

BIBIYAN LAW GROUP, P.C.

David D. Bibiyan (SBN 287811)

david@tomorrowlaw.com

Vedang J. Patel (SBN 328647)

vedang@tomorrowlaw.com

1460 Westwood Boulevard

Los Angeles, California 90024

Telephone: (310) 438-5555

Facsimile: (310) 300-1705

Attorneys for Plaintiffs, on behalf of themselves
and all others similarly situated and aggrieved

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

STEVEN GONZALEZ and GIANA
PADILLA on behalf of themselves and all
others similarly situated and aggrieved,

Plaintiffs,

v.

H&M HENNES & MAURITZ L.P., a
Domestic limited partnership; ALYSE
DIGILDO, an individual; and DOES 1
through 100, inclusive,

Defendants.

CASE NO.: 30-2021-01217029-CU-OE-
CXC

[Assigned to the Hon. William Claster in
Dept. CX101]

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS AND
REPRESENTATIVE ACTION
SETTLEMENT; DECLARATIONS OF
VEDANG J. PATEL, DAVID D. BIBIYAN,
PLAINTIFFS, AND ANTHONY ROGERS
IN SUPPORT THEREOF**

HEARING INFORMATION:

DATE: May 9, 2025

TIME: 9:00 A.M.

DEPT: CX101

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 9, 2025 at 9:00 A.M. or as soon thereafter as they may be heard in Department CX101 of the Superior Court of the State of California for the County of Orange, Plaintiffs Steven Gonzalez (“Plaintiff Gonzalez”) and Giana Padilla (“Plaintiff Padilla”, and with Plaintiff Gonzalez, the “Plaintiffs”), on behalf of themselves and all others similarly situated and aggrieved, will and hereby does move for this Court for entry of an Order:

1. Preliminarily certifying the following settlement class (“Settlement Class,” “Settlement Class Members” or “Class Members”) for the purpose of settlement only: all retail workers currently or formerly employed by Defendant H&M Fashion USA, Inc. (“Defendant”), either directly or through any subsidiary, staffing agency, or professional employer organization, as non-exempt employees during the period from August 18, 2017 through November 6, 2024 (“Class Period”) in the State of California.

2. Preliminarily approving Plaintiffs as Class Representatives.

3. Preliminary approving David D. Bibiyan and Vedang J. Patel, of Bibiyan Law Group, P.C, as Class Counsel.

4. Preliminarily approving the settlement claims under the terms set forth in the Settlement Agreement.

5. Preliminarily approving payment of the Gross Settlement Amount of \$7,500,000.00, which is subject to escalation pursuant to the Settlement Agreement.

6. Approving the form and content of the Notice of Class Action Settlement (“Class Notice”) submitted herewith.

7. Appointing ILYM Group, Inc. (“Settlement Administrator”) to administer the Settlement, including distribution of the Class Notice, as set forth in the Settlement Agreement.

8. Preliminarily approving the payment of not to exceed \$71,950.00 for settlement administration to the Settlement Administrator from the Gross Settlement Amount.

9. Preliminarily approving a service award of \$7,500.00 to each of the Plaintiffs, for a total amount of \$15,000.00 to Plaintiffs, in consideration for Plaintiffs’ extensive efforts in prosecuting

1 this case.

2 10. Preliminarily approving payment of reasonable attorneys' fees to Class Counsel in the
3 amount of not more than thirty-five (35%) of the Gross Settlement Amount which, unless increased
4 pursuant to the Settlement Agreement, amounts to \$2,625,000.00.

5 11. Preliminarily approving reimbursement of Class Counsel's costs in an amount, according
6 to proof, not to exceed \$85,000.00.

7 12. "Aggrieved Employees" means all retail workers currently or formerly employed by
8 Defendant, either directly or through any subsidiary, staffing agency, or professional employer
9 organization, as non-exempt employees during the period from August 18, 2020 through November
10 6, 2024 ("PAGA Period") in the State of California.

11 13. Preliminarily approving PAGA penalties in the amount of \$200,000.00, seventy-five
12 percent (75%) or \$150,000.00 of which will be paid to the Labor and Workforce Development
13 Agency ("LWDA") out of the Gross Settlement Amount, and twenty-five percent (25%) or
14 \$50,000.00 of which will be distributed to PAGA Members.

15 14. Entering an Order preliminarily approving the Settlement consistent with the terms of the
16 Settlement Agreement.

17 Good cause exists for granting this Motion in that the proposed settlement is fair, reasonable
18 and adequate.

19 This Motion will be based on this Notice of Motion, the Memorandum of Points and
20 Authorities filed herewith, the Declarations of Vedang J. Patel, David D. Bibiyan, Plaintiffs, and
21 Anthony Rogers, and exhibits attached thereto, arguments of counsel and upon such other materials
22 contained in the file and pleadings of this action.

23
24 Dated: April 15, 2025

BIBIYAN LAW GROUP, P.C.

25 /s/ Vedang J. Patel

26 _____
VEDANG J. PATEL
27 Attorneys for Plaintiffs, on behalf of
28 themselves and all others similarly situated
and aggrieved

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Steven Gonzalez (“Plaintiff Gonzalez”) and Giana Padilla (“Plaintiff Padilla”,
4 and with Plaintiff Gonzalez, the “Plaintiffs”), on behalf of themselves and all others similarly
5 situated and aggrieved, hereby applies for preliminary approval of the proposed Class and PAGA
6 Settlement Agreement (“Settlement,” “Agreement” or “Settlement Agreement”) upon the terms
7 and conditions set forth in the Settlement Agreement, attached to the Declaration of Vedang J.
8 Patel (“Patel Decl.”) attached as Exhibit “1.”

