What Keeps Fashion's In-House Counsel Awake at Night?

Friday, February 8, 2019

FASHION LAW INSTITUTE®

CLE MATERIALS

INSIDE OUT 4:
WHAT KEEPS FASHION'S IN-HOUSE COUNSEL AWAKE AT NIGHT?

FEBRUARY 8, 2019

RECEPTION: 9:00AM
PANEL: 9:30AM - 10:45AM

FORDHAM UNIVERSITY SCHOOL OF LAW
150 W. 62ND STREET
NEW YORK, NY 10023

SPEAKERS:

- **PAULA L. BARNES**, SENIOR COUNSEL, MACY'S
- **ANGELA BYUN**, EXECUTIVE ACCOUNT DIRECTOR AND ASIA-PACIFIC BUSINESS DEVELOPMENT, CONDÉ NAST STYLE DIVISION – VOGUE, GQ, GLAMOUR, W, ALLURE, BRIDES
- **CRISTINA DEL VALLE**, SENIOR ASSOCIATE GENERAL COUNSEL, THE METROPOLITAN MUSEUM OF ART
- **GRACE FU**, EXECUTIVE VICE PRESIDENT OF HUMAN RESOURCES, GENERAL COUNSEL AND SECRETARY, BARNEYS NEW YORK
- **ELISHEVA JASIE**, SVP LEGAL – GLOBAL BUSINESS SERVICES & LICENSING, COTY
- **JEFFREY HELLMAN**, VICE PRESIDENT AND ASSISTANT GENERAL COUNSEL, PVH
- **AMY LAMBERTI**, ASSOCIATE GENERAL COUNSEL, THE METROPOLITAN MUSEUM OF ART
- **DEREK MORALES**, BRAND PROTECTION COUNSEL, RALPH LAUREN

MODERATOR:

- **PROFESSOR SUSAN SCAFIDI**, FOUNDER AND DIRECTOR, FASHION LAW INSTITUTE AT FORDHAM

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SPEAKERS' BIOGRAPHIES

PAULA L. BARNES

Senior Counsel, Macy’s

Paula Barnes is Senior Counsel with Macy’s, Inc. and serves as a marketing law and corporate retail law generalist advising her Macy’s, Bloomingdale’s and Bluemercury clients on a variety of retail operational issues. Her practice area at Macy’s, Inc. includes providing advice on advertising, social media and digital marketing, cause marketing, Corporate Social Responsibility issues, regulatory including FTC Endorsement guidelines and brand protection matters, as well as reviewing, drafting and negotiating vendor contracts, Designer collaboration and other licensing/co-branding agreements, sponsorship, data analytics, digital agreements, and talent releases. Ms. Barnes has been active in a number of local and national bar associations and public service and social justice organizations. She is a member of the United Nations Association, New York chapter, formerly served as a Board Member of the Association of Black Women Attorneys and serves as an Adjunct Professor with Fordham University School of Law. She is a member of Corporate Counsel Women of Color and a 2015 Leadership Council on Legal Diversity Fellow. Prior to joining Macy’s and MetLife, Ms. Barnes served as an Assistant District Attorney with the Manhattan District Attorney’s Office under Robert Morgenthau, where she successfully prosecuted numerous general misdemeanor and felony crimes, before being selected to join the Child Abuse Bureau to prosecute felony child abuse crimes and served as a Supervisor for the unit’s Summer Interns.

Ms. Barnes is *cum laude* graduate of the University of Louisville and Howard University School of Law.

Ms. Barnes speaks regularly on legal issues affecting the retail and fashion industries, including presenting on *Best Practices for Conducting Investigations* at the Retail Symposium hosted by the New York State Retail Association and Macy’s (June 2015) and *Working with Talent and Influencers to Promote Your Brand* at the American Conference Institute’s Women Leaders in Advertising and Marketing Law Conference (October 2015), as well as presenting as a Co-Panelist on *Cause Marketing* at the Brand Activation Association/ Association of National Advertisers conference (November 2016).

ANGELA BYUN

Executive Account Director and Asia-Pacific Business Development,
Condé Nast Style Division – VOGUE, GQ, GLAMOUR, W, ALLURE, BRIDES

Angela Byun is the Executive Account Director and Asia-Pacific Business Development, Condé Nast Style Division – VOGUE, GQ, GLAMOUR, W, ALLURE, BRIDES. Previously, Angela was the Head of International Strategy and Development for Golf Digest, responsible for all international revenue streams including print, digital, video, and brand extensions. From 2006-2015, Angela was responsible for 2 corporate groups at Condé Nast -- Business Affairs and International Business Development. She led all negotiations for Condé Nast's new business development deals including: licensing, e-commerce, digital and event partnerships, and joint ventures. Angela also oversaw the international expansion for Women's Wear Daily (WWD) and Style.com.

From 2004-2006, Angela was the licensing attorney at Jones Apparel Group, and prior to that, she was an attorney at Paul Weiss. Under the Clinton administration, Angela was a law clerk in the Chief of Staff's Office at the White House in 1999, as well as intern in 1996. She was worked at the U.K.'s House of Commons in Parliament.

Angela is an Adjunct Professor at Fordham Law School, serves on the Executive Council of Diversity at Condé Nast with Anna Wintour and David Remnick, volunteers and sits on various non-profit boards in NYC/NJ, has frequently guest lectured on intellectual property and media matters at Columbia Law School and Fashion Law Institute at Fordham, and is a CORO Leadership New York Alum – an extensive leadership training program exploring civic leadership, diversity issues, and New York City public policy.

Angela received her J.D. from the University of Wisconsin-Madison Law School, B.A. in Political Science and History from the University of California at Berkeley, and has also studied Politics, Philosophy and Economics (PPE) at Oxford University. Her passion and mission is to support and champion great people, brands, causes and organizations.

CRISTINA DEL VALLE

Senior Associate General Counsel, The Metropolitan Museum of Art

Cristina Del Valle is Senior Associate General Counsel at The Metropolitan Museum of Art. Having joined the Museum in in 1993, she oversees intellectual property matters and covers legal issues involving merchandising, publishing, licensing, digital initiatives, information systems & technology and educational programs.

She is a graduate of Smith College and the University of Pennsylvania Law School. Before joining the Museum she was an associate at Weil Gotshal & Manges in New York.

GRACE FU

Executive Vice President of Human Resources, General Counsel and Secretary,
Barneys New York

Grace Fu is Executive Vice President of Human Resources, General Counsel and Secretary of Barneys New York. She also serves on the Board of Directors of the Barneys New York Foundation. In her capacity as General Counsel, she advises on all legal matters pertaining to the business, including labor and employment, contracts and transactions, litigation, regulatory issues, intellectual property, real estate and philanthropy. As Executive Vice President of Human Resources, she oversees all human resources functions at Barneys, including talent acquisition and recruiting, benefits administration and company-wide training, development and engagement.

Ms. Fu was previously Deputy General Counsel and Chief Compliance Officer at Tiger Management, where she advised on the firm's legal and compliance matters. In connection with her role at Tiger, she also advised the Robertson Foundation and Tiger Foundation. Prior to working at Tiger, Ms. Fu practiced as an attorney in the Mergers & Acquisitions department at Skadden, Arps, Slate, Meagher & Flom in New York City. At Skadden, Ms. Fu was active in the firm's diversity, recruiting and pro bono initiatives.

Ms. Fu is a graduate of Harvard College, Harvard University Graduate School of Arts & Sciences and the University of Virginia School of Law. She is a longstanding volunteer with New York Cares.

ELISHEVA JASIE

SVP Legal – Global Business Services & Licensing, Coty

Elisheva Jasie is a Senior Vice President in the legal department of Coty Inc., a pure play beauty company. Elisheva has been with Coty from 2005 where she has done a "residency" in nearly every practice area – including, licensing, IP, digital, e-commerce, advertising and marketing, compliance and supply chain. She has served as divisional counsel for Coty's fragrance business and also works closely with the M&A and Business Development groups on M&A and other strategic relationships. In her current role, Elisheva focuses on new businesses and leading the build of Coty's first ever out-licensing program. Elisheva takes pride in partnering with her business and marketing counterparts to find creative, out of the box solutions – her favorite pastime is coming up with new product and business names. Prior to her tenure at Coty, Elisheva was in private practice with a focus on IP, licensing, high-tech and venture capital. Elisheva is a member of both the Israeli and New York Bars and most importantly, a mother of four.

JEFFREY HELLMAN

Vice President and Assistant General Counsel, PVH

Jeffrey Hellman is the Vice President and Assistant General Counsel at PVH Corp. PVH Corp. is a global apparel company whose brand portfolio consists of nationally and internationally recognized brand names, including *Calvin Klein*, *Tommy Hilfiger*, *Van Heusen*, *IZOD*, *ARROW*, *Warner's, Olga* and *Speedo*.

He works on mergers and acquisition transactions (including acquisitions of The Warnaco Group, Inc. and Tommy Hilfiger B.V.), joint ventures, financings and securities offerings and handles corporate governance, securities law, creditors' rights and commercial litigation matters.

He also serves as pro bono counsel to the YMA Fashion Scholarship Fund, a non-profit organization that provides scholarships to college students planning to pursue careers in the fashion industry, a member of the Board of Directors of Comprehensive

Development, Inc., a non-profit organization that partners with New York City public high schools to prepare young adults for successful futures, and an adjunct professor at Fordham University Law School.

Mr. Hellman holds a J.D. from the University of Pennsylvania Law School and a B.S. Economics, Finance from the University of Pennsylvania.

AMY LAMBERTI

Associate General Counsel, The Metropolitan Museum of Art

Amy Lamberti joined The Metropolitan Museum of Art in July 2013 and serves as Associate General Counsel. Amy's practice includes assisting with special exhibitions and loans, litigation (other than employment), insurance matters and provenance inquiries.

She is a graduate of Williams College and the Fordham Law School. Before joining the Museum she was an associate at Cahill Gordon in New York for eight years.

DEREK MORALES

Brand Protection Counsel, Ralph Lauren

Derek Morales is brand protection counsel at Ralph Lauren Corporation, where he oversees global anticounterfeiting operations for the company's multiple brands. Prior to joining Ralph Lauren, Derek was intellectual property counsel for Tapestry, Inc. (Coach, Kate Spade, and Stuart Weitzman brands) and spent several years in private practice representing clients within the fashion and other consumer goods industries. Derek also is a proud Fordham Law and Fashion Law Institute alumnus.

PROFESSOR SUSAN SCAFIDI

Founder and Director, Fashion Law Institute at Fordham

Susan Scafidi is the first professor ever to offer a course in Fashion Law, and she is internationally recognized for her leadership in establishing the field. She has testified regarding the proposed extension of legal protection to fashion designs and continues to work actively with members of the U.S. Congress and the fashion industry on this and other issues. Her additional areas of expertise encompass property, intellectual property, cultural property, international law, and legal history.

Professor Scafidi founded and directs the Fashion Law Institute, the world's first center dedicated to the law and business of fashion. A nonprofit organization headquartered at Fordham Law School, the Fashion Law Institute was established with the generous support and advice of the Council of Fashion Designers of America and its president, Diane von Furstenberg. Prior to teaching at Fordham, Professor Scafidi was a tenured member of both the law and history faculties at SMU, and she has taught at a number of other schools, including Yale, Georgetown, and Cardozo. After graduating from Duke University and the Yale Law School, she pursued graduate study in legal history at Berkeley and the University of Chicago and clerked for a distinguished legal historian, Judge Morris S. Arnold of the Eighth Circuit Court of Appeals.

