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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

AMANDA GONZALEZ and
AUDRIANA GONZALEZ on behalf
of themselves, all others similarly
situated and on behalf of the general
public,

Plaintiffs,

v.

BURLINGTON COAT FACTORY
WAREHOUSE CORPORATION
and DOES 1-100,

Defendants.

CASE NO. 5:18-cv-00666-JGB-SP

Honorable Jesus G. Bernal

**DECLARATION OF DAVID MARA,
ESQ. IN SUPPORT OF PLAINTIFFS'
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND
ENTERING OF JUDGMENT**

Date: March 1, 2021
Time: 9:00 a.m.
Courtroom: 1

Filed: February 27, 2018
FAC Filed: October 31, 2018
Trial Date: None

1 I, DAVID MARA, declare as follows:

- 2 1. I am President of Mara Law Firm, PC and counsel of record for Plaintiffs
3 Amanda Gonzalez and Audriana Gonzalez (“Plaintiffs”) and the putative class
4 in this matter. I am duly admitted to practice before all the courts of the state of
5 California. The following facts are within my personal knowledge and, if called
6 to testify, I could and would competently testify thereto.
- 7 2. I have been practicing law in California since 2004.
- 8 3. I extensively handle employment cases which involve violations of the
9 California Labor Code and Industrial Welfare Commission Wage Orders, such
10 as wage and hour class actions and cases alleging violations of the Private
11 Attorneys General Act of 2004 (“PAGA”).
- 12 4. I was co-class counsel in *Hohnbaum v. Brinker Restaurant Corp.*, San Diego
13 Superior Court, Case No. GIC834348, which was the underlying case in the
14 California Supreme Court’s landmark decision in *Brinker Restaurant Corp. v.*
15 *Superior Court* (2012) 53 Cal.4th 1004, in which the California Supreme Court
16 delineated the scope of employer obligations to provide, and employee rights to
17 receive, meal and rest periods under California law.
- 18 5. I wrote an Amicus brief on behalf of Consumer Attorneys Of California
19 (“CAOC”) in the recent decision by the California Supreme Court in *Augustus*
20 *v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257 (rest breaks must be duty-
21 free and time spent being on call during rest breaks is not considered duty-free).
- 22 6. My firm also wrote an Amicus brief on behalf of CAOC in the recent decision
23 by the California Supreme Court in *Williams v. Superior Court* (2017) 3 Cal.
24 5th 531 (PAGA and wage and hour class action).
- 25 7. I have also lectured as a panelist for California Employment Lawyers
26 Association regarding a host of wage and hour issues.
- 27 8. My firm has been granted class certification in both state and federal courts.
- 28 9. I am also Plaintiff’s counsel in a host of other class actions involving violations

1 of California's wage and hour laws. For example, I have been and am involved
2 as counsel for plaintiffs in the following sampling of class action cases involving
3 wage and hour violations under California law: *Davis v. Apria Healthcare*
4 *Group* (Case No. 37-2015-00007743); *Norona v. B&G Delivery System, Inc.*
5 (Case No. RG1577005); *Perez v. City of San Diego* (Case No. 37-2014-
6 00016621); *Cuellar-Ramirez v. US Foods, Inc.* (Case No. RG15770766); *Peron*
7 *v. The Vons Companies, Inc.* (Case No. 15-cv-01567-L-JMA); *Hilderbrand v.*
8 *LinkUs Enterprises, LLC* (Case No. DR150155); *Belton v. Pacific Pulmonary*
9 *Services* (Case No. CGC-15-547564); *Medina v. Central Cal Transportation,*
10 *Inc.* (Case No. RG15770011); *Eure v. Dotson v. Asbury Environmental Services*
11 (Case No. RG16842620); *Spikes v. Bear Trucking, Inc.* (Case No.
12 16CECG02389); *Reynoso v. Benjamin's Transfer, Inc.* (Case No. FCS048845);
13 *Montes v. Coram Specialty Infusion Services, Inc.* (Case No. 37-2016-
14 00028950-CU-OE-CTL); *Rodriguez v. Delta Sierra Beverage, LLC* (Case No.
15 34-2017-00206727); *Clavel v. La Jolla Beach & Tennis Club, Inc.* (Case No.
16 37-2017-00004802-CU-OE-CTL); *Martin v. Sysco Central California, Inc.*
17 (Case No. 9000052).