9 On August 18, 2021, Plaintiff Gonzalez filed his class action complaint for damages in the
10 Superior Court of the State of California for the County of Orange, Case No. 30-2021-01217029-
11 CU-OE-CXC. Plaintiff Gonzalez alleged violations, including but not limited to, failure to give
12 compliant meal and rest breaks, to pay meal and rest break premiums, to pay overtime, to provide
13 accurate wage statements, to pay minimum wage, to pay all due wages upon termination, failure
14 to indemnify, and unfair competition. On August 18, 2021, Plaintiff Gonzalez also filed a notice
15 with the Labor and Workforce Development Agency (“LWDA”) to seek civil penalties for various
16 Labor Code violations.

17 On April 19, 2022, Plaintiff Gonzalez filed a First Amended Complaint in the instant action
18 seeking civil penalties under the Private Attorney’s General Act Labor Code section 2699. On
19 January 2, 2024, Plaintiffs filed an amended notice with the LWDA (“Amended PAGA Notice”).
20 A true and correct copy of the Amended PAGA Noticed is attached to the Patel Decl. as Exhibit
21 2. On February 5, 2024, Plaintiff Gonzalez filed a Second Amended Complaint adding another
22 allegedly aggrieved employee and purported class representative, Giana Padilla, as a named
23 plaintiff.

24 Thereafter, the Parties conducted formal discovery and also agreed to exchange informal
25 discovery and attend mediation. Prior to the mediations, Plaintiffs obtained, through informal
26 discovery: (a) a 10% sampling of time and payroll records for Class Members and Aggrieved
27 Employees; (b) all policy documents related to the claims in this case; and (c) Plaintiffs’ personnel
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1 file. Plaintiffs' investigation was sufficient to satisfy the criteria for court approval set forth in
2 *Dunk v. Foot Locker Retail, Inc.* (1996) 48 Cal.App.4th 1794, 1801 and *Kullar v. Foot Locker*
3 *Retail, Inc.* (2008) 168 Cal.App.4th 116, 129-130 ("*Dunk/Kullar*").

4 On July 18, 2023, the Parties participated in an all-day mediation presided over by Mark
5 S. Rudy, Esquire. The mediation was unsuccessful, but the Parties continued settlement
6 negotiations for the next several months with the aid of the mediator.

7 On November 6, 2024, the Parties attended a second all-day mediation, also presided over
8 by Mark S. Rudy, Esquire, which led to the Parties reaching an agreement to settle the Action. As
9 part of the Settlement, the Parties agreed Plaintiffs shall dismiss, without prejudice, any and all
10 claims against defendant Alyse Digildo ("Ms. Digildo"). Defendant represents that Ms. Digildo is
11 a Class Member and as such Plaintiffs agree that dismissal of any claims against her is appropriate
12 for approval purposes.

13 II. THE SETTLEMENT

14 Subject to Court approval pursuant to Code of Civil Procedure section 382 and California
15 Rules of Court, rule 3.679, *et seq.*, the Parties have agreed to settle the Action by agreement upon
16 the terms and conditions and for the consideration set forth in the Settlement Agreement, a copy
17 of which is attached to the Patel Decl. as Exhibit "1" thereto. A summary of the terms of the
18 settlement are as follows:

19 Defendant will stipulate, for purpose of this settlement only, as follows:

- 20 • Certification of a class ("Settlement Class," "Settlement Class Members" or "Class
21 Members") defined as: all retail workers currently or formerly employed by Defendant
22 H&M Fashion USA, Inc. ("Defendant"), either directly or through any subsidiary,
23 staffing agency, or professional employer organization, as non-exempt employees
24 during the period from August 18, 2017 through November 6, 2024 ("Class Period") in
25 the State of California.
- 26 • Defendant will pay \$7,500,000.00 ("Gross Settlement Amount") to resolve the matter.

- 1 • The Settlement was negotiated based on Defendant’s representation that there are
2 approximately 1,020,974 Workweeks worked during the Class Period. In the event the
3 number of Workweeks worked increases during the Class Period by more than 10%, or
4 an additional 102,097 Workweeks, then, at Defendant’s election: (1) the Gross
5 Settlement Amount shall be increased proportionally by the Workweeks worked in
6 excess of 1,123,071 (1,020,974 Workweeks + 102,097 Workweeks) multiplied by the
7 Workweek Value; or (2) the Class Period shall be reduced in order to ensure that the
8 Workweeks do not exceed 1,123,071. The Workweek Value shall be calculated by
9 dividing the Gross Settlement Amounts by 1,020,974. The Parties agree that the
10 Workweek Value amounts to \$7.35 per Workweek (\$7,500,000 / 1,020,974
11 Workweeks). Thus, for example, should there be 1,200,000 Workweeks in the Class
12 Period, then, if Defendant elects option 1 above, the Gross Settlement Amount shall be
13 increased by \$565,428.15. (1,200,000 Workweeks – 1,123,071 Workweeks) x
14 \$7.35/Workweek.) Defendant shall have ten (10) business days from receiving notice
15 that there are greater than 1,123,071 Workweeks to exercise its election; otherwise, it
16 will be assumed that Defendant has exercised Option (1).
- 17 • Defendant will pay the employer’s share of taxes separate and apart from the Gross
18 Settlement Amount.
- 19 • This is a non-reversionary settlement.
- 20 • Class Members will be paid their *pro rata* share of the class action settlement based
21 on the total number of Workweeks¹ worked during the Class Period.
- 22 • The Settlement Administration costs, estimated not to exceed \$71,950.00 will be paid
23 out of the Gross Settlement Amount.
- 24 • Class Counsel will apply for, and Defendant will not oppose, attorneys’ fees of not
25 more than thirty-five (35%) of the Gross Settlement Amount, which, unless escalated