Professor Scafidi is the author of *Who Owns Culture? Appropriation and Authenticity in American Law* (2005), as well as articles in the areas of intellectual property, cultural property, and of course fashion law. She is currently writing a book to be published by Yale University Press. In addition, she has spoken to legal, design, and academic audiences around the globe and has contributed commentary to hundreds of media reports on issues related to law and the fashion industry. Professor Scafidi also created the first website on fashion law, Counterfeit Chic, which was recognized as one of the American Bar Association's top 100 blogs

SELECTED READINGS

SELECTED READINGS

Tariffs and Trade:

Letter from Retailers to U.S. Trade Representative Robert Lighthizer (Sept. 6, 2018).

Privacy and Technology:

California Consumer Privacy Act of 2018 § 1798.120 (West Ann. Cal. Civ. Code § 1798.120).

Complaint, Suzanne Boelter v. Advance Magazine Publishers Inc., d/b/a Condé Nast, No. 1:15-cv-05671-NRB (S.D.N.Y. July 20, 2015).

In re Zappos.com, Inc., 108 F. Supp. 3d 949, 951 (D. Nev. 2015).

Design Inspiration:

Complaint, City Merchandise Inc. v. Balenciaga America, Inc., No. 1:18-cv-06748 (S.D.N.Y. July 26, 2018).

Gillian Naylor, *Signs of the times at Glasgow airport*, DESIGN 48-51 (1966).

Off-White LLC, Trademark Registration No. 5,387,983.

Image Rights and the Public Domain:

Complaint, Xclusive-Lee, Inc. v. Jelena Noura "Gigi" Hadid, No. 1:19-cv-00520 (S.D.N.Y. Jan. 28, 2019).

Open Access at The Met, MET MUSEUM (2017), https://www.metmuseum.org/about-the-met/policies-and-documents/open-access.

Frequently Asked Questions: Image and Data Resources, MET MUSEUM (2018), https://www.metmuseum.org/about-the-met/policies-and-documents/image-resources/frequently-asked-questions.

ASSOCIATION OF ART MUSEUM DIRECTORS, GUIDELINES FOR THE USE OF COPYRIGHTED MATERIALS AND WORKS OF ART BY ART MUSEUMS 3 (2017), https://aamd.org/sites/default/files/document/Guidelines%20for%20the%20Use%20of%20Copyrighted%20Materials.pdf.

Class Action Wage and Hour Lawsuits:

Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval of Class Action Settlement, Payano v. Burberry Limited, 1:15-cv-10178 (S.D.N.Y. July 17, 2017) (Final Order and Judgment filed Nov. 16, 2017).

Order Granting Defendant's Motion for Summary Judgment, Rodriguez v. Nike Retail Services, Inc., 14-cv-01508-BLF (N.D. Cal., Sept. 12, 2017).

September 6, 2018

The Honorable Robert Lighthizer
U.S. Trade Representative
Office of the U.S. Trade Representative
Executive Office of the President
600 17th Street, NW
Washington, DC 20006

Post-Hearing Comments on Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation **(Docket Number: USTR-2018-0026)**

Dear Mr. Ambassador:

We are writing to express our very strong opposition to proposals to impose a 10% to 25% tax on consumer and commercial products, such as textiles and fabrics, clothing, shoes, home goods, headwear, accessories, sporting goods, children's products, furniture, and travel goods from China.

Some of these items were proposed by the Administration in Tranche 3. Others have been proposed to be added to the proposed list for taxation by outside groups.

We support holding our trading partners accountable and using targeted trade remedies against intellectual property theft and other proven trade violations. However, further taxing legitimately traded consumer and commercial products is not the solution. Imposing additional tariffs on U.S. imports of these products from China would disproportionately hurt U.S. consumers, U.S. workers, and U.S. companies. These tariffs are paid by U.S. companies and ultimately U.S. consumers. These tariffs are not paid by Chinese exporters.

We cannot simply shift our supply chains outside of China without massive disruption and cost increases due to materials availability, quality, compliance, and capacity in other countries. Moreover, because China accounts for such a large percentage of imports for consumption or further manufacturing, any additional tariffs would likely translate into added costs and price increases in the United States.

Millions of U.S. jobs in our industry's global value chains – including those in research and design, supply chain, manufacturing, compliance, logistics, and retail – would be put at risk if a new 10% or 25% tax were imposed, due to fewer sales, less investment, and cost increases throughout U.S. supply chains. Such an outcome would undermine strong economic growth at a time when unemployment is falling. It would also surely not be consistent with the Administration's stated Section 301 algorithm for avoiding U.S. economic damage, including harm to U.S. consumers.

At a time when we are working to expand U.S. jobs and provide affordable options for American consumers, new taxes on consumer and commercial products that touch every American are not the answer.

We urge you to ensure that these products are excluded from any final Section 301 product tariff lists.

Thank you for your consideration of our views.

Sincerely,

13 Rattles, Inc.
3.1 Phillip Lim
47 Brand LLC
5 Star Apparel LLC
A.L.C.
AACCK LLC
Abercrombie & Fitch Co.
ABG Accessories, Inc.
Academy Sports + Outdoors
Accessory Innovations
adidas America, Inc.
Aerosoles
AIA / Colorado Advertising Specialties, Inc
Alexander Wang
Alice and Olivia by Stacey Bendet
Allen Edmonds
Allstar Marketing Group, LLC
Alster, Inc.
American Eagle
American Sale
American Textile Company
Ariat International
Ascena Retail Group, Inc.
Ballet Group Inc.
Bashian Bros.
Bates
Bauer Hockey LLC
Beall's, Inc.
Belk, Inc
Big Agnes
Big Lots Stores
Bigston Shoes
Black Diamond Equipment
Black Halo
Boardriders
BOGS
Bokara Rug Company Inc.
Boombah
Bueno of California
Byer California
Caleres
California Luggage
Cap America, Inc.
Capel Incorporated
Carlos by Carlos Santana
Carter's, Inc.
Cascade Maverik Lacrosse LLC
Cat Footwear
Chaco
Clarisse, Inc.
Clarks
Clipper Corporation/Lone Oak Apparel
Cobra PUMA Golf
Collection XIIX, LTD
Columbia Sportswear Company
Concept One Accessories
Converse
Couristan
Crate and Barrel
Crocs
DAI Holding
David's Bridal, Inc.
Dearfoams
Deer Stags Concepts
Delta Enterprise Corp.
Derek Lam International, LLC

Design Go
Diamond Sports
DICK'S Sporting Goods, Inc
Diversitex Inc.
Dolce Vita
Dr. Scholls Shoes
Dream Duffel, LLC
Dreamwear Inc
DSW, Inc.
E. S. Originals Inc.
Easton Diamond Sports LLC
Eddie Bauer LLC
Edison's Harounian Imports
Elan Polo International
Elbeco Incorporated
Elite Apparel Source
Elite Tuxedo
Essex Mfg., Inc.
Famous Footwear
Faviana International, Inc.
Feizy Import & Export Co
FGX International
Fila, Inc.
Florsheim
Flying Circle and Mint
Foot Petals
Frank's Uniforms Inc.
G.A. Gertmenian & Sons
Gap, Inc.
Genesco
Gina Concepts LLC
Gina Group LLC
Girlfriend Gear
GMA Accessories Inc.
Gold Medal International
GoldBug
Golden Touch Holdings, Inc.
Hallmark Cards, Inc.
Hamburger Woolen Company, Inc.
Hammitt Los Angeles
Harley Davidson Footwear
Harry J. Rashti & Co. Inc.
Havertys Furniture Companies, Inc.
Haydaway, LLC
Heritage Travelware
Hobby Lobby Stores, Inc.
Home Expressions
Hontus, Ltd.
Hush Puppies
Hytest
IKEA North America Services, LLC
IMNY by Isaac Mizrahi
Import Packaging
Itasca Footwear
J. Crew Group
J. Renee'
Jaclyn Apparel, LLC
Jaclyn Bonnie International, LLC
Jaipur Living
JCPenney
JGR Copa LLC
Jo-Ann Stores, LLC.
Jockey International, Inc.
Johnston & Murphy
Journeys
Kahn Lucas
Kaleen
Karen Kane Inc.
Karman Inc
Kas Oriental Rugs Inc
Keds
Kingport Trading LLC
Kobi Halperin
Kohl's Department Stores, Inc.
Komar
KÜHL USA
L.C. Industries, Inc. (Lewis N. Clark)
L.L.Bean
La Femme Fashion, Inc.
Leonard Sloan & Assoc., Inc.
Levi Strauss & Co.
LifeGear Design, Inc
Livingston International, Inc.
Loeffler Randall Inc.
LollyZip, LLC
Loloi Rugs
LT Apparel Group
Luenthai USA

Luggage Shop of Lubbock
M. Hidary & Company Inc.
Mac Swed, Inc.
Macy's, Inc.
Mamiye Brothers, Inc.
McCrary International LLC.
Meijer
Merchsource LLC
Merrell
MGF Sourcing
Michael Kors
MinkeeBlue
Minnetonka Moccasin
Mocean Holding Company, LLC
Momeni Inc.
Mon Cheri Bridals
Mondani
Mundi Westport Group
MZ Wallace, Inc
Narciso Rodriguez
Natori Company
NEMO Equipment
New Balance Athletics, Inc.
New Era
New York Accessory Group, Inc
NIKE, Inc.
Nourison Industries
Nu*Crisp Image Apparel
Nunn Bush
Occasion Brands, LLC
Ocean State Jobbers, Inc
Off Broadway Shoe Warehouse
Olympia International, Inc.
One Jeanswear Group Inc.
Outdoor Cap Company, Inc.
Oved Apparel Corp LLC
Oxford Industries, Inc.
P.F. Pettibone & Company
Pacific Sunwear of California, LLC
Park & Sun Sports
Patricia Nash Designs
Payless ShoeSource
PEARL iZUMi
Perry Ellis International
Petco Animal Supplies, Inc.
PetSmart
Precision Custom Coatings
Primaloft
Pukka Inc.
Puma North America
PVH Corp.
R.G. Barry Brands
Rachel Roy
Rack Room Shoes
Randa Accessories
Rawlings Sporting Goods
Rebecca Minkoff LLC.
Renaissance Imports
Renfro Corporation
Restaurant Services, Inc.
Ricardo Beverly Hills
Richardson Sports, Inc.
Riddell Inc.
Rip-It Sports
Rite Choice Uniforms, Inc.
Romag Fasteners Inc.
Rome Fastener Corporation
Ross Stores
rue21
S Thetix Home
SA&E International Bags and Accessories LLC
Safavieh
Salewa North America
SanMar Corporation.
Saucony
Schutt Sports
Schwartz & Benjamin
Scott Adam Designs, Inc.
SG Companies
Shoe Carnival
Simms Fishing Products
Skechers
Snowden Brothers
Spanx, Inc.
Sperry
Sportsman Cap & Bag
Stage Stores, Inc.