18 10. Mara Law Firm, PC (formerly The Turley & Mara Law Firm, APLC) devotes a
19 significant portion of its practice specifically to wage and hour class actions. A
20 majority of the cases I handle are wage and hour class actions and actions filed
21 pursuant to the Private Attorneys General Act of 2004 ("PAGA"). Ms. Vecchi
22 and Mr. Roberts solely handle wage and hour class actions and PAGA actions.
23 Mara Law Firm, PC, has been appointed class counsel in numerous federal and
24 state class actions. Mara Law Firm, PC, and its lawyers have handled over three
25 hundred and fifty (350) class action and PAGA lawsuits. Mara Law Firm, PC,
26 and its lawyers have successfully settled over one hundred (100) cases over a
27 period of approximately sixteen (16) years, resulting in the recovery of millions
28 of dollars for class members.

1 11. Mara Law Firm, PC, is well versed in wage and hour class action law.
2 Specifically, Mara Law Firm, PC, has obtained class certification and has been
3 certified as class counsel in the following cases: *Mario Norona v. B&G Delivery*
4 *System, Inc.* (Sacramento County Superior Court, Case No. 34-2015-00186826-
5 CU-OE-GDS); *Jerald Schroeder v. YRC, Inc.*; *YRC Worldwide, Inc.* (Central
6 District of California, Case No. 12-cv-01374-TJH); *John Martin v. Sysco*
7 *Corporation*; *Sysco Central California, Inc.* (Eastern District of California, Case
8 No. 1:16-cv-00990-DAD-SAB); *William Smith v. Werner Enterprises, Inc.*
9 *d/b/a C.L. Werner, Inc.* (District of Nebraska, Case No. 8:15-cv-287); and
10 *Thomas Perez v. City of San Diego* (San Diego County Superior Court, Case
11 No. 37-2014-00016621-CU-OE-CTL).

12 12. In addition, Mara Law Firm, PC, filed and fully briefed class certification
13 motions before the following cases were settled: *Alton Davis v. Apria*
14 *Healthcare Group, Inc.* (San Diego County Superior Court, Case No. 37-2014-
15 00004724); *Rick Frieri v. Sysco Corporation*; *Sysco San Diego, Inc.* (Southern
16 District of California, Case No. 16-cv-1432-JLS-NLS); *Alberto Solano and*
17 *Damon Randall v. Professional Auto Transport, Inc.* (San Bernardino County
18 Superior Court, Case No. CIVDS1619020); *Richard Terry v. Hoovestol, Inc.*
19 (Northern District of California, Case No. 3:16-cv-05183-JST); and *Kristina*
20 *McConville v. Renzenberger, Inc.* (Central District of California, Case No. 2:17-
21 cv-02972-FMO-JC).

22 13. I have litigated over three hundred and fifty (350) class action and PAGA
23 lawsuits. I have been litigating wage and hour class action lawsuits for
24 approximately sixteen (16) years. I graduated from California Western School
25 of Law and was admitted to practice law in California in May 2004. I primarily
26 handle wage and hour class actions and PAGA actions. I am the president of
27 Mara Law Firm, PC.

28 14. I was co-class counsel in *Hohnbaum v. Brinker Restaurant Corp.* (San Diego

County Superior Court, Case No. GIC834348) which was the underlying case in the California Supreme Court's landmark decision in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, in which the California Supreme Court delineated the scope of employer obligations to provide, and employee rights to receive, meal and rest periods under California law. I also wrote the Amicus Curiae brief on behalf of Consumer Attorneys of California ("CAOC") in the decision by the California Supreme Court in *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257 (rest breaks must be duty-free and time spent being on call during rest breaks is not considered duty-free). I also wrote the Amicus Curiae brief on behalf of CAOC in the matter currently pending before the California Supreme Court, *Frlekin v. Apple, Inc.* (Cal. S. Ct. No. S243805).

15. I oversee all aspects of the class action and PAGA action cases Mara Law Firm, PC, handles. I also write a wide range of motions and argue at a wide range of hearings. I review and edit motions written by the associates at Mara Law Firm, PC; develop strategies with associates at Mara Law Firm, PC, in how to best litigate each case; review and edit discovery that is sent out to employers; review and edit clients' discovery responses; draft and revise complaints; draft and revise retainers sent to clients; communicate with clients; communicate with class members; communicate with defense counsel; communicate with co-counsel; review documents produced by employers; conduct investigations into potential cases; research and stay up to date in relevant law; attend mediations; draft, review, and revise settlement agreements; and oversee all day to day matters in cases.