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27 ¹ “Workweek” means any week (i.e. 7-day period) during which a Class Member was employed by Defendant for at
28 least one day in a non-exempt position during the Class Period in California, based on hire dates, re-hire dates (as
 applicable), and termination dates (as applicable).

pursuant to the Settlement Agreement, amounts to \$2,625,000.00, and actual costs, not to exceed \$85,000.00 all of which will be paid out of the Gross Settlement Amount. Class Counsel may seek less than 35% in fees at the time of final approval.

- Class Counsel will apply for, and Defendant will not oppose, a service award in the amount of \$7,500.00 each, to a total amount of \$15,000, for the Class Representatives, which will be paid out of the Gross Settlement Amount.
- “Aggrieved Employees” means all retail workers currently or formerly employed by Defendant, either directly or through any subsidiary, staffing agency, or professional employer organization, as non-exempt employees during the period from August 18, 2020 through November 6, 2024 (“PAGA Period”) in the State of California.
- Defendant has agreed to pay \$200,000.00 as PAGA penalties, seventy-five percent (75%) or \$ 150,000.00 of which will be paid to the LWDA out of the Gross Settlement Amount, and twenty-five percent (25%) or \$ 50,000.00 of which will be distributed to the PAGA Members.
- For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date (180 days), the Administrator shall transmit the funds represented by such checks to Legal Aid at Work.

III. THE TWO-STEP APPROVAL PROCESS AND THE PRESUMPTION OF FAIRNESS

Any settlement of class litigation must be reviewed and approved by the Court. (*See* Cal. Rules of Court, rule 3.769). This is done in two steps: (1) an early (preliminary) review by the trial court; and (2) a final review after notice has been distributed to the class members for their comment or objections. (*See id.*). Courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were conducted in good faith. (Newberg on Class Actions, § 11.51; *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability*

1 *Litigation* (N.D. Cal. May 17, 2017) No. 16-cv-00295, 2017 WL 2214655, quoting *United States*
2 *v. Oregon* (9th Cir. 1990) 913 F.2d 576, 580.). Here, the negotiations were conducted in good faith.

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5 **IV. SETTLEMENT AGREEMENT AND ACCOMPANYING DOCUMENTS**

6 A notice of settlement of a class action “must contain an explanation of the proposed
7 settlement and procedures for class members to follow in filing written objections to it and in
8 arranging to appear at the settlement hearing and state any objections to the proposed settlement.”
9 (Cal. Rules of Court, rule 3.769, subd. (f).) Attached to the Patel Decl. as Exhibit “1” is the
10 Settlement Agreement between the Parties. Attached to the Settlement Agreement as internal Exhibit
11 “A” is the proposed Class Notice to be distributed to Class Members in English and Spanish. The
12 proposed Class Notice satisfies these requirements. The Parties respectfully request that this Court
13 approve the above-referenced Class Notice and dissemination of the Class Notice to the Class
14 Members, consistent with the manner and timing as set forth in the Settlement Agreement. The
15 Parties have agreed to use ILYM Group, Inc. an experienced settlement administrator, to administer
16 the Settlement.

17 **V. THE SETTLEMENT IS FAIR AND REASONABLE BASED UPON**
18 **OBJECTIVE EVIDENCE**

19 **A. The Settlement was Negotiated at Arm’s-Length and is not Collusive**

20 The Settlement that has been reached, subject to this Court’s approval, is a product of
21 substantial efforts by Class Counsel. The Settlement was reached after extensive factual and legal
22 investigation and research; substantial negotiation regarding the scope of informal discovery; an
23 exchange of documents and information that included review of time and pay records and analysis
24 thereof with the aid of Plaintiffs and expert consultants; an analysis of shifts and Workweeks worked
25 by Class Members in the Class Period, analysis of the number of pay periods and number of PAGA
26 Members in the PAGA Period for calculating PAGA penalties, number of Class Members eligible
27 for wage statement penalties and waiting time penalties; an analysis of Plaintiffs’ employment
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1 records; extensive correspondence and communication between counsel; a review of pleadings,
2 evidence and rulings in similar actions litigated elsewhere in the state; a review of similar cases in
3 the same industry elsewhere in the country; and preparation for and attendance at two full-day
4 session of mediations, followed by months of further discussions and coordination to finalize the
5 terms and conditions of the general settlement parameters agreed to by the Parties.

6 While Class Counsel believe in the chance of success of certifying the claims, Class Counsel
7 recognized the potential risk, expense and complexity posed by further litigation. Moreover,
8 litigating Plaintiffs' claims in this Litigation—claims that involve approximately 19,694 Class
9 Members during the Class Period—would require enormous preparation and discovery, and
10 ultimately would involve the deposition and presentation of numerous more witnesses (including
11 Class Members and expert witnesses), as well as the consideration, preparation and analysis of
12 expert reports. Therefore, should litigation have progressed any further, there would have been
13 significant expense incurred by each side (above and beyond the expense already incurred).