STC-QST, LLC
Steve Madden, Ltd.
Storm Products, Inc
Stowe Mercantile
Stride Rite
Strikeforce Bowling LLC
Sttelli, LLC
Südwolle Group
Surya
Swatfame, Inc.
Sweet Little Things
SYNERGIES WORLDWIDE, USA.
Talking Tables Inc
Tapestry
Taylor's Leatherwear, Inc.
The Bottle Crew
The Bradford Group
The Burton Company
The Echo Design Group, Inc.
The Gem Group, Inc.
The Michaels Companies, Inc.
The Savvy Traveler, Inc
The Talbots, Inc.
THEORY, INC
Topline Footwear
Topsville, LLC
Traveler’s Choice
Travel-Light, Inc.
Travelpro Group Holdings
TTI Global Resources
Under Armour
United Legwear & Apparel Co
United Sports Brands
United States Luggage Company, LLC.
US Ring, LLC
USPA Accessories, LLC
Val D’or Apparel, LLC
Velvet Heart Clothing
Vera Bradley Designs, Inc.
VF Corporation
Vibram Corporation
Vivacity Sportswear
Walmart
Weinbrenner Shoe Company
Weyco Group
Williams-Sonoma, Inc.
Wolf Manufacturing
Wolverine Worldwide
Wrapsody Gifts, LLC
Xenith, LLC
XIIX
Zero Halliburton

California Consumer Privacy Act of 2018

Following the implementation of the E.U. General Data Protection Regulation last May, California passed its own version, the California Consumer Privacy Act. As of January 1, 2020, companies around the world will have to comply with additional regulations related to processing of personal data of California residents.

Compliance will include restrictions on data monetization business models, updating company privacy policies, and accommodating consumers' right to access, delete, and move their personal data. As a result, companies will be forced to engage with a further fragmented privacy law landscape.

For consumers, the California law will provide four basic rights in relation to their personal information:

1. the right to know, through a general privacy policy and with more specifics available upon request, what personal information a business has collected about them, where it was sourced from, what it is being used for, whether it is being disclosed or sold, and to whom it is being disclosed or sold;

2. the right to "opt out" of allowing a business to sell their personal information to third parties (or, for consumers who are under 16 years old, the right not to have their personal information sold absent their, or their parent's, opt-in);

3. the right to have a business delete their personal information, with some exceptions; and

4. the right to receive equal service and pricing from a business, even if they exercise their privacy rights under the Act.

The full text of the law follows.

Assembly Bill No. 375

CHAPTER 55

An act to add Title 1.81.5 (commencing with Section 1798.100) to Part 4 of Division 3 of the Civil Code, relating to privacy.

[Approved by Governor June 28, 2018. Filed with Secretary of State June 28, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 375, Chau. Privacy: personal information: businesses.

The California Constitution grants a right of privacy. Existing law provides for the confidentiality of personal information in various contexts and requires a business or person that suffers a breach of security of computerized data that includes personal information, as defined, to disclose that breach, as specified.

This bill would enact the California Consumer Privacy Act of 2018. Beginning January 1, 2020, the bill would grant a consumer a right to request a business to disclose the categories and specific pieces of personal information that it collects about the consumer, the categories of sources from which that information is collected, the business purposes for collecting or selling the information, and the categories of 3rd parties with which the information is shared. The bill would require a business to make disclosures about the information and the purposes for which it is used. The bill would grant a consumer the right to request deletion of personal information and would require the business to delete upon receipt of a verified request, as specified. The bill would grant a consumer a right to request that a business that sells the consumer's personal information, or discloses it for a business purpose, disclose the categories of information that it collects and categories of information and the identity of 3rd parties to which the information was sold or disclosed. The bill would require a business to provide this information in response to a verifiable consumer request. The bill would authorize a consumer to opt out of the sale of personal information by a business and would prohibit the business from discriminating against the consumer for exercising this right, including by charging the consumer who opts out a different price or providing the consumer a different quality of goods or services, except if the difference is reasonably related to value provided by the consumer's data. The bill would authorize businesses to offer financial incentives for collection of personal information. The bill would prohibit a business from selling the personal information of a consumer under 16 years of age, unless affirmatively authorized, as specified, to be referred to as the right to opt in. The bill would prescribe requirements for receiving, processing, and satisfying these requests from consumers. The bill would prescribe various definitions for its purposes and would define “personal information” with reference to a broad list of characteristics and behaviors, personal and commercial, as well as inferences drawn from this information. The bill would prohibit the provisions described above from restricting the ability of the business to comply with federal, state, or local laws, among other things.

The bill would provide for its enforcement by the Attorney General, as specified, and would provide a private right of action in connection with certain unauthorized access and exfiltration, theft, or disclosure of a consumer’s nonencrypted or nonredacted personal information, as defined. The bill would prescribe a method for distribution of proceeds of Attorney General actions. The bill would create the Consumer Privacy Fund in the General Fund with the moneys in the fund, upon appropriation by the Legislature, to be applied to support the purposes of the bill and its enforcement. The bill would provide for the deposit of penalty money into the fund. The bill would require the Attorney General to solicit public participation for the purpose of adopting regulations, as specified. The bill would authorize a business, service provider, or 3rd party to seek the Attorney General’s opinion on how to comply with its provisions. The bill would void a waiver of a consumer’s rights under its provisions. The bill would condition its operation on the withdrawal of a specified initiative from the ballot.

The people of the State of California do enact as follows:

SECTION 1. This measure shall be known and may be cited as “The California Consumer Privacy Act of 2018.”

SEC. 2. The Legislature finds and declares that:

(a) In 1972, California voters amended the California Constitution to include the right of privacy among the “inalienable” rights of all people. The amendment established a legal and enforceable right of privacy for every Californian. Fundamental to this right of privacy is the ability of individuals to control the use, including the sale, of their personal information.

(b) Since California voters approved the right of privacy, the California Legislature has adopted specific mechanisms to safeguard Californians’ privacy, including the Online Privacy Protection Act, the Privacy Rights for California Minors in the Digital World Act, and Shine the Light, a California law intended to give Californians the ‘who, what, where, and when’ of how businesses handle consumers’ personal information.

(c) At the same time, California is one of the world’s leaders in the development of new technologies and related industries. Yet the proliferation of personal information has limited Californians’ ability to properly protect and safeguard their privacy. It is almost impossible to apply for a job, raise a child, drive a car, or make an appointment without sharing personal information.

(d) As the role of technology and data in the every daily lives of consumers increases, there is an increase in the amount of personal information shared by consumers with businesses. California law has not kept pace with these developments and the personal privacy implications surrounding the collection, use, and protection of personal information.

(e) Many businesses collect personal information from California consumers. They may know where a consumer lives and how many children a consumer has, how fast a consumer drives, a consumer's personality, sleep habits, biometric and health information, financial information, precise geolocation information, and social networks, to name a few categories.

(f) The unauthorized disclosure of personal information and the loss of privacy can have devastating effects for individuals, ranging from financial fraud, identity theft, and unnecessary costs to personal time and finances, to destruction of property, harassment, reputational damage, emotional stress, and even potential physical harm.

(g) In March 2018, it came to light that tens of millions of people had their personal data misused by a data mining firm called Cambridge Analytica. A series of congressional hearings highlighted that our personal information may be vulnerable to misuse when shared on the Internet. As a result, our desire for privacy controls and transparency in data practices is heightened.

(h) People desire privacy and more control over their information. California consumers should be able to exercise control over their personal information, and they want to be certain that there are safeguards against misuse of their personal information. It is possible for businesses both to respect consumers' privacy and provide a high level transparency to their business practices.

(i) Therefore, it is the intent of the Legislature to further Californians' right to privacy by giving consumers an effective way to control their personal information, by ensuring the following rights:

(1) The right of Californians to know what personal information is being collected about them.

(2) The right of Californians to know whether their personal information is sold or disclosed and to whom.

(3) The right of Californians to say no to the sale of personal information.

(4) The right of Californians to access their personal information.

(5) The right of Californians to equal service and price, even if they exercise their privacy rights.

SEC. 3. Title 1.81.5 (commencing with Section 1798.100) is added to Part 4 of Division 3 of the Civil Code, to read:

TITLE 1.81.5. CALIFORNIA CONSUMER PRIVACY ACT OF 2018

1798.100. (a) A consumer shall have the right to request that a business that collects a consumer's personal information disclose to that consumer the categories and specific pieces of personal information the business has collected.

(b) A business that collects a consumer's personal information shall, at or before the point of collection, inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used. A business shall not collect additional categories of personal information or use personal information collected for additional purposes without providing the consumer with notice consistent with this section.

(c) A business shall provide the information specified in subdivision (a) to a consumer only upon receipt of a verifiable consumer request.

(d) A business that receives a verifiable consumer request from a consumer to access personal information shall promptly take steps to disclose and deliver, free of charge to the consumer, the personal information required by this section. The information may be delivered by mail or electronically, and if provided electronically, the information shall be in a portable and, to the extent technically feasible, in a readily useable format that allows the consumer to transmit this information to another entity without hindrance. A business may provide personal information to a consumer at any time, but shall not be required to provide personal information to a consumer more than twice in a 12-month period.

(e) This section shall not require a business to retain any personal information collected for a single, one-time transaction, if such information is not sold or retained by the business or to reidentify or otherwise link information that is not maintained in a manner that would be considered personal information.

(1) Retain any personal information collected for a single, one-time transaction, if the information is not sold or retained by the business.

(2) Reidentify or otherwise link any data that, in the ordinary course of business, is not maintained in a manner that would be considered personal information.

1798.105. (a) A consumer shall have the right to request that a business delete any personal information about the consumer which the business has collected from the consumer.

(b) A business that collects personal information about consumers shall disclose, pursuant to subparagraph (A) of paragraph (5) of subdivision (a) of Section 1798.130, the consumer's rights to request the deletion of the consumer's personal information.

(c) A business that receives a verifiable request from a consumer to delete the consumer's personal information pursuant to subdivision (a) of this section shall delete the consumer's personal information from its records and direct any service providers to delete the consumer's personal information from their records.

(d) A business or a service provider shall not be required to comply with a consumer's request to delete the consumer's personal information if it is necessary for the business or service provider to maintain the consumer's personal information in order to:

(1) Complete the transaction for which the personal information was collected, provide a good or service requested by the consumer, or reasonably anticipated within the context of a business's ongoing business relationship with the consumer, or otherwise perform a contract between the business and the consumer.

(2) Detect security incidents, protect against malicious, deceptive, fraudulent, or illegal activity; or prosecute those responsible for that activity.

(3) Debug to identify and repair errors that impair existing intended functionality.

(4) Exercise free speech, ensure the right of another consumer to exercise his or her right of free speech, or exercise another right provided for by law.

(5) Comply with the California Electronic Communications Privacy Act pursuant to Chapter 3.6 (commencing with Section 1546) of Title 12 of Part 2 of the Penal Code.

(6) Engage in public or peer-reviewed scientific, historical, or statistical research in the public interest that adheres to all other applicable ethics and privacy laws, when the businesses' deletion of the information is likely to render impossible or seriously impair the achievement of such research, if the consumer has provided informed consent.

(7) To enable solely internal uses that are reasonably aligned with the expectations of the consumer based on the consumer's relationship with the business.

(8) Comply with a legal obligation.

(9) Otherwise use the consumer's personal information, internally, in a lawful manner that is compatible with the context in which the consumer provided the information.

1798.110. (a) A consumer shall have the right to request that a business that collects personal information about the consumer disclose to the consumer the following:

(1) The categories of personal information it has collected about that consumer.

(2) The categories of sources from which the personal information is collected.

(3) The business or commercial purpose for collecting or selling personal information.

(4) The categories of third parties with whom the business shares personal information.

(5) The specific pieces of personal information it has collected about that consumer.

(b) A business that collects personal information about a consumer shall disclose to the consumer, pursuant to paragraph (3) of subdivision (a) of Section 1798.130, the information specified in subdivision (a) upon receipt of a verifiable request from the consumer.

(c) A business that collects personal information about consumers shall disclose, pursuant to subparagraph (B) of paragraph (5) of subdivision (a) of Section 1798.130:

(1) The categories of personal information it has collected about that consumer.