16. I have been named as class counsel in the following certified cases as a result of the court granting a motion for class certification: *Mario Norona v. B&G Delivery System, Inc.* (Sacramento County Superior Court, Case No. 34-2015-00186826-CU-OE-GDS); *Jerald Schroeder v. YRC, Inc.*; *YRC Worldwide, Inc.*

(Central District of California, Case No. 12-cv-01374-TJH); *John Martin v. Sysco Corporation*; *Sysco Central California, Inc.* (Eastern District of California, Case No. 1:16-cv-00990-DAD-SAB); *William Smith v. Werner Enterprises, Inc. d/b/a C.L. Werner, Inc.* (District of Nebraska, Case No. 8:15-cv-287); and *Thomas Perez v. City of San Diego* (San Diego County Superior Court, Case No. 37-2014-00016621-CU-OE-CTL).

17. Jill Vecchi is an associate at the Mara Law Firm, PC. Ms. Vecchi has been a member of the bar since 2014. Ms. Vecchi has handled over one hundred (100) class action and PAGA lawsuits. Ms. Vecchi received her training in wage and hour class action and PAGA lawsuits while at Mara Law Firm. Ms. Vecchi has gained extensive experience handling wage and hour class actions and has been substantially involved in all phases of this litigation and the following wage and hour class actions: *Rodriguez et al. v. Cleansource, Inc., et al.* (Case No. 14-cv-0789L DHB); *Norona v. B&G Delivery System, Inc.* (Case No. RG1577005); *Thompson v. Costco Wholesale Corporation* (Case No. 14-cv-2778-CAB-WVG); *Simon v. Sysco Corporation* (Case No. 37-2014-00012263); *Lopez v. Sysco Corporation* (Case No. 4:15-cv004420-JSW); *Pyara v. Sysco Corporation* (Case No. 2:15-cv-01208); *Cuellar-Ramirez v. US Foods, Inc.* (Case No. RG15770766); *Peron v. The Vons Companies, Inc.* (Case No. 37-2014-00006965-CU-OE-CTL); *Little v. Gate Gourmet, Inc.* (Case No. 37-2016-00010636-CU-OE-CTL); *Limon v. National Retail Transportation, Inc.* (Case No. 2:16-cv-02054); *Belton v. Pacific Pulmonary Services* (Case No. CGC-15-547564); *Medina v. Central Cal Transportation, Inc.* (Case No. RG15770011); *Schram v. Take Two Interactive Software, Inc.* (Case No. 37-2014-00042000-CU-OE-CTL); *Spikes v. Bear Trucking, Inc.* (Case No. 16CECG02389); *Houston v. Big 5 Sporting Goods Corporation* (Case No. RG16823835); *Solis v. Bottomley Distribution Co., Inc.* (Case No. 115CV287797); *Prasad v. CFC Network, Inc.* (Case No. 34-2016-00193907); *Montes v. CORAM Specialty Infusion Services, Inc.* (Case No. 37-2016-00028950-CU-OE-CTL); *Paz v. Estenson Logistics, LLC* (Case No. RIC1610271); *Rodriguez v. Freshpoint, Inc.*

(Case No. 4:16-cv-05271); *Valentich v. Hub Construction Specialties, Inc.* (Case No. RIC 1610267); *Roby v. Pan Pacific Petroleum, Inc.* (Case No. BCV-16-101856); *Smith v. Roadrunner Management Services, Inc.* (Case No. BC630949); *Tolbert v. Secure Transportation Company, Inc.* (Case No. 16CV297844); *Zubia v. Shamrock Foods Company* (Case No. 16-cv-3128); *Hunt v. VEP Healthcare, Inc.* (Case No. 3:16-cv-04790); *Terry v. Hoovestol, Inc.* (Case No. RG16823879); *Lopez v. Starving Students, Inc.* (Case No. 37-2014-00083995-CU-OE-CTL).