14 **B. The Settlement Amount is Well Within Range of Reasonableness**

15 The settlement amount reached in this case provides significant recovery to Class Members
16 and PAGA Members, and easily falls within the range of reasonableness. Based on documents and
17 information provided by Defendant, Class Counsel understand there are approximately 1,020,974
18 Workweeks during the Class Period.

19 **1. Unpaid Wages for Failure to Pay Off-the-Clock Work**

20 Class Counsel theorized at the mediation, based on Plaintiffs' and Class Members'
21 narrative evidence, that Defendant's practices during the Claas Period resulted in off-the-clock
22 work. Class Counsel theorized that Class Members spent time off-the-clock because, among other
23 things, they were required to walk to the time clock to clock in and out, wait in line to clock in,
24 stow their personal belongings, and submit to security checks, all off-the-clock. Class Counsel
25 further theorized that Class Members were required to wait for the on-duty keyholder to arrive
26 and unlock the doors before being admitted into the store. Furthermore, based upon Plaintiffs' and
27 Class Members' narrative evidence, Class Counsel theorized that every putative Class Member
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1 was required to notify the manager of their departure before they are permitted to leave for the
2 day which involved clocking out, searching for the manager, notifying the manager of the
3 employee's departure, and then departing the store which would occur off-the-clock. Additionally,
4 all Class Members with bags were obligated to submit to mandatory security checks after clocking
5 out resulting in additional off-the-clock work.

6 Class Counsel advanced a theory that all Class Members worked off-the-clock for an
7 estimate of 6 minutes each shift throughout the Class period, without pay. Class Counsel
8 understand from the data provided and analyzed by expert data consultants that there were
9 4,380,195 shifts during the Class Period, 22.7% of shifts worked were over 8 hours, and that Class
10 Members were paid an average of \$18.65 per hour. Thus, one theory advanced by Class Counsel
11 resulted in Defendant's exposure for unpaid overtime wages due to failure to track and pay for all
12 time worked of \$2,781,566 (0.1 hr. x \$18.65/hr x 1.5 OT rate x 4,380,195 shifts x 0.227 shifts
13 over 8 hrs.). Additionally, Class Counsel theorized Defendant's exposure for unpaid minimum
14 wages is \$12,629,372 (0.1 hr. x \$18.65/hr x 2 liquidated damages x 4,380,195 shifts x 0.773 shifts
15 under 8 hrs.). Thus, Class Counsel theorized Defendant's total exposure for failure to pay for all
16 time worked at the time of mediation was **\$15,410,938.**

17 Class Counsel understand from the mediator and the mediation process that Defendant made
18 the following defenses, among others, in connection with this claim: Defendant contends that its
19 policies specifically prohibit off-the-clock work. Defendant contends that it did not require Class
20 Members to work off-the-clock and, rather, they were paid for all time suffered or permitted to work.
21 Defendant also state that its provided numerous computers for Class Members to clock in and out,
22 and therefore it would not have to wait in line. Furthermore, Defendant argued that any allegations
23 that Class Members were required to be under Defendant's control off-the-clock would necessitate
24 an individualized inquiry into when and why, making this claim not subject to class treatment and
25 any trial in this litigation unmanageable. Thus, Defendant contends that no damages can be
26 recovered here, and, even if, *arguendo*, they could, an estimate of six (6) minutes of unpaid work
27 off-the-clock of Class Members for every single shift during the Class Period is a wild exaggeration
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1 of time spent working off-the-clock if any such time was spent.

2 **2. Recovery of Damages for Non-Compliant Meal Periods**

3 Class Counsel theorized, based on the narrative evidence of Plaintiffs, as well as documents
4 produced by Defendant, that Defendant's meal period policies and practices throughout the Class
5 Period were non-compliant as Plaintiffs and Class Members did not receive full, timely and
6 uninterrupted meal periods. Class Counsel theorized that, among other things, Plaintiffs and Class
7 Members were required to walk back and forth from a suitable break area, and therefore would
8 regularly end their breaks early so that their meal break would not exceed 30 minutes. Furthermore,
9 Class Counsel understand that Defendant's time punch machine was located in the back room and
10 away from the break room. The food court was also located in a different part of the store requiring
11 Class Members to walk to clock in and out. Class Counsel also theorized that Plaintiffs and Class
12 Members were required to retrieve and stow their belongings in the company lockers as a part of
13 Defendant's safety policy after clocking out for meal periods. Furthermore, Class Counsel also
14 theorized, based on Plaintiffs' and Class Members' narrative evidence, that managers would often
15 come and ask work-related questions during the meal break, and customers would interrupt Class
16 Members' break by asking them questions.

17 Class Counsel understands from the documents produced by Defendant and analyzed by
18 expert data consultants that there were 965,184 unique meal period violations (*i.e.* meal periods that
19 were late, short, or missed) during the Class Period through the mediation. Thus, one theory
20 advanced by Class Counsel, based solely on facial and unique violations, resulted in Defendant's
21 liability for unpaid meal premiums of **\$17,071,110** [$\$18.65/\text{hr} \times (965,184 \text{ unique meal period}$
22 $\text{violations} - 49,842 \text{ meal period premiums paid})$].