(2) The categories of sources from which the personal information is collected.

(3) The business or commercial purpose for collecting or selling personal information.

(4) The categories of third parties with whom the business shares personal information.

(5) The specific pieces of personal information the business has collected about that consumer.

(d) This section does not require a business to do the following:

(1) Retain any personal information about a consumer collected for a single one-time transaction if, in the ordinary course of business, that information about the consumer is not retained.

(2) Reidentify or otherwise link any data that, in the ordinary course of business, is not maintained in a manner that would be considered personal information.

1798.115. (a) A consumer shall have the right to request that a business that sells the consumer's personal information, or that discloses it for a business purpose, disclose to that consumer:

(1) The categories of personal information that the business collected about the consumer.

(2) The categories of personal information that the business sold about the consumer and the categories of third parties to whom the personal information was sold, by category or categories of personal information for each third party to whom the personal information was sold.

(3) The categories of personal information that the business disclosed about the consumer for a business purpose.

(b) A business that sells personal information about a consumer, or that discloses a consumer's personal information for a business purpose, shall disclose, pursuant to paragraph (4) of subdivision (a) of Section 1798.130, the information specified in subdivision (a) to the consumer upon receipt of a verifiable request from the consumer.

(c) A business that sells consumers' personal information, or that discloses consumers' personal information for a business purpose, shall disclose, pursuant to subparagraph (C) of paragraph (5) of subdivision (a) of Section 1798.130:

(1) The category or categories of consumers' personal information it has sold, or if the business has not sold consumers' personal information, it shall disclose that fact.

(2) The category or categories of consumers' personal information it has disclosed for a business purpose, or if the business has not disclosed the consumers' personal information for a business purpose, it shall disclose that fact.

(d) A third party shall not sell personal information about a consumer that has been sold to the third party by a business unless the consumer has received explicit notice and is provided an opportunity to exercise the right to opt out pursuant to 1798.120.

1798.120. (a) A consumer shall have the right, at any time, to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. This right may be referred to as the right to opt out.

(b) A business that sells consumers' personal information to third parties shall provide notice to consumers, pursuant to subdivision (a) of Section 1798.135, that this information may be sold and that consumers have the right to opt out of the sale of their personal information.

(c) A business that has received direction from a consumer not to sell the consumer's personal information or, in the case of a minor consumer's personal information has not received consent to sell the minor consumer's personal information shall be prohibited, pursuant to paragraph (4) of subdivision (a) of Section 1798.135, from selling the consumer's personal information after its receipt of the consumer's direction, unless the consumer subsequently provides express authorization for the sale of the consumer's personal information.

(d) Notwithstanding subdivision (a), a business shall not sell the personal information of consumers if the business has actual knowledge that the consumer is less than 16 years of age, unless the consumer, in the case of consumers between 13 and 16 years of age, or the consumer's parent or guardian, in the case of consumers who are less than 13 years of age, has affirmatively authorized the sale of the consumer's personal information. A business that willfully disregards the consumer's age shall be deemed to have had actual knowledge of the consumer's age. This right may be referred to as the "right to opt in."

1798.125. (a) (1) A business shall not discriminate against a consumer because the consumer exercised any of the consumer's rights under this title, including, but not limited to, by:

(A) Denying goods or services to the consumer.

(B) Charging different prices or rates for goods or services, including through the use of discounts or other benefits or imposing penalties.

(C) Providing a different level or quality of goods or services to the consumer, if the consumer exercises the consumer's rights under this title.

(D) Suggesting that the consumer will receive a different price or rate for goods or services or a different level or quality of goods or services.

(2) Nothing in this subdivision prohibits a business from charging a consumer a different price or rate, or from providing a different level or quality of goods or services to the consumer, if that difference is reasonably related to the value provided to the consumer by the consumer's data.

(b) (1) A business may offer financial incentives, including payments to consumers as compensation, for the collection of personal information, the sale of personal information, or the deletion of personal information. A business may also offer a different price, rate, level, or quality of goods or services to the consumer if that price or difference is directly related to the value provided to the consumer by the consumer's data.

(2) A business that offers any financial incentives pursuant to subdivision (a), shall notify consumers of the financial incentives pursuant to Section 1798.135.

(3) A business may enter a consumer into a financial incentive program only if the consumer gives the business prior opt-in consent pursuant to Section 1798.135 which clearly describes the material terms of the financial incentive program, and which may be revoked by the consumer at any time.

(4) A business shall not use financial incentive practices that are unjust, unreasonable, coercive, or usurious in nature.

1798.130. (a) In order to comply with Sections 1798.100, 1798.105, 1798.110, 1798.115, and 1798.125, in a form that is reasonably accessible to consumers, a business shall:

(1) Make available to consumers two or more designated methods for submitting requests for information required to be disclosed pursuant to Sections 1798.110 and 1798.115, including, at a minimum, a toll-free telephone number, and if the business maintains an Internet Web site, a Web site address.

(2) Disclose and deliver the required information to a consumer free of charge within 45 days of receiving a verifiable request from the consumer. The business shall promptly take steps to determine whether the request is a verifiable request, but this shall not extend the business's duty to disclose and deliver the information within 45 days of receipt of the consumer's request. The time period to provide the required information may be extended once by an additional 45 days when reasonably necessary, provided the consumer is provided notice of the extension within the first 45-day period. The disclosure shall cover the 12-month period preceding the business's receipt of the verifiable request and shall be made in writing and delivered through the consumer's account with the business, if the consumer maintains an account with the business, or by mail or electronically at the consumer's option if the consumer does not maintain an account with the business, in a readily useable format that allows the consumer to transmit this information from one entity to another entity without hindrance. The business shall not require the consumer to create an account with the business in order to make a verifiable request.

(3) For purposes of subdivision (b) of Section 1798.110:

(A) To identify the consumer, associate the information provided by the consumer in the verifiable request to any personal information previously collected by the business about the consumer.

(B) Identify by category or categories the personal information collected about the consumer in the preceding 12 months by reference to the enumerated category or categories in subdivision (c) that most closely describes the personal information collected.

(4) For purposes of subdivision (b) of Section 1798.115:

(A) Identify the consumer and associate the information provided by the consumer in the verifiable request to any personal information previously collected by the business about the consumer.

(B) Identify by category or categories the personal information of the consumer that the business sold in the preceding 12 months by reference to the enumerated category in subdivision (c) that most closely describes the personal information, and provide the categories of third parties to whom the consumer's personal information was sold in the preceding 12 months by reference to the enumerated category or categories in subdivision (c) that most closely describes the personal information sold. The business shall disclose the information in a list that is separate from a list generated for the purposes of subparagraph (C).

(C) Identify by category or categories the personal information of the consumer that the business disclosed for a business purpose in the preceding 12 months by reference to the enumerated category or categories in subdivision (c) that most closely describes the personal information, and provide the categories of third parties to whom the consumer's personal information was disclosed for a business purpose in the preceding 12 months by reference to the enumerated category or categories in subdivision (c) that most closely describes the personal information disclosed. The business shall disclose the information in a list that is separate from a list generated for the purposes of subparagraph (B).

(5) Disclose the following information in its online privacy policy or policies if the business has an online privacy policy or policies and in any California-specific description of consumers' privacy rights, or if the business does not maintain those policies, on its Internet Web site, and update that information at least once every 12 months:

(A) A description of a consumer's rights pursuant to Sections 1798.110, 1798.115, and 1798.125 and one or more designated methods for submitting requests.

(B) For purposes of subdivision (c) of Section 1798.110, a list of the categories of personal information it has collected about consumers in the preceding 12 months by reference to the enumerated category or categories in subdivision (c) that most closely describe the personal information collected.

(C) For purposes of paragraphs (1) and (2) of subdivision (c) of Section 1798.115, two separate lists:

(i) A list of the categories of personal information it has sold about consumers in the preceding 12 months by reference to the enumerated category or categories in subdivision (c) that most closely describe the personal information sold, or if the business has not sold consumers' personal information in the preceding 12 months, the business shall disclose that fact.

(ii) A list of the categories of personal information it has disclosed about consumers for a business purpose in the preceding 12 months by reference to the enumerated category in subdivision (c) that most closely describe the personal information disclosed, or if the business has not disclosed consumers' personal information for a business purpose in the preceding 12 months, the business shall disclose that fact.

(6) Ensure that all individuals responsible for handling consumer inquiries about the business's privacy practices or the business's compliance with

this title are informed of all requirements in Sections 1798.110, 1798.115, 1798.125, and this section, and how to direct consumers to exercise their rights under those sections.

(7) Use any personal information collected from the consumer in connection with the business's verification of the consumer's request solely for the purposes of verification.

(b) A business is not obligated to provide the information required by Sections 1798.110 and 1798.115 to the same consumer more than twice in a 12-month period.

(c) The categories of personal information required to be disclosed pursuant to Sections 1798.110 and 1798.115 shall follow the definition of personal information in Section 1798.140.

1798.135. (a) A business that is required to comply with Section 1798.120 shall, in a form that is reasonably accessible to consumers:

(1) Provide a clear and conspicuous link on the business' Internet homepage, titled "Do Not Sell My Personal Information," to an Internet Web page that enables a consumer, or a person authorized by the consumer, to opt out of the sale of the consumer's personal information. A business shall not require a consumer to create an account in order to direct the business not to sell the consumer's personal information.

(2) Include a description of a consumer's rights pursuant to Section 1798.120, along with a separate link to the "Do Not Sell My Personal Information" Internet Web page in:

(A) Its online privacy policy or policies if the business has an online privacy policy or policies.

(B) Any California-specific description of consumers' privacy rights.

(3) Ensure that all individuals responsible for handling consumer inquiries about the business's privacy practices or the business's compliance with this title are informed of all requirements in Section 1798.120 and this section and how to direct consumers to exercise their rights under those sections.

(4) For consumers who exercise their right to opt out of the sale of their personal information, refrain from selling personal information collected by the business about the consumer.

(5) For a consumer who has opted out of the sale of the consumer's personal information, respect the consumer's decision to opt out for at least 12 months before requesting that the consumer authorize the sale of the consumer's personal information.

(6) Use any personal information collected from the consumer in connection with the submission of the consumer's opt-out request solely for the purposes of complying with the opt-out request.

(b) Nothing in this title shall be construed to require a business to comply with the title by including the required links and text on the homepage that the business makes available to the public generally, if the business maintains a separate and additional homepage that is dedicated to California consumers and that includes the required links and text, and the business takes reasonable steps to ensure that California consumers are directed to the homepage for California consumers and not the homepage made available to the public generally.

(c) A consumer may authorize another person solely to opt out of the sale of the consumer's personal information on the consumer's behalf, and a business shall comply with an opt out request received from a person authorized by the consumer to act on the consumer's behalf, pursuant to regulations adopted by the Attorney General.

1798.140. For purposes of this title:

(a) "Aggregate consumer information" means information that relates to a group or category of consumers, from which individual consumer identities have been removed, that is not linked or reasonably linkable to any consumer or household, including via a device. "Aggregate consumer information" does not mean one or more individual consumer records that have been deidentified.

(b) "Biometric information" means an individual's physiological, biological or behavioral characteristics, including an individual's deoxyribonucleic acid (DNA), that can be used, singly or in combination with each other or with other identifying data, to establish individual identity. Biometric information includes, but is not limited to, imagery of the iris, retina, fingerprint, face, hand, palm, vein patterns, and voice recordings, from which an identifier template, such as a faceprint, a minutiae template, or a voiceprint, can be extracted, and keystroke patterns or rhythms, gait patterns or rhythms, and sleep, health, or exercise data that contain identifying information.