18. Ms. Vecchi is involved in all aspects of the cases assigned to her. Ms. Vecchi routinely writes and opposes motions and argues at hearings. Ms. Vecchi drafts and edits motions and drafts and revises discovery propounded on employers; communicates with clients, class members, and defense counsel; drafts and revises notices to the Labor and Workforce Development Agency (“LWDA”) pursuant to the Private Attorneys General Act of 2004; creates exhibits for use in cases; reviews and analyzes documents produced by employers; deposes employer witnesses; defends client depositions; attends mediations; drafts, reviews, and revises settlement agreements; drafts, reviews, and revises settlement approval motions; argues at hearings on settlement motions; and oversees day to day work in her cases.

19. Tony Roberts handles wage and hour class actions and PAGA lawsuits at Mara Law Firm. Mr. Roberts graduated from the University of San Diego School of Law where he merited honors in class action studies and performed independent studies on class actions. Mr. Roberts externed at the United States District Court for the Honorable Mitchell D. Dembin. Mr. Roberts was admitted to practice law in California in June 2017. Shortly thereafter, Mr. Roberts joined Mara Law Firm, PC, litigating wage and hour class and PAGA actions. Mr. Roberts received his training in wage and hour class action and PAGA lawsuits while at Mara Law Firm, PC. Mr. Roberts is also an adjunct professor of law at the University of San Diego School of Law.

1 20.Mr. Roberts routinely writes and opposes motions, drafts complaints, appears
2 before the Court at law and motion and settlement hearings; engages in the
3 discovery process; deposes witnesses and defends depositions; creates exhibits
4 and analyzes documents and data; drafts, reviews, and revises settlement
5 agreements and oversees day to day work in his cases.

6 21.The proposed settlement is the product of serious, informed, non-collusive
7 negotiations, has no obvious defects, does not improperly grant preferential
8 treatment to the class representative or segments of the class and falls within the
9 range of fair and reasonable settlements. I believe that this non-reversionary
10 settlement is in the best interests of the class as fair, reasonable, and adequate.
11 Therefore, I recommend approval of the settlement.

12 22.Burlington is an off-price retailer with operations in California. The company
13 ships products from distribution centers in San Bernardino and Redlands as part
14 of its supply chain operation. Burlington utilizes temporary workers from
15 Lyneer Staffing Solutions at its distribution centers to assist with the flow of
16 merchandise during the distribution process. This class settlement involves non-
17 exempt, non-union, hourly employees provided as temporary workers by Lyneer
18 Staffing Solutions who worked one or more shifts in a workweek at Burlington's
19 distribution centers located in California.

20 23.The Class is comprised of: All current and/or former non-exempt, non-union,
21 hourly employees provided as temporary workers by Lyneer Staffing Solutions
22 who worked one or more shifts in a workweek at Burlington's distribution
23 centers located in California at any time between February 27, 2014 and August
24 21, 2020. There are 5,776 individuals who fall within this Class definition.

25 24.The Parties have agreed (subject to and contingent upon the Court's approval)
26 that this action be settled and compromised for the non-reversionary total sum
27 of \$3,000,000 ("Maximum Settlement Amount" or "MSA"), which includes,
28 subject to Court approval: (a) attorneys' fees of up to \$750,000 (25% of the

MSA) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administrating the settlement, and securing Court approval; (b) litigation expenses of \$25,826.97 (originally estimated not to exceed \$50,000); (c) Class Representative Service Payments to the named class representatives, Amanda Gonzalez and Audriana Gonzalez, in a sum not to exceed \$7,500 each in consideration for agreeing to a general release of their claims against Burlington that is broader than that of other class members, and in recognition of their efforts in prosecuting the action; (d) claims administration fees and expenses to CPT Group, Inc. (“CPT” or the “Settlement Administrator”) of \$45,000; (e) Burlington’s employer payroll taxes; and, (e) PAGA payment to the LWDA in the amount of \$225,000 (which represents seventy-five percent (75%) of \$300,000 allocated to PAGA). *See* Dkt. No. 39-1 (Joint Stipulation of Class Action and PAGA Representative Action Settlement and Release (“Joint Stipulation”)).