23 Class Counsel understand from the mediator and the mediation process that Defendant
24 makes the following defenses, among others, in connection with this claim: Defendant argued that
25 it had compliant meal period policies and practices. Defendant argued that Class Members took
26 timely and full meal periods. Defendant contends that its policy requires their employees to take
27 timely and full meal periods. Defendant further contends that any instance of a Class Member
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1 failing to take a compliant meal period was voluntary, in violation of its meal period policy, would
2 necessitate an individualized inquiry and would not lend itself to a manageable trial. Thus,
3 Defendant contends that *no* monies are owed for this account but, even if any amounts were due,
4 the amount calculated by Class Counsel is excessive.

5 3. **Recovery of Damages for Non-Compliant Rest Periods**

6 Class Counsel theorized at mediation, based on Plaintiffs' and Class Members' narrative
7 evidence, that Class Members did not receive compliant rest periods throughout the Class Period
8 based on many of the reasons stated above for meal period violations, including that they were cut
9 short, interrupted, or just not provided in some instances. Class Counsel theorized from Plaintiffs'
10 and Class Members' narrative evidence that Class Members would be required to walk to and from
11 the break room or another suitable break area to retrieve and stow their personal items. Class
12 Counsel also theorized that Plaintiffs and Class Members missed rest breaks entirely due to
13 workload and understaffing. Class Counsel understand from Defendant's records and Class
14 Members' narrative evidence that Class Members did not know that they were entitled to more than
15 one rest break per shift, even for shifts longer than eight hours. As a result, Class Members were
16 deprived of a second or third rest break, even for qualifying shifts. Moreover, Class Counsel also
17 theorized from Plaintiffs' narrative evidence that rest periods were frequently cut short or interrupted
18 by managers or customers with time-sensitive questions and tasks. Notably, no rest period premiums
19 were paid during the Class Periods through the mediation. One calculation performed by Class
20 Counsel resulted in, assuming a conservative 20% violation rate for rest-eligible shifts, of
21 **\$16,052,320** (\$18.65/hr. x 4,303,571 shifts x 0.20 violation rate).

22 Class Counsel understand from the mediator and the mediation process that Defendant make
23 the following defenses, among others, in connection with this claim: Defendant argued that it had
24 compliant rest period policies and practices and that its policy requires their employees to take
25 timely and full rest breaks. Defendant argued that Class Members took timely and full rest breaks
26 or received the required rest period premium for each instance of rest period violations. Defendant
27 further contends that any instance of a Class Member failing to take a compliant rest period was
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1 voluntary and therefore would necessitate an individualized inquiry and would not lend itself to a
2 manageable trial. Thus, Defendant contends that *no* monies are owed for this account but, even if
3 any amounts were due, the amount calculated by Class Counsel is excessive.

4 **4. Wage Statement Violations**

5 Class Counsel theorized that Class Members are entitled to recover penalties for
6 Defendant's alleged failure to issue compliant wage statements under Labor Code section 226,
7 subdivision (e), because, among other things, shifts involved off-the-clock work that was not
8 included on wage statements. Further, many shifts included meal period and rest period violations
9 for which premiums were not paid. Thus, Defendant is liable for wage statement violations for
10 each pay period. Class Counsel understand from the data provided by Defendant that there were
11 351,909 pay periods in the wage statement liability period. Thus, Class Counsel theorized
12 Defendant's exposure for this claim, assuming a 20% violation rate, to be **\$7,038,180**. (351,909
13 pay periods in the wage statement period x \$100 penalty x .20 violation rate).

14 Class Counsel understand from the mediator and the mediation process that Defendant
15 makes the following defenses, among others, in connection with this claim: Defendant contends
16 that the wage statements issued to the employees fully complied with Labor Code section 226.
17 Defendant contends that because they believe no wages are unpaid that, thus, there can be no
18 derivative penalties. However, Class Counsel also understand the risks inherent in this claim if
19 the above claims were not certified. Class Counsel also had to factor in, and did factor in, the risk
20 that a Court would find there was no injury to Class Members even if the wage statements were
21 inaccurate or that Defendant's conduct was not intentional, both of which are requirements of
22 Labor Code section 226 before penalties can issue. Class Counsel also note that the calculation
23 used does not consider the first pay period violation only being \$50 and the fact that all Class
24 Members did not work all pay periods.

25 **5. Waiting Time Penalties**

26 Pursuant to Labor Code sections 201, 202 and 203, each employee in the relevant statutory
27 period (*i.e.*, three years before the filing of the initial Complaint) is entitled to 30 days' worth of
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1 wages as waiting time penalty for not being paid all wages due upon separation of employment.
2 Class Counsel theorized at mediation, based on relevant documents provided by Defendant, that,
3 under Labor Code section 203, Defendant is liable to pay each Class Member, who was terminated
4 during the relevant statutory period, a full 30-day worth of wages as waiting time penalty for failure
5 to pay compensation in lieu of compliant meal and rest periods, and failure to timely pay all wages
6 due. Class Counsel further theorized that there are putative Class Members who were provided their
7 final paycheck late and in addition to this, numerous putative Class Members were given their final
8 paycheck as a pay card. That pay card had fees associated with it and therefore all final wages were
9 not paid properly to any of those Class Members. Class Counsel understands from documents
10 provided by Defendant that there were 12,000 separated employees during the relevant statutory
11 period. Thus, Class Counsel theorized Defendant's exposure for this claim, assuming a 20%
12 violation rate, to be **\$10,742,400** (12,000 separated Class Members x \$18.65/hr. x 8 hrs x 30 days
13 x .20 violation rate).