(c) "Business" means:

(1) A sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that collects consumers' personal information, or on the behalf of which such information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers' personal information, that does business in the State of California, and that satisfies one or more of the following thresholds:

(A) Has annual gross revenues in excess of twenty-five million dollars ($25,000,000), as adjusted pursuant to paragraph (5) of subdivision (a) of Section 1798.185.

(B) Alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices.

(C) Derives 50 percent or more of its annual revenues from selling consumers' personal information.

(2) Any entity that controls or is controlled by a business, as defined in paragraph (1), and that shares common branding with the business. "Control" or "controlled" means ownership of, or the power to vote, more than 50 percent of the outstanding shares of any class of voting security of a business; control in any manner over the election of a majority of the directors, or of

individuals exercising similar functions; or the power to exercise a controlling influence over the management of a company. "Common branding" means a shared name, servicemark, or trademark.

(d) "Business purpose" means the use of personal information for the business' or a service provider's operational purposes, or other notified purposes, provided that the use of personal information shall be reasonably necessary and proportionate to achieve the operational purpose for which the personal information was collected or processed or for another operational purpose that is compatible with the context in which the personal information was collected. Business purposes are:

(1) Auditing related to a current interaction with the consumer and concurrent transactions, including, but not limited to, counting ad impressions to unique visitors, verifying positioning and quality of ad impressions, and auditing compliance with this specification and other standards.

(2) Detecting security incidents, protecting against malicious, deceptive, fraudulent, or illegal activity, and prosecuting those responsible for that activity.

(3) Debugging to identify and repair errors that impair existing intended functionality.

(4) Short-term, transient use, provided the personal information that is not disclosed to another third party and is not used to build a profile about a consumer or otherwise alter an individual consumer's experience outside the current interaction, including, but not limited to, the contextual customization of ads shown as part of the same interaction.

(5) Performing services on behalf of the business or service provider, including maintaining or servicing accounts, providing customer service, processing or fulfilling orders and transactions, verifying customer information, processing payments, providing financing, providing advertising or marketing services, providing analytic services, or providing similar services on behalf of the business or service provider.

(6) Undertaking internal research for technological development and demonstration.

(7) Undertaking activities to verify or maintain the quality or safety of a service or device that is owned, manufactured, manufactured for, or controlled by the business, and to improve, upgrade, or enhance the service or device that is owned, manufactured, manufactured for, or controlled by the business.

(e) "Collects," "collected," or "collection" means buying, renting, gathering, obtaining, receiving, or accessing any personal information pertaining to a consumer by any means. This includes receiving information from the consumer, either actively or passively, or by observing the consumer's behavior.

(f) "Commercial purposes" means to advance a person's commercial or economic interests, such as by inducing another person to buy, rent, lease, join, subscribe to, provide, or exchange products, goods, property, information, or services, or enabling or effecting, directly or indirectly, a commercial transaction. “Commercial purposes” do not include for the purpose of engaging in speech that state or federal courts have recognized as noncommercial speech, including political speech and journalism.

(g) “Consumer” means a natural person who is a California resident, as defined in Section 17014 of Title 18 of the California Code of Regulations, as that section read on September 1, 2017, however identified, including by any unique identifier.

(h) “Deidentified” means information that cannot reasonably identify, relate to, describe, be capable of being associated with, or be linked, directly or indirectly, to a particular consumer, provided that a business that uses deidentified information:

(1) Has implemented technical safeguards that prohibit reidentification of the consumer to whom the information may pertain.

(2) Has implemented business processes that specifically prohibit reidentification of the information.

(3) Has implemented business processes to prevent inadvertent release of deidentified information.

(4) Makes no attempt to reidentify the information.

(i) “Designated methods for submitting requests” means a mailing address, email address, Internet Web page, Internet Web portal, toll-free telephone number, or other applicable contact information, whereby consumers may submit a request or direction under this title, and any new, consumer-friendly means of contacting a business, as approved by the Attorney General pursuant to Section 1798.185.

(j) “Device” means any physical object that is capable of connecting to the Internet, directly or indirectly, or to another device.

(k) “Health insurance information” means a consumer’s insurance policy number or subscriber identification number, any unique identifier used by a health insurer to identify the consumer, or any information in the consumer’s application and claims history, including any appeals records, if the information is linked or reasonably linkable to a consumer or household, including via a device, by a business or service provider.

(*l*) “Homepage” means the introductory page of an Internet Web site and any Internet Web page where personal information is collected. In the case of an online service, such as a mobile application, homepage means the application’s platform page or download page, a link within the application, such as from the application configuration, “About,” “Information,” or settings page, and any other location that allows consumers to review the notice required by subdivision (a) of Section 1798.145, including, but not limited to, before downloading the application.

(m) “Infer” or “inference” means the derivation of information, data, assumptions, or conclusions from facts, evidence, or another source of information or data.

(n) “Person” means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert.

(o) (1) "Personal information" means information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. Personal information includes, but is not limited to, the following:

(A) Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier Internet Protocol address, email address, account name, social security number, driver's license number, passport number, or other similar identifiers.

(B) Any categories of personal information described in subdivision (e) of Section 1798.80.

(C) Characteristics of protected classifications under California or federal law.

(D) Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.

(E) Biometric information.

(F) Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer's interaction with an Internet Web site, application, or advertisement.

(G) Geolocation data.

(H) Audio, electronic, visual, thermal, olfactory, or similar information.

(I) Professional or employment-related information.

(J) Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act (20 U.S.C. section 1232g, 34 C.F.R. Part 99).

(K) Inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.

(2) "Personal information" does not include publicly available information. For these purposes, "publicly available" means information that is lawfully made available from federal, state, or local government records, if any conditions associated with such information. "Publicly available" does not mean biometric information collected by a business about a consumer without the consumer's knowledge. Information is not "publicly available" if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained. "Publicly available" does not include consumer information that is deidentified or aggregate consumer information.

(p) "Probabilistic identifier" means the identification of a consumer or a device to a degree of certainty of more probable than not based on any categories of personal information included in, or similar to, the categories enumerated in the definition of personal information.

(q) “Processing” means any operation or set of operations that are performed on personal data or on sets of personal data, whether or not by automated means.

(r) “Pseudonymize” or “Pseudonymization” means the processing of personal information in a manner that renders the personal information no longer attributable to a specific consumer without the use of additional information, provided that the additional information is kept separately and is subject to technical and organizational measures to ensure that the personal information is not attributed to an identified or identifiable consumer.

(s) “Research” means scientific, systematic study and observation, including basic research or applied research that is in the public interest and that adheres to all other applicable ethics and privacy laws or studies conducted in the public interest in the area of public health. Research with personal information that may have been collected from a consumer in the course of the consumer’s interactions with a business’ service or device for other purposes shall be:

(1) Compatible with the business purpose for which the personal information was collected.

(2) Subsequently pseudonymized and deidentified, or deidentified and in the aggregate, such that the information cannot reasonably identify, relate to, describe, be capable of being associated with, or be linked, directly or indirectly, to a particular consumer.

(3) Made subject to technical safeguards that prohibit reidentification of the consumer to whom the information may pertain.

(4) Subject to business processes that specifically prohibit reidentification of the information.

(5) Made subject to business processes to prevent inadvertent release of deidentified information.

(6) Protected from any reidentification attempts.

(7) Used solely for research purposes that are compatible with the context in which the personal information was collected.

(8) Not be used for any commercial purpose.

(9) Subjected by the business conducting the research to additional security controls limit access to the research data to only those individuals in a business as are necessary to carry out the research purpose.

(t) (1) “Sell,” “selling,” “sale,” or “sold,” means selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer’s personal information by the business to another business or a third party for monetary or other valuable consideration.

(2) For purposes of this title, a business does not sell personal information when:

(A) A consumer uses or directs the business to intentionally disclose personal information or uses the business to intentionally interact with a third party, provided the third party does not also sell the personal information, unless that disclosure would be consistent with the provisions of this title. An intentional interaction occurs when the consumer intends to interact with the third party, via one or more deliberate interactions. Hovering over, muting, pausing, or closing a given piece of content does not constitute a consumer's intent to interact with a third party.

(B) The business uses or shares an identifier for a consumer who has opted out of the sale of the consumer's personal information for the purposes of alerting third parties that the consumer has opted out of the sale of the consumer's personal information.

(C) The business uses or shares with a service provider personal information of a consumer that is necessary to perform a business purposes if both of the following conditions are met: services that the service provider performs on the business' behalf, provided that the service provider also does not sell the personal information.

(i) The business has provided notice that information being used or shared in its terms and conditions consistent with Section 1798.135.

(ii) The service provider does not further collect, sell, or use the personal information of the consumer except as necessary to perform the business purpose.

(D) The business transfers to a third party the personal information of a consumer as an asset that is part of a merger, acquisition, bankruptcy, or other transaction in which the third party assumes control of all or part of the business provided that information is used or shared consistently with Sections 1798.110 and 1798.115. If a third party materially alters how it uses or shares the personal information of a consumer in a manner that is materially inconsistent with the promises made at the time of collection, it shall provide prior notice of the new or changed practice to the consumer. The notice shall be sufficiently prominent and robust to ensure that existing consumers can easily exercise their choices consistently with Section 1798.120. This subparagraph does not authorize a business to make material, retroactive privacy policy changes or make other changes in their privacy policy in a manner that would violate the Unfair and Deceptive Practices Act (Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code).

(u) "Service" or "services" means work, labor, and services, including services furnished in connection with the sale or repair of goods.

(v) "Service provider" means a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that processes information on behalf of a business and to which the business discloses a consumer's personal information for a business purpose pursuant to a written contract, provided that the contract prohibits the entity receiving the information from retaining, using, or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business, or as otherwise permitted by this title, including retaining, using, or disclosing the personal information for a commercial purpose other than providing the services specified in the contract with the business.

(w) "Third party" means a person who is not any of the following:

(1) The business that collects personal information from consumers under this title.

(2) A person to whom the business discloses a consumer's personal information for a business purpose pursuant to a written contract, provided that the contract:

(A) Prohibits the person receiving the personal information from:

(i) Selling the personal information.

(ii) Retaining, using, or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract, including retaining, using, or disclosing the personal information for a commercial purpose other than providing the services specified in the contract.

(iii) Retaining, using, or disclosing the information outside of the direct business relationship between the person and the business.

(B) Includes a certification made by the person receiving the personal information that the person understands the restrictions in subparagraph (A) and will comply with them.

A person covered by paragraph (2) that violates any of the restrictions set forth in this title shall be liable for the violations. A business that discloses personal information to a person covered by paragraph (2) in compliance with paragraph (2) shall not be liable under this title if the person receiving the personal information uses it in violation of the restrictions set forth in this title, provided that, at the time of disclosing the personal information, the business does not have actual knowledge, or reason to believe, that the person intends to commit such a violation.

(x) "Unique identifier" or "Unique personal identifier" means a persistent identifier that can be used to recognize a consumer, a family, or a device that is linked to a consumer or family, over time and across different services, including, but not limited to, a device identifier; an Internet Protocol address; cookies, beacons, pixel tags, mobile ad identifiers, or similar technology; customer number, unique pseudonym, or user alias; telephone numbers, or other forms of persistent or probabilistic identifiers that can be used to identify a particular consumer or device. For purposes of this subdivision, "family" means a custodial parent or guardian and any minor children over which the parent or guardian has custody.