25. After all deductions and employer payroll tax obligations have been made, it is estimated that \$1,860,726.53 (“Net Settlement Amount” or “NSA”), less withholdings for federal and state taxes on the amounts deemed wages, will be available for disbursement—\$75,000 in PAGA penalties for PAGA Group Members and \$1,785,726.53 in wages, interest, and penalties for Participating Class Members, resulting in an average payment of \$322.15 per Class Member. Per the Agreement, the term “Participating Class Member” is defined as any Class Member who does not opt-out of the Settlement or who opts-out but subsequently rescinds the opt-out in a timely manner. The money available for payout to these individuals comes out of the NSA, which is what remains of the MSA after subtracting all Court approved attorneys’ fees and costs, the Class Representative Enhancement Payment, settlement administration costs, the LWDA’s portion of the PAGA Payment, and the employer’s payroll tax obligation.

1 26.The NSA of 1,860,726.53 was calculated as follows: \$3,000,000 MSA - \$45,000
2 (administration costs) - \$25,826.97 (costs) - \$750,000 (attorneys' fees) -
3 \$15,000 (service awards) - \$225,000 (LWDA share of PAGA penalties)=
4 \$1,939,173.03 after deductions. Of the \$1,939,173.03, \$75,000 is paid to PAGA
5 Group members as their share of the PAGA penalties and the remaining
6 \$1,864,170.03 is wages, interest, and penalties. \$621,328.87 (or one-third) of
7 the \$1,864,170.03 is attributable to wages ($\$1,864,170.03 \times .3333$). The
8 employer taxes are estimated by using the highest possible tax rate available for
9 2021, which is 14.45%. Because employer taxes are to be deducted, the
10 following formula is used: $\$621,328.87 / 1.1445 = \$542,882.37$. \$542,882.37 is
11 the amount of wages not including the employer taxes. The difference between
12 \$621,328.87 - \$542,882.37 provides the estimated employer taxes of
13 \$78,446.50. Subtracting \$78,446.50 from \$1,939,173.03 results in the
14 \$1,860,726.53 NSA.

15 27.The average payment was calculated as follows: \$1,860,726.53 divided by 5,776
16 Class Members equates to \$322.15 per Class Member.

17 28.On August 21, 2020, the Court granted preliminary approval, conditionally
18 certified the Class, appointed CPT to act as the Settlement Administrator,
19 approved the notice to be sent to the Class, and directed that the notice be mailed
20 to the Class by First Class U.S. Mail.

21 29.The settlement receives overwhelming support from the Class Members.
22 Specifically, there are no objections and no requests for exclusion. Thus, 100%
23 of the 5,776 Class Members are Participating Class Members who will be issued
24 settlement payments. Under no circumstances will any portion of the settlement
25 revert to Burlington.

26 30.Plaintiffs submit, and Burlington disputes, that this case is factually and legally
27 strong. Plaintiffs contend that Burlington's failure to pay all wages owed and to
28 provide compliant meal periods and rest breaks are the predominant claims in

1 the lawsuit. While Plaintiffs believe they would successfully litigate these
2 claims, these claims are subject to risks in obtaining and maintaining
3 certification, proving liability, and in continued litigation. However, before
4 reaching the merits of these claims, Plaintiffs would first have to prove that
5 Burlington was their employer as well as the Class Members' employer and
6 successfully certify this issue.

7 31. All the claims alleged in this matter are based on Burlington's failure to classify
8 Plaintiffs and the Class Members as employees. Based on the interviews,
9 staffing agreements, policies, Burlington's practices, and documents produced
10 in this matter, Plaintiffs contend that Burlington substantially controls the Class
11 Members and would meet the factors delineated in the *Borello* test in *S. G.*
12 *Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341
13 (1989). Because, at most, Burlington would be considered a co-employer and
14 because Burlington has not classified the Class Members as independent
15 contractors, the multi-factored analysis in *Borello*, rather than the streamlined
16 ABC test adopted by the recent Supreme Court decision in *Dynamex Operations*
17 *West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 and recently codified at Labor
18 Code § 2750.3 (popularly referred to under its pre-passage moniker, AB 5),
19 determines whether Burlington is the employer.

20 32. Plaintiffs claim that Burlington retained the right to control the manner and
21 means of accomplishing the desired result of the Class Members' work. To this
22 end, Plaintiffs claim that Burlington had the right to discharge at will, without
23 cause, that the type of work performed by Class Members was that typically
24 performed by low-wage/low skilled employees who do so under strict
25 supervision, that Burlington supplied the place of work and instrumentalities
26 needed to perform the work, that Class Members were paid by the hour, and that
27 the work Class Members performed in Burlington's warehouse was part of its
28 regular business of clothing retail.