14 Class Counsel understand from the mediator and the mediation process that Defendant
15 contends that there is no credence to Plaintiffs' off-the-clock theory and that, thus, no waiting time
16 penalties are owed based on that theory. Finally, Defendant contends that their actions were not
17 "willful" and that, thus, waiting time penalties cannot be awarded. Thus, Defendant argued that no
18 waiting time penalties are owed.

19 **6. Failure to Reimburse Work Expenses**

20 Class Counsel theorized that Defendant failed to indemnify Class Members for business
21 expenses because, among other things, Defendant required Class Members to use their personal
22 cellphones for work-related purposes. Class Counsel theorized from Plaintiffs' and Class
23 Members' narrative evidence that Class Members were required to use their phones to document
24 merchandising in stores, and interact with their managers, district managers, and supervisors.
25 Class Counsel, based on Class Members' narrative evidence, also theorized that Defendant
26 contacted Class Members at least twice a week on their personal cell phones. Moreover, Class
27 Counsel understand that Defendant had no system for reporting or recording cell-phone usage, so
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1 there was no mechanism by which non-exempt Class Members could recuperate the costs of
2 employer-mandated cellphone usage. Class Counsel theorized that Class Members are owed \$3
3 of cell phone usage per week in reimbursement which results in approximately **\$3,062,922** (\$3
4 per Workweek x 1,020,974 Workweeks).

5 Class Counsel understand from the mediator and the mediation process that Defendant
6 argued the following, among other things: Defendant argued that they did not require Class
7 Members to use their cell phones for work-related purposes and that Class Members used cell
8 phones solely for personal use. Defendant also argued that they reimbursed all employees for all
9 expenses incurred in furtherance of work. Thus, Defendant contends that no monies under this
10 theory, either.

11 **7. PAGA Penalties**

12 Class Counsel understand from the time and payroll data provided by Defendant that there
13 were 351,909 pay periods in the PAGA Period. Plaintiffs' claims in the Action under PAGA are
14 substantially similar to those described herein. PAGA penalties include penalties for initial
15 violations and subsequent violations. Defendant contends that only initial violation rates may be
16 used instead of the subsequent violation rates initially used by Class Counsel. With this in mind
17 and because Class Counsel through investigation and discovery did not come to the conclusion
18 that Defendant at any time was notified by any governmental entity that they violated any Labor
19 Code sections presented in the PAGA Notice and PAGA claims, Class Counsel adjusted the
20 exposure model for Defendant to include only initial violation rates.

21 While Class Counsel are informed and believe that reasonable minds differ with regard to
22 calculation of PAGA penalties, Class Counsel believe it is reasonable to calculate Defendant's
23 maximum exposure on certain of the PAGA penalties as follows:

24 a. Overtime Violations: Labor Code section 558 prescribes penalties of \$50 for an
25 initial violation and \$100 for each subsequent violation. Using the initial pay period rate for all
26 violations, and a violation every single pay period for every single non-exempt employee in the
27 PAGA Period, this amounts to a maximum exposure of \$17,595,450 (351,909 pay periods x \$50).

1 b. Minimum Wage Violations: Labor Code section 1197.1 prescribes penalties of
2 \$100 for an initial violation and \$250 for each subsequent violation. Using the initial pay period
3 rate for all violations and a violation every single pay period for every single non-exempt
4 employee in the PAGA Period, this amounts to a maximum exposure of \$35,190,900 (351,909
5 pay periods x \$100).

6 c. Meal Period Violations: Labor Code section 558 prescribes penalties of \$50 for an
7 initial violation and \$100 for each subsequent violation. Using the initial pay period rate for all
8 violations and a violation every single pay period for every single non-exempt employee in the
9 Settlement Period, this amounts to a maximum exposure of \$17,595,450 (351,909 pay periods x
10 \$50).

11 d. Rest Period Violations: Labor Code section 558 prescribes penalties of \$50 for an
12 initial violation and \$100 for each subsequent violation. Using the initial pay period rate for all
13 violations and a violation every single pay period for every single non-exempt employee in the
14 Settlement Period, this amounts to a maximum exposure of \$17,595,450 (351,909 pay periods x
15 \$50).

16 e. Waiting Time Penalties: Labor Code section 2699 prescribes penalties of \$100 for
17 an initial violation and \$200 for each subsequent violation. Because this violation is merited only
18 at separation of employment, a 100% violation rate would likely include just one violation per
19 employee. The data produced by Defendant indicates that there were 8,139 Aggrieved Employees
20 whose employment was separated during the PAGA Period. This amounts to a maximum exposure
21 of \$813,900 (8,139 Aggrieved Employees x \$100).

22 f. Wage Statement Violations: According to *Gunther v. Alaska Airlines, Inc.* (2021)
23 287 Cal.Rptr.3d 229, in this instance, Labor Code section 2699 would be the appropriate penalty
24 for wage statement violations that are inaccurate, which prescribes penalties of \$100 for an initial
25 violation and \$200 for each subsequent violation (*Id.* at 247-248). Using the initial pay period rate
26 for all violations and a violation every single pay period for every single non-exempt employee in
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1 the PAGA Period, this amounts to a maximum exposure of \$35,190,900 (351,909 pay periods x
2 \$100).