(y) "Verifiable consumer request" means a request that is made by a consumer, by a consumer on behalf of the consumer's minor child, or by a natural person or a person registered with the Secretary of State, authorized by the consumer to act on the consumer's behalf, and that the business can reasonably verify, pursuant to regulations adopted by the Attorney General pursuant to paragraph (7) of subdivision (a) of Section 1798.185 to be the consumer about whom the business has collected personal information. A business is not obligated to provide information to the consumer pursuant to Sections 1798.110 and 1798.115 if the business cannot verify, pursuant this subdivision and regulations adopted by the Attorney General pursuant to paragraph (7) of subdivision (a) of Section 1798.185, that the consumer making the request is the consumer about whom the business has collected information or is a person authorized by the consumer to act on such consumer's behalf.

1798.145. (a) The obligations imposed on businesses by this title shall not restrict a business's ability to:

(1) Comply with federal, state, or local laws.

(2) Comply with a civil, criminal, or regulatory inquiry, investigation, subpoena, or summons by federal, state, or local authorities.

(3) Cooperate with law enforcement agencies concerning conduct or activity that the business, service provider, or third party reasonably and in good faith believes may violate federal, state, or local law.

(4) Exercise or defend legal claims.

(5) Collect, use, retain, sell, or disclose consumer information that is deidentified or in the aggregate consumer information.

(6) Collect or sell a consumer's personal information if every aspect of that commercial conduct takes place wholly outside of California. For purposes of this title, commercial conduct takes place wholly outside of California if the business collected that information while the consumer was outside of California, no part of the sale of the consumer's personal information occurred in California, and no personal information collected while the consumer was in California is sold. This paragraph shall not permit a business from storing, including on a device, personal information about a consumer when the consumer is in California and then collecting that personal information when the consumer and stored personal information is outside of California.

(b) The obligations imposed on businesses by Sections 1798.110 to 1798.135, inclusive, shall not apply where compliance by the business with the title would violate an evidentiary privilege under California law and shall not prevent a business from providing the personal information of a consumer to a person covered by an evidentiary privilege under California law as part of a privileged communication.

(c) This act shall not apply to protected or health information that is collected by a covered entity governed by the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56 of Division 1)) or governed by the privacy, security, and breach notification rules issued by the federal Department of Health and Human Services, Parts 160 and 164 of Title 45 of the Code of Federal Regulations, established pursuant to the Health Insurance Portability and Availability Act of 1996. For purposes of this subdivision, the definition of "medical information" in Section 56.05 shall apply and the definitions of "protected health information" and "covered entity" from the federal privacy rule shall apply.

(d) This title shall not apply to the sale of personal information to or from a consumer reporting agency if that information is to be reported in, or used to generate, a consumer report as defined by subdivision (d) of Section 1681a of Title 15 of the United States Code, and use of that information is limited by the federal Fair Credit Reporting Act (15 U.S.C. Sec. 1681 et seq.).

(e) This title shall not apply to personal information collected, processed, sold, or disclosed pursuant to the federal Gramm-Leach-Bliley Act (Public Law 106-102), and implementing regulations, if it is in conflict with that law.

(f) This title shall not apply to personal information collected, processed, sold, or disclosed pursuant to the Driver's Privacy Protection Act of 1994 (18 U.S.C. Sec. 2721 et seq.), if it is in conflict with that act.

(g) Notwithstanding a business' obligations to respond to and honor consumer rights requests pursuant to this title:

(1) A time period for a business to respond to any verified consumer request may be extended by up to 90 additional days where necessary, taking into account the complexity and number of the requests. The business shall inform the consumer of any such extension within 45 days of receipt of the request, together with the reasons for the delay.

(2) If the business does not take action on the request of the consumer, the business shall inform the consumer, without delay and at the latest within the time period permitted of response by this section, of the reasons for not taking action and any rights the consumer may have to appeal the decision to the business.

(3) If requests from a consumer are manifestly unfounded or excessive, in particular because of their repetitive character, a business may either charge a reasonable fee, taking into account the administrative costs of providing the information or communication or taking the action requested, or refuse to act on the request and notify the consumer of the reason for refusing the request. The business shall bear the burden of demonstrating that any verified consumer request is manifestly unfounded or excessive.

(h) A business that discloses personal information to a service provider shall not be liable under this title if the service provider receiving the personal information uses it in violation of the restrictions set forth in the title, provided that, at the time of disclosing the personal information, the business does not have actual knowledge, or reason to believe, that the service provider intends to commit such a violation. A service provider shall likewise not be liable under this title for the obligations of a business for which it provides services as set forth in this title.

(i) This title shall not be construed to require a business to reidentify or otherwise link information that is not maintained in a manner that would be considered personal information.

(j) The rights afforded to consumers and the obligations imposed on the business in this title shall not adversely affect the rights and freedoms of other consumers.

1798.150. (a) (1) Any consumer whose nonencrypted or nonredacted personal information, as defined in subparagraph (A) of paragraph (1) of subdivision (d) of Section 1798.81.5, is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information may institute a civil action for any of the following:

(A) To recover damages in an amount not less than one hundred dollars ($100) and not greater than seven hundred and fifty ($750) per consumer per incident or actual damages, whichever is greater.

(B) Injunctive or declaratory relief.

(C) Any other relief the court deems proper.

(2) In assessing the amount of statutory damages, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(b) Actions pursuant to this section may be brought by a consumer if all of the following requirements are met:

(1) Prior to initiating any action against a business for statutory damages on an individual or class-wide basis, a consumer shall provide a business 30 days' written notice identifying the specific provisions of this title the consumer alleges have been or are being violated. In the event a cure is possible, if within the 30 days the business actually cures the noticed violation and provides the consumer an express written statement that the violations have been cured and that no further violations shall occur, no action for individual statutory damages or class-wide statutory damages may be initiated against the business. No notice shall be required prior to an individual consumer initiating an action solely for actual pecuniary damages suffered as a result of the alleged violations of this title. If a business continues to violate this title in breach of the express written statement provided to the consumer under this section, the consumer may initiate an action against the business to enforce the written statement and may pursue statutory damages for each breach of the express written statement, as well as any other violation of the title that postdates the written statement.

(2) A consumer bringing an action as defined in paragraph (1) of subdivision (c) shall notify the Attorney General within 30 days that the action has been filed.

(3) The Attorney General, upon receiving such notice shall, within 30 days, do one of the following:

(A) Notify the consumer bringing the action of the Attorney General's intent to prosecute an action against the violation. If the Attorney General does not prosecute within six months, the consumer may proceed with the action.

(B) Refrain from acting within the 30 days, allowing the consumer bringing the action to proceed.

(C) Notify the consumer bringing the action that the consumer shall not proceed with the action.

(c) Nothing in this act shall be interpreted to serve as the basis for a private right of action under any other law. This shall not be construed to relieve any party from any duties or obligations imposed under other law or the United States or California Constitution.

1798.155. Any business or third party may seek the opinion of the Attorney General for guidance on how to comply with the provisions of this title.

(a) A business shall be in violation of this title if it fails to cure any alleged violation within 30 days after being notified of alleged noncompliance. Any business, service provider, or other person that violates this title shall be liable for a civil penalty as provided in Section 17206 of the Business and Professions Code in a civil action brought in the name of the people of the State of California by the Attorney General. The civil penalties provided for in this section shall be exclusively assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General.

(b) Notwithstanding Section 17206 of the Business and Professions Code, any person, business, or service provider that intentionally violates this title may be liable for a civil penalty of up to seven thousand five hundred dollars ($7,500) for each violation.

(c) Notwithstanding Section 17206 of the Business and Professions Code, any civil penalty assessed pursuant to Section 17206 for a violation of this title, and the proceeds of any settlement of an action brought pursuant to subdivision (a), shall be allocated as follows:

(1) Twenty percent to the Consumer Privacy Fund, created within the General Fund pursuant to subdivision (a) of Section 1798.109, with the intent to fully offset any costs incurred by the state courts and the Attorney General in connection with this title.

(2) Eighty percent to the jurisdiction on whose behalf the action leading to the civil penalty was brought.

(d) It is the intent of the Legislature that the percentages specified in subdivision (c) be adjusted as necessary to ensure that any civil penalties assessed for a violation of this title fully offset any costs incurred by the state courts and the Attorney General in connection with this title, including a sufficient amount to cover any deficit from a prior fiscal year.

1798.160. (a) A special fund to be known as the “Consumer Privacy Fund” is hereby created within the General Fund in the State Treasury, and is available upon appropriation by the Legislature to offset any costs incurred by the state courts in connection with actions brought to enforce this title and any costs incurred by the Attorney General in carrying out the Attorney General’s duties under this title.

(b) Funds transferred to the Consumer Privacy Fund shall be used exclusively to offset any costs incurred by the state courts and the Attorney General in connection with this title. These funds shall not be subject to appropriation or transfer by the Legislature for any other purpose, unless the Director of Finance determines that the funds are in excess of the funding needed to fully offset the costs incurred by the state courts and the Attorney General in connection with this title, in which case the Legislature may appropriate excess funds for other purposes.

1798.175. This title is intended to further the constitutional right of privacy and to supplement existing laws relating to consumers' personal information, including, but not limited to, Chapter 22 (commencing with Section 22575) of Division 8 of the Business and Professions Code and Title 1.81 (commencing with Section 1798.80). The provisions of this title are not limited to information collected electronically or over the Internet, but apply to the collection and sale of all personal information collected by a business from consumers. Wherever possible, law relating to consumers' personal information should be construed to harmonize with the provisions of this title, but in the event of a conflict between other laws and the provisions of this title, the provisions of the law that afford the greatest protection for the right of privacy for consumers shall control.

1798.180. This title is a matter of statewide concern and supersedes and preempts all rules, regulations, codes, ordinances, and other laws adopted by a city, county, city and county, municipality, or local agency regarding the collection and sale of consumers' personal information by a business.

1798.185. (a) On or before January 1, 2020, the Attorney General shall solicit broad public participation to adopt regulations to further the purposes of this title, including, but not limited to, the following areas:

(1) Updating as needed additional categories of personal information to those enumerated in subdivision (c) of Section 1798.130 and subdivision (o) of Section 1798.140 in order to address changes in technology, data collection practices, obstacles to implementation, and privacy concerns.

(2) Updating as needed the definition of unique identifiers to address changes in technology, data collection, obstacles to implementation, and privacy concerns, and additional categories to the definition of designated methods for submitting requests to facilitate a consumer's ability to obtain information from a business pursuant to Section 1798.130.

(3) Establishing any exceptions necessary to comply with state or federal law, including, but not limited to, those relating to trade secrets and intellectual property rights, within one year of passage of this title and as needed thereafter.

(4) Establishing rules and procedures for the following, within one year of passage of this title and as needed thereafter:

(A) To facilitate and govern the submission of a request by a consumer to opt out of the sale of personal information pursuant to paragraph (1) of subdivision (a) of Section 1798.145.

(B) To govern business compliance with a consumer's opt-out request.

(C) The development and use of a recognizable and uniform opt-out logo or button by all businesses to promote consumer awareness of the opportunity to opt out of the sale of personal information.

(5) Adjusting the monetary threshold in subparagraph (A) of paragraph (1) of subdivision (b) of Section 1798.106 in January of every odd-numbered year to reflect any increase in the Consumer Price Index.

(6) Establishing rules, procedures, and any exceptions necessary to ensure that the notices and information that businesses are required to provide pursuant to this title are provided in a manner that may be easily understood

by the average consumer, are accessible to consumers with disabilities, and are available in the language primarily used to interact with the consumer, including establishing rules and guidelines regarding financial incentive offerings, within one year of passage of this title and as needed thereafter.