1 33. Burlington disputes that it is the employer under *Borello*. Rather, Burlington
2 maintains that, on balance, the staffing company – Lyneer Staffing Solutions –
3 is the employer. Burlington relies on the facts that Lyneer recruits and hires
4 Class Members, pays Class Member wages, maintains time, attendance, and
5 wage records of Class Members, provides meal, rest period and other applicable
6 employment policies, sets Class Member wages, and can discharge with or
7 without cause. Thus, Burlington concludes that, although Class Members
8 perform work at Burlington facilities, all other control under *Borello* is exerted
9 through Lyneer, whom Burlington claims is the appropriate employer.

10 34. The importance of who prevailed on the issue of employment cannot be
11 understated. All of Plaintiffs’ causes of action are predicated on satisfying the
12 threshold issue of Burlington being deemed the employer. If the Court found
13 otherwise, there would be no recovery. Thus, in exploring settlement, Plaintiffs
14 had to factor in the risks associated with not prevailing on the employment issue.

15 35. While Plaintiffs remain confident in their claims, they recognize the risk to
16 continued litigation. Namely, Burlington argues that the issue of whether workers
17 were provided meal periods and rest breaks is not susceptible of common proof.
18 Burlington argues that, even if it were deemed the employer, it would be a co-
19 employer with Lyneer Staffing Solutions, who was involved in hiring, firing,
20 and paying the putative class members. Thus, Burlington argues that the
21 determination of whether the putative class members were provided meal
22 periods and rest breaks would not depend exclusively on Burlington’s policies,
23 but would also depend on whether the various Lyneer Staffing Solutions on-site
24 managers ensured the different groups of workers they supervised were
25 provided lawful breaks and whether Lyneer Staffing Solutions provided for
26 meal periods and rest breaks despite Burlington’s policies and practices.
27 Although Plaintiffs are confident the common questions that would be framed
28 for certification would avoid these problems, this variance could cast doubt on

whether class treatment is appropriate and therefore had to be factored for purposes of exploring classwide settlement.

36. There is also a risk that should the Court grant certification of these claims, these claims would later be decertified. For example, in the case *Hamilton v. Wal-Mart Stores, Inc.* the district court granted certification of the unpaid wages claims based on employees going through a security checkpoint, only to later decertify them on the basis that the plaintiff was unable to set forth a workable damages model. *Hamilton*, Case No. ED CV 17-01415-AB (KKx), 2019 U.S. Dist. LEXIS 153367 *1, *41 (C.D. Cal. March 4, 2019) (“[T]he Court finds that Plaintiffs’ security checkpoint subclass and Plaintiffs’ overtime subclass to the extent it is based on the security checkpoint claim cannot be maintained because Plaintiffs are unable to put forth a workable damages model.”). As such, if Plaintiffs’ unpaid wages claim is certified, there is a risk that this class may later be decertified.

37. Plaintiffs’ claims for unpaid straight and overtime wages and meal and rest period violations are based on the same set of facts, *i.e.*, Burlington’s security screenings employees have to satisfy upon entry and exit. Plaintiffs claim that, because of these searches, Plaintiffs are not relieved of all control for meal and rest breaks and, due to the fact that Class Members endure these screenings while they are off the clock, they are not paid straight and overtime wages while undergoing the screenings.

38. Based on the security screenings, Plaintiffs claim that their right to 30-minute meal and 10-minute rest periods, wherein employees are to be free to leave the premises without being subject to employer controls, have been violated. *See Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1038-1040 (2012); *accord Augustus v. ABM Security Services, Inc.*, 2 Cal. 5th 257, 260, 265 (2017). Because these screenings subject them to control off the clock, *i.e.*, when they are not being paid, Plaintiffs also claim that their right to be compensated for all

1 hours subject to the employer's control has been violated.