3 g. Failure to Reimburse Work Expenses: Labor Code section 2699 would be the
4 appropriate penalty for failure to reimburse work expenses, which prescribes penalties of \$100 for
5 an initial violation and \$200 for each subsequent violation. Using *only* the initial pay penalty of
6 \$100 for all violations, and a violation every pay period for each non-exempt employee in the
7 PAGA Period, this amounts to exposure of \$35,190,900 (351,909 pay periods x \$100).

8 h. Conclusion: In sum, Class Counsel calculated Defendant's total maximum
9 exposure for PAGA violations if the Court were to find a 100% violation rate for every PAGA
10 Member every pay period and not exercise its discretion to reduce any of those penalties to be
11 \$159,172,950. Class Counsel understand from the mediator and the mediation process that
12 Defendant argued the following in connection with this claim: Defendant contends that no PAGA
13 penalties are likely to be awarded and, even if they were, the maximum exposure calculated by
14 Class Counsel is vastly overstated. First, Defendant defends that PAGA penalties cannot and
15 should not be stacked. Second, Defendant asserts that individualized issues predominate the
16 PAGA claims, making the claims unmanageable for trial. Third, Defendant denies that a violation
17 for each pay period can be established. Fourth, Defendant contends that a Court is unlikely to
18 exercise its discretion to award civil penalties under PAGA where, as here, there is no conduct
19 shown by Plaintiffs that would show any Labor Code violation by Defendant is knowing and
20 intentional. Defendant insists that this is especially true in this Action where class action damages
21 are available to Class Members, rendering an award of PAGA penalties in addition to class action
22 damages to be double recovery.

23 Class Counsel maintain that it is possible to recover the subsequent violation rate for
24 penalties, that stacking is permissible, and that there is no manageability requirement under PAGA
25 (citing *Estrada v. Royalty Carpet Mills, Inc.*). As such, Class Counsel believe a 95% discount of this
26 claim to be reasonable, resulting in a valuation of **\$7,958,613** as a reasonable estimate of the
27 likelihood of what Plaintiffs may recover at trial for PAGA penalties (\$159,172,950 x .05).

8. Conclusion

When including derivative penalties, such as waiting time penalties, wage statement violations, and discretionary PAGA penalties, Class Counsel theorized Defendant's maximum exposure to be approximately **\$77,336,483**. In all, Class Counsel obtained a Gross Settlement Amount of **\$7,500,000**. Particularly in light of the risks involving obstacles to class certification, all issues and risks related to liability, the issues with manageability at trial, the discretionary nature of PAGA penalties, and considering the case law regarding fair, reasonable and adequate settlements, Class Counsel strongly believe that the settlement reached is fair, reasonable and adequate, and in the best interest of Class Members.

Moreover, \$200,000 of the Gross Settlement Amount was attributed to PAGA penalties. This allocation was decided mutually by the Parties and the mutual decision was based on: (1) the fact that damages are available for the failure to pay wage claims while only penalties are available for the PAGA claims; (2) the risk that the Court may exercise its discretion to decline to stack PAGA penalties; (3) the risk that the Court may exercise its discretion to not award the full amount of PAGA penalties available; and (4) the risk that the Court may decline to award any PAGA penalties at all in light of the fact that damages are available for Class Members and it may find any further liability against Defendant unnecessarily punitive.

VII. THE PROPOSED ATTORNEYS' FEES AND COSTS ARE REASONABLE

Class Counsel seek an attorneys' fees award of *not more than* thirty-five percent (35%) of the Gross Settlement Amount, which, unless escalated pursuant to this Agreement, would amount to \$2,625,000.00. Class Counsel also seek reimbursement of costs not to exceed \$85,000.00. Class Counsel may seek less than 35% in fees at the time of final approval. The requested fees fall well within the historical range of attorney's fees awards under the common fund theory, which is generally from 25% to 50%. The requested fee is fair compensation for undertaking complex, risky, expensive and time-consuming litigation on a contingent fee basis. Thus, the Court should preliminarily approve the requested attorneys' fees and costs, which are justified by the results achieved, the complexity of the issues, the difficulty of the case and the great risks undertaken by

1 Class Counsel. The requested attorneys' fees will not be opposed by Defendant and are well within
2 established guidelines.

3 **VIII. THE REQUESTED ENHANCEMENT AWARD TO THE NAMED**
4 **PLAINTIFFS AND CLASS REPRESENTATIVES IS REASONABLE**

5 Plaintiffs are entitled to enhanced awards for their service as class representatives, for
6 answering extensive questions by Class Counsel, for being available and answering questions during
7 mediation, for the risks in being the named plaintiffs and for providing Defendant with a more
8 expansive release of claims, including a waiver based upon California Civil Code section 1542, in
9 exchange for the enhancement award. Defendant does not oppose the requested enhancement to
10 Plaintiffs. Plaintiffs risked intrusive discovery and the payment of employer costs. Class Counsel
11 seek an extremely limited enhancement of \$7,500.00 each for Plaintiffs or a total of \$15,000.00 for
12 their services.