(7) Establishing rules and procedures to further the purposes of Sections 1798.110 and 1798.115 and to facilitate a consumer's or the consumer's authorized agent's ability to obtain information pursuant to Section 1798.130, with the goal of minimizing the administrative burden on consumers, taking into account available technology, security concerns, and the burden on the business, to govern a business' determination that a request for information received by a consumer is a verifiable request, including treating a request submitted through a password-protected account maintained by the consumer with the business while the consumer is logged into the account as a verifiable request and providing a mechanism for a consumer who does not maintain an account with the business to request information through the business' authentication of the consumer's identity, within one year of passage of this title and as needed thereafter.

(b) The Attorney General may adopt additional regulations as necessary to further the purposes of this title.

1798.190. If a series of steps or transactions were component parts of a single transaction intended from the beginning to be taken with the intention of avoiding the reach of this title, including the disclosure of information by a business to a third party in order to avoid the definition of sell, a court shall disregard the intermediate steps or transactions for purposes of effectuating the purposes of this title.

1798.192. Any provision of a contract or agreement of any kind that purports to waive or limit in any way a consumer's rights under this title, including, but not limited to, any right to a remedy or means of enforcement, shall be deemed contrary to public policy and shall be void and unenforceable. This section shall not prevent a consumer from declining to request information from a business, declining to opt out of a business' sale of the consumer's personal information, or authorizing a business to sell the consumer's personal information after previously opting out.

1798.194. This title shall be liberally construed to effectuate its purposes.

1798.196. This title is intended to supplement federal and state law, if permissible, but shall not apply if such application is preempted by, or in conflict with, federal law or the California Constitution.

1798.198. (a) Subject to limitation provided in subdivision (b), this title shall be operative January 1, 2020.

(b) This act shall become operative only if initiative measure No. 17-0039, The Consumer Right to Privacy Act of 2018, is withdrawn from the ballot pursuant to Section 9604 of the Elections Code.

SEC. 4. (a) The provisions of this bill are severable. If any provision of this bill or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUZANNE BOELTER, individually and on behalf of all others similarly situated, Plaintiff, v. ADVANCE MAGAZINE PUBLISHERS INC., d/b/a CONDÉ NAST, Defendant.	Civil Action No.: **CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff Suzanne Boelter ("Plaintiff"), individually and on behalf of herself and all others similarly situated, by and through her attorneys, makes the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to allegations specifically pertaining to herself and her counsel, which are based on personal knowledge.

NATURE OF THE CASE

1. Advance Magazine Publishers Inc., d/b/a Condé Nast ("Condé Nast"), is an international media company that publishes some of the most widely circulated magazines in the United States, including *GQ*, *The New Yorker*, *Vanity Fair*, *Vogue*, *Glamour*, *Allure*, and *Lucky*.

2. To supplement its sales and advertising revenues, Condé Nast sells its subscribers' personal information—including their full names, titles of magazines subscribed to, and home addresses (collectively "Personal Reading Information"), as well as myriad other personal, lifestyle, and demographic information such as gender, age, ethnicity, income, religion, parental status, and political affiliation—to data miners and other third parties without the written consent of its customers.

3. Condé Nast's disclosure of Personal Reading Information, and other personal, demographic, and lifestyle information is not only unlawful, but also dangerous because it allows for the targeting of particularly vulnerable members of society. In fact, anyone can buy a customer list from Condé Nast that contains a number of categories of detailed subscriber information. For example, a purchase could buy a list with the names and addresses of all *Bon Appétit* subscribers who are Jewish, Republican, single, over the age of 80, with a net worth of greater than $500,000, no children in the household, and a history of charitable donations. Condé Nast would sell such a list for approximately $180 per thousand subscribers listed.

4. While Condé Nast profits handsomely from the unauthorized sale and disclosure of its customers' Personal Reading Information and other personal information, it does so at the expense of its subscribers' privacy rights because Condé Nast does not obtain its customers' written consent prior to selling their Personal Reading Information.

5. By selling its customers' Personal Reading Information without their written consent, Condé Nast violates Michigan's Video Rental Privacy Act, M.C.L. § 445.1712 ("VRPA"), which prohibits companies from disclosing without permission any record or information concerning a Michigan customer's purchase of written materials, if the record identifies the customer.

6. Accordingly, Plaintiff brings this Class Action Complaint against Condé Nast for its intentional and unlawful disclosure of its customers' Personal Reading Information in violation of the VRPA, and for unjust enrichment.

PARTIES

7. Plaintiff Suzanne Boelter is a natural person and citizen of the State of Michigan. Plaintiff Boelter is a subscriber to *Bon Appétit* and *Self* magazines, which are published by

Condé Nast. Prior to and at the time she subscribed to *Bon Appétit* and *Self*, Condé Nast did not notify Plaintiff Boelter that it discloses the Personal Reading Information of its customers, and Plaintiff Boelter has never authorized Condé Nast to do so. Furthermore, Plaintiff Boelter was never provided any written notice that Condé Nast sells its customers' Personal Reading Information, or any means of opting out. Since subscribing to *Bon Appétit* and *Self*, and continuing to present, Condé Nast has disclosed, and continues to disclose, without consent or prior notice, Plaintiff Boelter's Personal Reading Information to data mining companies including Insource and others, who then supplement that information with data from their own files. Moreover, during that same period, Condé Nast has sold – and continues to sell and offer for sale – mailing lists containing Plaintiff Boelter's Personal Reading Information to third parties seeking to contact Condé Nast subscribers, without first obtaining Plaintiff Boelter's written consent or even giving her prior notice of the disclosure and sales. Because Condé Nast sold and disclosed her Personal Reading Information, Plaintiff Boelter now receives junk mail and telephone solicitations offering discounted magazine subscriptions, among other things. These unwarranted offers waste Plaintiff Boelter's time, money, and resources. These harassing junk mail offerings and phone call solicitations received by Plaintiff Boelter are attributable to Condé Nast's unauthorized sale and disclosure of her Personal Reading Information. Because Plaintiff Boelter is entitled by law to privacy in her Personal Reading Information, and because she paid money for her subscription, Condé Nast's sale of her Personal Reading Information deprived Plaintiff Boelter of the full set of benefits to which she was entitled as a part of her *Bon Appétit* and *Self* subscriptions, thereby causing economic harm. Accordingly, what Plaintiff Boelter received (a subscription without statutory privacy protections) was less valuable than what she paid for (a subscription with accompanying statutory privacy protections), and she would not have been willing to pay as much, if at all, for her *Bon Appétit* and *Self* subscriptions had she known that Condé Nast would disclose her Personal Reading Information.

8. Defendant Advance Magazine Publishers Inc., d/b/a Condé Nast is a New York corporation with its principal place of business at 1 World Trade Center, New York, New York 10007. Condé Nast does business throughout Michigan, New York, and the entire United States.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this civil action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 class members and the aggregate amount in controversy exceeds $5,000,000, exclusive of interest, fees, and costs, and at least one Class member is a citizen of a state different from Defendants. This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

10. This Court has personal jurisdiction over Condé Nast because Condé Nast conducts substantial business within New York, such that Condé Nast has significant, continuous, and pervasive contacts with the State of New York. Additionally, Condé Nast is a New York corporation, with its principal place of business is in New York, New York.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Condé Nast does substantial business in this District, a substantial part of the events giving rise to Plaintiff's claims took place within this judicial District, and Condé Nast's principal place of business is in this District.

FACTUAL BACKGROUND

Michigan's Video Rental Privacy Act

12. In 1988, members of the United States Senate warned that records of consumers' purchases and rentals of audiovisual and written materials offer "a window into our loves, likes, and dislikes," and that "the trail of information generated by every transaction that is now

recorded and stored in sophisticated record-keeping systems is a new, more subtle and pervasive form of surveillance." S. Rep. No. 100-599 at 7–8 (1988) (statements of Sens. Simon and Leahy, respectively).

13. Recognizing the need to further protect its citizens' privacy rights, Michigan's legislature enacted the VRPA "to preserve personal privacy with respect to the purchase, rental, or borrowing of certain materials," by prohibiting companies from disclosing certain types of sensitive consumer information. H.B. No. 5331, 1988 Mich. Legis. Serv. 378 (West).

14. Section 2 of the VRPA states:

> [A] person, or an employee or agent of the person, engaged in the business of selling at retail, renting, or lending books or other written materials . . . *shall not disclose* to any person, other than the customer, a record or information concerning the purchase . . . of those materials by a customer that indicates the identity of the customer.

M.C.L. § 445.1712 (emphasis added).

15. Michigan's protection of reading information reflects the "gut feeling that people ought to be able to read books and watch films without the whole world knowing," and recognizes that "[b]ooks and films are the intellectual vitamins that fuel the growth of individual thought. The whole process of intellectual growth is one of privacy—of quiet, and reflection. This intimate process should be protected from the disruptive intrusion of a roving eye." S. Rep. No. 100–599, at 6 (Statement of Rep. McCandless).

16. As Senator Patrick Leahy recognized in proposing the Video and Library Privacy Protection Act (later codified as the Video Privacy Protection Act, 18 U.S.C. § 2710), "[i]n practical terms our right to privacy protects the choice of movies that we watch with our family in our own homes. And it protects the selection of books that we choose to read." 134 Cong. Rec. S5399 (May 10, 1988).

17. Senator Leahy also explained why choices in movies and reading materials are so private: "These activities are at the core of any definition of personhood. They reveal our likes and dislikes, our interests and our whims. They say a great deal about our dreams and ambitions, our fears and our hopes. They reflect our individuality, and they describe us as people." *Id.*

18. Michigan's passage of the VRPA also established as a matter of law "that a person's choice in reading, music, and video entertainment is a private matter, and not a fit subject for consideration by gossipy publications, employers, clubs, or anyone else for that matter." *Privacy: Sales, Rentals of Videos, etc.*, House Legislative Analysis Section, H.B. No. 5331, Jan. 20, 1989 (attached hereto as **Exhibit A**).

19. Despite the fact that thousands of Michigan residents subscribe to Condé Nast publications, Condé Nast disregards its legal responsibility by systematically violating the VRPA.

The Personal Information Market: Consumers' Personal Information Has Real Value

20. In 2001, Federal Trade Commission ("FTC") Commissioner Orson Swindle remarked that "the digital revolution . . . has given an enormous capacity to the acts of collecting and transmitting and flowing of information, unlike anything we've ever seen in our lifetimes . . . [and] individuals are concerned about being defined by the existing data on themselves."[1]

21. More than a decade later, Commissioner Swindle's comments ring truer than ever, as consumer data feeds an information marketplace that supports a $26 billion dollar per year online advertising industry in the United States.[2]

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[1] The Information Marketplace: Merging and Exchanging Consumer Data (Mar. 13, 2001), at 8:15-11:16, *available at* https://www.ftc.gov/sites/default/files/documents/public_events/information-marketplace-merging-and-exchanging-consumer-data/transcript.pdf (last visited July 15, 2015).