2 39. There was a considerable dispute over the degree of employer control the
3 searches at issue here occasioned on Class Members. Burlington contends that
4 its entry/exit screenings are minimal, with most employees not even breaking
5 stride upon entering and exiting the facility. Burlington searches bags upon entry
6 to ensure employees are not bringing anything dangerous, *i.e.*, a weapon, into
7 the warehouse. Burlington urges employees to either not bring in bags or bring
8 all belongings in a clear plastic bag for quick, unhindered passage at checkpoint.
9 The exit searches, although for a different, inventory control related purpose,
10 bear the same hallmark according to Burlington. That is, if no bag is brought
11 out, or, if the employee does tote a bag of some sort, if it is contained in a clear
12 plastic bag, the employee is not delayed in leaving the facility. Burlington
13 contrasts its searches from those of the tech retail giant in *Frlekin v. Apple, Inc.*
14 8 Cal.5th 1038 (2020), wherein the record showed employees were detained
15 under the policy for up to several minutes while a manager was flagged down
16 to perform a search. Burlington employees do not have to endure such wait times
17 to comply with the policy, as there is a designated security gate through which
18 they pass. Thus, based on these facts, Burlington contends that, on balance of
19 the factors outlined in *Apple*, its searches do not constitute an unlawful control
20 for purposes of assessing wage and meal/rest period violations.

21 40. Given the load-bearing nature of the status of the security screenings here on the
22 predominating claims for unpaid straight/overtime wages and meal and rest
23 period violations, Plaintiffs had to seriously evaluate the risk of Burlington
24 prevailing on the issue in engaging in settlement discussions.

25 41. In evaluating the risks, Plaintiffs did so on a sliding scale. Whether a search rises
26 to the level of a compensable control during which employees must be paid does
27 not fall under the same analysis when analyzed in the context of meal and rest
28 period claims. Meal and rest periods enjoy a more heightened freedom from

1 employer mandated controls and intrusions than they do for purposes of
2 evaluating the same in the unpaid wage context. Whereas for purposes of
3 evaluating whether an employer policy – like the security screenings at issue
4 here – rises to a compensable control focuses on “the degree of the employer’s
5 control,” Plaintiffs contend *any* employer control exerted during a meal and/or
6 rest period triggers meal and rest period liability for which an hours’ worth of
7 pay is owed under Labor Code § 226.7.

8 42. Based on the different legal impact the searches have on meal and rest period
9 claims as opposed to wage claims, Plaintiffs placed a greater risk factor on the
10 straight and overtime wage claims than the claims for meal and rest period
11 violations when evaluating settlement. Burlington disputes Plaintiffs’
12 interpretation of California law. Specifically, Burlington contends that whether
13 the security screenings rise to the level of unlawful control is the same analysis
14 for wage claims as it is for meal and rest period claims. At any rate, the dispute
15 about the legal test of what constitutes a violation is exemplary of another
16 threshold issue that could have significant bearing on the outcome of the case if
17 litigation continued.

18 43. Plaintiffs also pursued claims for failure to provide accurate itemized wage
19 statements and waiting time penalty claims. These claims are derivative of
20 Plaintiffs’ unpaid wages claims. Should Plaintiffs’ unpaid wages claims fail,
21 these claims would also fail. Burlington argues that it would not be liable for
22 waiting time penalties because a “good faith dispute” exists over the payment
23 of past wages. *See* Cal. Code Regs. Tit. 8 § 13520; *Amaral v. Cintas Corp.*, 163
24 Cal.App.4th 1157, 1201 (2008). Further, Burlington contends Plaintiffs would
25 have to prove it “willfully” failed to pay class members appropriate wages due
26 upon separation of employment, which Burlington contends was not willful, as
27 it was not adjudged to be the workers’ employer at the time of separation. *See*
28 Cal. Lab. Code § 203(a).

1 44. Plaintiffs' PAGA claims are based on the same alleged unlawful conduct as their
2 class claims. Therefore, PAGA penalties could only be awarded if the factfinder
3 agreed with Plaintiffs' theories of liability. Should the Court agree with any of
4 Burlington's defenses to certification or on the merits, the potential exposure for
5 PAGA would be reduced and any associated PAGA penalties would be
6 extinguished, as penalties can only be awarded if the Court agrees with
7 Plaintiffs' underlying allegations. Further, these penalties would be in addition
8 to the potential recovery from the underlying violations.

9 45. In *Thurman v. Bayshore Transit Management, Inc.*, the court determined that an
10 award of the maximum penalty allowed may be unjust in circumstances outside
11 of when a defendant cannot afford to pay the maximum amount. *See Thurman*
12 *v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1135-1136
13 (2012). The *Thurman* court found that penalties may be reduced when a
14 defendant has taken its obligations to comply with the law seriously. *Id.*
15 Burlington argues that if the case were to continue in litigation, it would be able
16 to show that it took its obligations to comply with the law seriously such as
17 providing an additional 15 minutes during meal periods and 5 minutes during
18 rest breaks. As such, if Plaintiffs were able to prevail on the merits of their
19 PAGA claims, it is likely that the Court would reduce the maximum penalty
20 allowed.