13 **IX. CONDITIONAL CERTIFICATION FOR SETTLEMENT PURPOSES**

14 **A. The Class should be Preliminarily Certified**

15 In California, there are two certification prerequisites: (1) the existence of an "ascertainable
16 class;" and (2) "a well-defined community of interest in the questions of law and fact involved
17 affecting the parties to be represented." (*Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th
18 639, 647.) To certify a class, the party advocating class treatment must demonstrate: (1) a numerous
19 class; (2) predominant common questions of law or fact; (3) class representatives with claims or
20 defenses typical of the class; and (4) class representatives who can adequately represent the class."
21 (*Williams v. Sup. Ct.* (2013) 221 Cal.App.4th 1353, citing *Brinker Restaurant Corp. v. Sup. Ct.*
22 (2012) 53 Cal.4th 1004, 1021.) Each of the criteria for class certification is satisfied in this instance:

23 **1. Ascertainability** – "Ascertainability" is a due process requirement that
24 ensures it is possible to decide who will be bound by the judgment (*res judica* effect). The
25 determination is made by examining the class definition and the size of the class. Here, the Class
26 Members definition (*i.e.*, all retail workers currently or formerly employed by Defendant, either
27 directly or through any subsidiary, staffing agency, or professional employer organization, as non-
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1 exempt employees during the Class Period in the State of California) is derived from the operative
2 complaint, which complains of alleged violations of Labor Code sections that are chiefly and, in
3 some instances, solely applicable to non-exempt employees. There is no difficulty ascertaining who
4 is a Class Member based on the above-described definition as it is readily apparent to all involved
5 who is a non-exempt employee who worked in California for Defendant during the Class Period
6 based solely from Defendant; payroll records, which amounts to approximately 19,694 persons.

7 **2. Numerosity** – According to the California Supreme Court, a putative class is
8 sufficiently numerous to achieve the numerosity requirement if their joinder is impracticable and
9 thus substantial benefits accrue both to litigants and the courts if the action proceeds as a class action.
10 (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435, 446.) Numerosity is presumed satisfied if
11 there are forty (40) putative class members. (*Miri v. Dillon* (E.D. MI 2013) 292 F.R.D. 454, 461.)
12 However, as few as 10 class members has been found sufficient. (*See, e.g., Bowles v. Sup. Ct.* (1955)
13 44 Cal.2d 574.) Class Counsel understand from documents provided that Defendant identified at
14 least 19,694 Class Members. That is sufficiently numerous to establish the numerosity requirement.

15 **3. Commonality** – California law also requires that “questions of law or fact
16 common to the class [be] substantially similar and predominate over the questions affecting the
17 individual members.” (*In re Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 153.)

18 This Litigation is brought to resolve common issues that include whether Defendant failed
19 to pay for all hours worked; whether Defendant provided full, timely and un-interrupted meal and
20 rest periods, whether Class Members are entitled to premium pay for incomplete, untimely or
21 interrupted meal or rest periods, among other claims as set forth above.

22 **4. Typicality** – Typicality requires only that the named plaintiff’s interests in
23 the action be significantly similar to those of other class members. (*Williams v. Sup. Ct.* (2013)
24 221 Cal.App.4th 1353, citing *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1021.)
25 Plaintiffs’ claims are typical of those of other Class Members as Plaintiffs: (1) were non-exempt
26 employees like other Class Members; (2) complains of not being paid for all time under
27 Defendant’s control or suffered and/or permitted to work for Defendant; (3) did not receive full
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premium pay for meal periods that were not compliant with the Labor Code; (4) did not receive premium pay for rest periods that were not provided, among others as set forth above.

5. Adequacy of Representation - To maintain a class action, the representative plaintiff must adequately protect the interests of the class. (*Williams v. Sup. Ct.* (2013) 221 Cal.App.4th 1353, citing *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1021.) Adequacy of representation consists of two components. First, there must be no disabling conflicts of interest between the class representatives and the class. Second, the class representative must be represented by counsel who are competent and experienced in the kind of litigation to be undertaken. (See *McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450; accord *In re Juniper Networks, Inc. Securities Litigation* (N.D. Cal. 2009) 264 F.R.D. 584, 590.) Both criteria are met in this instance:

(i) No Disabling Conflict of Interest Exists Between the Class Representatives and the Class

No conflicts, disabling or otherwise, exists between Plaintiffs and Class Members because Plaintiffs allege to have been damaged by the same alleged conduct of Defendant (*i.e.*, Plaintiffs classified were non-exempt, hourly-paid employees, not paid premium pay, etc.) and thus has the incentive to fairly represent all Class Members' claims to achieve the maximum possible recovery.

(ii) Class Counsel are Experienced Class Action Attorneys

As set forth in the Declarations of Class Counsel, Class Counsel in this matter consist of experienced class action attorneys, have been appointed as class counsel in other class actions and have a successful "track record" in litigating class actions.

6. Superiority of Class Action - Also relevant to the Court's certification decision is whether a class action is the superior method of adjudication. (*Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1021.)

It deals with common issues that are most efficiently adjudicated together, as indicated above. Moreover, with at least 19,694 Class Members, presentation of all of them before this Court may be problematic, impractical, and burdensome. On the contrary, a class action allows claims of many individuals to be resolved at the same time, eliminates the possibility of repetitious litigation

and affords small claimants with a method of obtaining redress for claims which otherwise would be too insufficient to warrant individual litigation.

7. **Conclusion** – Thus, because this class action meets all criteria for certification and a lesser standard of scrutiny applies when evaluating these criteria for settlement purposes, it should be certified for purposes of effectuating this settlement.

X. CONCLUSION

Therefore, the Parties request the Court grant preliminary approval of the proposed settlement.

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Dated: April 15, 2025

BIBIYAN LAW GROUP, P.C.

/s/ Vedang J. Patel

VEDANG J. PATEL
Attorneys for Plaintiffs, on behalf of
themselves and all others similarly situated
and aggrieved