff Octavio Rios Olivas, or simply do not accept the claim form, as occurred in the cases of Plaintiffs José Olivas and Alvaro Bravo.

119. After submitting a claim form, an employee must submit a written rebuttal to his employer's written answer to the wage claim. Defendants give claimants only 10 days for this rebuttal, calculated from the date the LLA mails the employer's response to the claimant. Defendants' form letter to claimants containing this deadline – like all of Defendants' form letters – is only in English, and the rebuttal statement must also be written in English. If the claimant does not respond within 10 days, Defendants' illegal policy is to close the claim with prejudice without further inquiry, regardless of the strength of the claim or the reason the claimant did not meet the deadline. This occurs even when the claimant did not understand the English-language letter, and when the employer admits to a violation of law in her answer, as in the cases of El CENTRO members Norma Vasquez and Esthela Leon, described above.

120. If the claimant does submit a written rebuttal statement within 10 days, or if the employer does not respond to the wage claim form at all, then the LLA typically schedules a hearing with a notice that is only in English. If the employee does not attend the hearing, Defendants' illegal policy is to close the wage claim with prejudice without further inquiry, regardless of the strength of the claim or the reason the claimant did not appear.

121. After the hearing, the LLA issues a written decision letter in English setting forth the agency's administrative determination on the claim. It is based solely on the parties' written submissions and the parties' testimony at the hearing. Defendants illegally do not allow LLAs to investigate wage claims beyond these steps. This is why Plaintiff Octavio Rios Olivas's case was closed at the decision letter phase. The LLA found that a company doing business as "Universal Janitorial" had employed and underpaid Mr. Rios Olivas, but under Defendants' unlawful policies the LLA could not investigate the identity and address of that company. Therefore, the case was

closed with prejudice once the LLA determined that Mr. Rios Olivas had listed the wrong corporation on the claim form.

122. If an LLA determines that an employer does owe wages, the decision letter requests that the employer pay the back wage amount. As discussed above, Defendants' policy is to never include statutory damages in the decision letter's findings concerning the back wages owed. If the employer does not pay the wage debt within a period of weeks, the LLA sends the claimant a letter in English informing him that Defendants **may** file the claim in court for the claimant. However, before Defendants will take any action to enforce a claimant's rights, the claimant must submit a notarized "Assignment of Wage Claim Form" within 10 days, including mailing time. The letter notifying the claimant of this requirement and the Assignment form are only in English. If the claimant does not meet this deadline, Defendants' illegal policy is to close the wage claim with prejudice without further inquiry, regardless of the strength of the claim or the reason the claimant did not submit it on time.

123. Bureaucratic convenience is not a legal basis for refusing to investigate a wage claim. Although Defendants have discretion to determine whether individual claims are "just, valid, and enforceable," NMSA 1978 § 50-1-3, § 50-4-8, the wage statutes require Defendants to "investigate any violations . . . and to institute or cause to be instituted actions for the enforcement of the same." NMSA 1978 § 50-4-8. The unreasonable claim closure policies and practices described in this Cause of Action, applied without regard to a claim's merits, cannot trump the statutory obligation to determine whether a claim is just, valid, and enforceable.

124. Defendants' illegal claim closure policies and practices have harmed Plaintiff Olivas, Plaintiff Rios Olivas, Plaintiff Cahill, Plaintiff Bravo, the Claimant Class, the Organizational Plaintiffs and the communities of low-wage workers they represent.

IRREPARABLE HARM AND NEED FOR PERMANENT INJUNCTIVE RELIEF

125. As a direct and proximate result of the conduct of Defendants, Plaintiffs and the Claimant Class have suffered and continue to suffer the violation of their statutory rights.

126. Plaintiffs and the Claimant Class are suffering and will continue to suffer immediate and irreparable harm unless this Court issues a preliminary and permanent injunction requiring Defendants to rescind their unlawful non-enforcement policies and investigate claims that were rejected pursuant to their unlawful policies. Without an injunction, members of the Claimant Class: a) will be unable to obtain Defendants' assistance with wage claims that fall outside of Defendants' one-year lookback period or wage claims that are worth more than \$10,000, b) will be unable to collect statutory damages for unpaid wages owed at the administrative enforcement phase, and c) will continue to have their claims permanently closed for illegal bureaucratic convenience without a resolution on the merits.

127. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

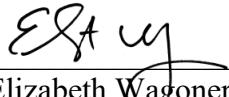
WHEREFORE, Plaintiffs pray that the Court:

- A. Certify the Claimant Class set forth above pursuant to Rules 1-023(A) and (B)(2) NMRA;
- B. Designate Plaintiffs as class representatives and counsel of record as Class Counsel;
- C. Declare that the non-enforcement policies and practices described herein violate the wage statutes at NMSA 1978, Sections 1 and 4.
- D. Order preliminary and permanent injunctive relief directing the Defendants to comply with their obligations; and specifically that they:
 - a. Rescind their unlawful policies and promulgate rules setting forth legally-compliant investigation and enforcement procedures;
 - b. Translate forms and letters to Claimant Class members into Spanish;
 - c. Develop training materials and manuals for DWS Wage and Hour Bureau employees;

- d. Collaborate with the Organizational Plaintiffs to develop monitoring and reporting requirements and procedures;
 - e. Resolve all future claims filed by the Claimant Class without reliance on illegal policies and practices;
 - f. Publicize the changes to their investigation and enforcement procedures to correct public misunderstanding about the wage statutes' requirements;
- E. Order Defendants to re-open and investigate the claims of the Individual Plaintiffs and those of all Claimant Class members who were prejudiced by Defendants' unlawful policies and practices.

Dated: January 17, 2017

Respectfully submitted,



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