21 46. As the above explains, Plaintiffs had to significantly factor in the risks of
22 prevailing on their claims, all of which are based on whether the entry/exit
23 searches constituted unlawful controls in the context of the particular claims at
24 issue. Plaintiffs also had to seriously factor in the risk of losing on the issue of
25 whether Burlington is the employer under the *Borello* factors. The settlement
26 amount of \$3,000,000 is a reasonable compromise of those claims and their
27 respective risks as outlined above. Again, without the settlement, the Parties
28 would be required to litigate the merits of the case—a process which is long,

1 complex, uncertain and expensive. Burlington would conduct further motion
2 practice to defend against Plaintiffs' claims such as seek summary judgment on
3 the employment relationship issue and oppose any motion for class certification.
4 Settlement of this matter will conserve the resources of this Court and the
5 Parties, thus weighing in favor of final approval.

6 47. Throughout the course of litigation, the Parties engaged in concentrated
7 informal discovery. Although informal in the sense that documents, data, and
8 information were produced pursuant to informal requests instead of formal
9 discovery inquiries, the gathering of information was no less robust than
10 Plaintiffs would obtain through formal means.

11 48. The discovery conducted and the resultant meet and confer efforts led to
12 exchanging hundreds of pages of documents and hundreds of thousands of lines
13 of data. The information and data included, for example, policies and best
14 practices, meal period and rest break policies, contracts between Burlington and
15 Lyneer Staffing Solutions, Lyneer Staffing Solutions' time records, attendance
16 records, and pay records, as well as personnel files. Plaintiffs hired an expert,
17 Mr. Jarrett Gorlick, who analyzed the timekeeping and payroll data.

18 49. On January 3, 2019, the Parties attended mediation with Jeff Ross. At the first
19 mediation, the Parties found unintended flaws in the data—*i.e.*, the number of
20 shifts used in the Parties exposure analysis was inflated for many temporary
21 workers. As such, the Parties agreed to reschedule the mediation.

22 50. On October 15, 2019, the Parties attended a second mediation with David
23 Rotman. The mediation resulted in a mediator's proposal later accepted by both
24 Parties. The Parties' memorialized the settlement in a long form agreement and
25 now seek the Court's approval of their Joint Stipulation. The proposed
26 settlement is the product of arm's-length negotiations facilitated by David
27 Rotman, one of the most respected mediators in wage and hour class actions.
28

1 51.The Parties agreed to hire CPT Group, Inc. as the Settlement Administrator, a
2 choice the Court approved in conjunction with granting preliminary approval.
3 CPT was responsible for mailing the Class Notice to Class Members, obtaining
4 updated addresses for undeliverable Class Notices, responding to Class Member
5 inquiries, providing weekly status reports to all counsel, receiving
6 communications from the Class Members, maintaining a settlement website,
7 and providing a declaration documenting its duties and responsibilities in
8 administering the Class Notice. Following the grant of final approval, CPT will
9 continue to calculate the payments to Participating Class Members and PAGA
10 Group Members, send the individual Settlement Shares to Participating Class
11 Members and PAGA Payments to PAGA Group Members, distribute other
12 payments ordered by the Court, and perform such other duties as described in
13 the Joint Stipulation. CPT's fee of \$45,000 for services rendered and to be
14 rendered is fair and reasonable in my experience.

15 52.The payment of \$225,000 (75% of \$300,000) to the LWDA for its share of the
16 applicable penalties claimed under PAGA is reasonable under the
17 circumstances. The Parties negotiated a good faith amount to the LWDA. The
18 sum to be paid to the LWDA was not the result of self-interest at the expense of
19 other Class Members. The LWDA was provided notice of the settlement and the
20 instant motion. Plaintiffs did not receive a response or objection to the
21 settlement from the LWDA.

22 I declare under penalty of perjury under the laws of the United States of America
23 that the foregoing is true and correct.

24
25 Dated: February 1, 2021

/s/David Mara, Esq.
David Mara, Esq.