[2] *See* Web's Hot New Commodity: Privacy, WSJ.com (Feb. 28, 2011), http://online.wsj.com/article/SB10001424052748703529004576160764037920274

22. The FTC has also recognized that consumer data possesses inherent monetary value within the new information marketplace and publicly stated that:

> Most consumers cannot begin to comprehend the types and amount of information collected by businesses, or why their information may be commercially valuable. Data is currency. The larger the data set, the greater potential for analysis—and profit.[3]

23. In fact, an entire industry exists where companies known as data miners purchase, trade, and collect massive databases of information about consumers. Data miners then profit by selling this "extraordinarily intrusive" information in an open and largely unregulated market.[4]

24. The scope of data miners' knowledge about consumers is immense: "If you are an American adult, the odds are that [they] know[] things like your age, race, sex, weight, height, marital status, education level, politics, buying habits, household health worries, vacation dreams—and on and on."[5]

25. Further, "[a]s use of the Internet has grown, the data broker industry has already evolved to take advantage of the increasingly specific pieces of information about consumers

.html (last visited July 15, 2015).

[3] Statement of FTC Commissioner Pamela Jones Harbour (Dec. 7, 2009), at 2, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/remarks-ftc-exploring-privacy-roundtable/091207privacyroundtable.pdf (last visited July 15, 2015) (emphasis added).

[4] *See* Martha C. White, *Big Data Knows What You're Doing Right Now*, TIME.com (July 31, 2012), http://moneyland.time.com/2012/07/31/big-data-knows-what-youre-doing-right-now/ (last visited July 15, 2013).

[5] Natasha Singer, *You for Sale: Mapping, and Sharing, the Consumer Genome*, N.Y. Times (June 16, 2012), *available at* http://www.nytimes.com/2012/06/17/technology/acxiom-the-quiet-giant-of-consumer-database-marketing.html (last visited May 12, 2015).

that are now available."[6]

26. Recognizing the serious threat the data mining industry poses to consumers' privacy, on July 25, 2012, the co-Chairmen of the Congressional Bi- Partisan Privacy Caucus sent a letter to nine major data brokerage companies seeking information on how those companies collect, store, and sell their massive collections of consumer data.[7]

27. In their letter, the co-Chairmen recognized that:

> By combining data from numerous offline and online sources, data brokers have developed hidden dossiers on every U.S. consumer. This large[-]scale aggregation of the personal information of hundreds of millions of American citizens raises a number of serious privacy concerns.[8]

28. Data mining is especially troublesome when consumer information is sold to direct-mail advertisers. In addition to causing waste and inconvenience, direct-mail advertisers often use consumer information to lure unsuspecting consumers into various scams,[9] including fraudulent sweepstakes, charities, and buying clubs. Thus, when companies like Condé Nast share information with data miners and direct-mail advertisers, they contribute to the "[v]ast databases of names and personal information" that are often "sold to thieves by large publicly

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[6] Letter from Senator John D. Rockefeller IV, Chairman, Senate Committee on Commerce, Science, and Transportation, to Scott E. Howe, Chief Executive Officer, Acxiom (Oct. 9, 2012) *available at* http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=3bb94703-5ac8-4157-a97b-a658c3c3061c (last visited July 15, 2015).

[7] *See Bipartisan Group of Lawmakers Query Data Brokers About Practices Involving Consumers' Personal Information*, Website of Senator Ed Markey (July 24, 2012), http://www.markey.senate.gov/news/press-releases/bipartisan-group-of-lawmakers-query-data-brokers-about-practices-involving-consumers-personal-information (last visited July 15, 2015).

[8] *Id.*

[9] *See Prize Scams*, Federal Trade Commission, http://www.consumer.ftc.gov/articles/0199-prize-scams (last visited July 15, 2015).

traded companies," which "put[s] almost anyone within the reach of fraudulent telemarketers" and other criminals.[10]

29. Information disclosures like Condé Nast's are particularly dangerous to the elderly. "Older Americans are perfect telemarketing customers, analysts say, because they are often at home, rely on delivery services, and are lonely for the companionship that telephone callers provide."[11] The FTC notes that "[t]he elderly often are the deliberate targets of fraudulent telemarketers who take advantage of the fact that many older people have cash reserves or other assets to spend on seemingly attractive offers."[12]

30. Indeed, an entire black market exists where the personal information of vulnerable elderly Americans is exchanged. Thus, information disclosures like Condé Nast's are particularly troublesome because of their cascading nature: "Once marked as receptive to [a specific] type of spam, a consumer is often bombarded with similar fraudulent offers from a host of scam artists."[13]

31. Condé Nast is not alone in jeopardizing its subscribers' privacy and well-being in exchange for increased revenue: disclosing subscriber information to data miners, direct marketers, and other third parties is a widespread practice in the publishing industry.

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[10] Charles Duhigg, *Bilking the Elderly, With a Corporate Assist*, N.Y. Times, May 20, 2007, *available at* http://www.nytimes.com/2007/05/20/business/20tele.html?pagewanted=all&_r=0 (last visited July15, 2015).

[11] *Id.*

[12] *Fraud Against Seniors: Hearing before the Senate Special Committee on Aging* (August 10, 2000) (prepared statement of the FTC), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-fraud-against-seniors/agingtestimony.pdf (last visited July 15, 2015).

[13] *See id.*

32. Thus, as consumer data has become an ever-more valuable commodity, the data mining industry has experienced rapid and massive growth. Unfortunately for consumers, this growth has come at the expense of their most basic privacy rights.

Consumers Place Monetary Value on their Privacy and Consider Privacy Practices When Making Purchases

33. As the data mining industry has grown, so too have consumer concerns regarding the privacy of their personal information.

34. A recent survey conducted by Harris Interactive on behalf of TRUSTe, Inc. showed that 89 percent of consumers polled avoid doing business with companies who they believe do not protect their privacy online.[14] As a result, 81 percent of smartphone users polled said that they avoid using smartphone apps that they don't believe protect their privacy online.[15]

35. Thus, as consumer privacy concerns grow, consumers are increasingly incorporating privacy concerns and values into their purchasing decisions and companies viewed as having weaker privacy protections are forced to offer greater value elsewhere (through better quality and/or lower prices) than their privacy- protective competitors.

36. In fact, consumers' personal information has become such a valuable commodity that companies are beginning to offer individuals the opportunity to sell their personal information themselves.[16]

37. These companies' business models capitalize on a fundamental tenet underlying

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[14] *See 2013 TRUSTe US Consumer Confidence Index*, TRUSTe, http://www.truste.com/us-consumer-confidence-index-2013/ (last visited July 15, 2015).

[15] *Id.*

[16] *See* Joshua Brustein, *Start-Ups Seek to Help Users Put a Price on Their Personal Data*, N.Y. Times (Feb. 12, 2012), *available at* http://www.nytimes.com/2012/02/13/technology/start-ups-aim-to-help-users-put-a-price-on-their-personal-data.html (last visited July 15, 2015).

the personal information marketplace: consumers recognize the economic value of their private data. Research shows that consumers are willing to pay a premium to purchase services from companies that adhere to more stringent policies of protecting their personal data.[17]

38. Thus, in today's economy, individuals and businesses alike place a real, quantifiable value on consumer data and corresponding privacy rights.[18] As such, where a business offers customers a service that includes statutorily guaranteed privacy protections, yet fails to honor these guarantees, the customer receives a service of less value than the service paid for.

Condé Nast Unlawfully Sells its Subscribers' Personal Reading Information

39. Condé Nast maintains a vast digital database comprised of its subscribers' Personal Reading Information. Condé Nast discloses its subscribers' Personal Reading Information to data mining companies including Insource and others, who then supplement that information with additional sensitive personal information about each Condé Nast subscriber, including gender, purchasing habits, political affiliation, religious practice, charitable donations, and (when applicable) number, age, and gender of the subscriber's children. (*See, e.g.*, **Exhibits B-D**).

40. Condé Nast then sells its mailing lists—which include subscribers' Personal

[17] *See* Tsai, Cranor, Acquisti, and Egelman, *The Effect of Online Privacy Information on Purchasing Behavior*, 22(2) Information Systems Research 254, 254 (2011); *see also* European Network and Information Security Agency, *Study on monetising privacy* (Feb. 27, 2012), *available at* https://www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/monetising-privacy (last visited July 15, 2015).

[18] *See* Hann, *et al.*, *The Value of Online Information Privacy: An Empirical Investigation* (Oct. 2003) at 2, *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.321.6125&rep=rep1&type=pdf (last visited July 15, 2015) ("The real policy issue is not whether consumers value online privacy. It is obvious that people value online privacy.")

Reading Information identifying which individuals purchased which magazines, and can include the sensitive information obtained from data miners—to data miners, other consumer-facing businesses, non-profit organizations seeking to raise awareness and solicit donations, and to political organizations soliciting donations, votes, and volunteer efforts. (*See* **Exhibits B–D**).

41. As a result of Condé Nast's data compiling and sharing practices, companies can purchase mailing lists from Condé Nast that identify Condé Nast subscribers by their most intimate details: income, political affiliation, religious practice, and charitable donations. Condé Nast's disclosure of such sensitive and personal information puts consumers, especially the more vulnerable members of society, at risk of serious harm from scammers. For example, Condé Nast will sell—to anyone willing to pay for it—a list with the names and addresses of all *Bon Appétit* subscribers who are Jewish, Republican, single, over the age of 80, with a net worth of greater than $500,000, no children in the household, and a history of charitable donations.

42. Condé Nast does not seek its subscribers' prior written consent to any of these disclosures and its subscribers remain unaware that their Personal Reading Information and other sensitive personal information is being bought and sold on the open market.

43. Consumers can sign up for Condé Nast subscriptions through numerous media outlets, including the Internet, telephone, or traditional mail. Regardless of how the consumer subscribes, Condé Nast never requires the individual to read or agree to any terms of service, privacy policy, or information-sharing policy. Consequently, Condé Nast uniformly fails to obtain any form of consent from – or even provide effective notice to – its subscribers before disclosing their Personal Reading Information.

44. As a result, Condé Nast disclosed and continues to disclose its customers' Personal Reading Information – including their reading habits and preferences that can "reveal

intimate facts about our lives, from our political and religious beliefs to our health concerns"[19] – to anybody willing to pay for it.

45. By and through these actions, Condé Nast has intentionally disclosed to third parties its Michigan subscribers' Personal Reading Information without consent, in direct violation of the VRPA with Plaintiff and other members of the Class.

CLASS ACTION ALLEGATIONS

46. Plaintiff seeks to represent a class defined as all Michigan residents who had their Personal Reading Information disclosed to third parties by Condé Nast without consent (the "Class"). Excluded from the Class is any entity in which Defendant has a controlling interest, and officers or directors of Defendant.

47. Members of the Class are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class number in the thousands. The precise number of Class members and their identities are unknown to Plaintiff at this time but may be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendant.

48. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to: (a) whether Condé Nast is "engaged in the business of selling at retail" books or other written materials (*i.e.*, magazines); (b) whether Condé Nast obtained consent before disclosing to third parties Plaintiff's and the Class's Personal Reading Information; (c) whether Condé Nast's disclosure of Plaintiff's and the Class's Personal Reading

[19] *California's Reader Privacy Act Signed into Law*, Electronic Frontier Foundation (Oct. 3, 2011), https://www.eff.org/press/archives/2011/10/03 (last visited July 15, 2015).

Information violated the Video Rental Privacy Act, M.C.L. § 445.1712; and (d) whether Condé Nast's sale of Plaintiff's and the Class's Personal reading Information constitutes unjust enrichment.

49. The claims of the named Plaintiff are typical of the claims of the Class in that the named Plaintiff and the Class sustained damages as a result of Defendant's uniform wrongful conduct, based upon Defendant's disclosure of Plaintiff's and the Class's Personal Reading Information.

50. Plaintiff is an adequate representative of the Class because her interests do not conflict with the interests of the Class members she seeks to represent, she has retained competent counsel experienced in prosecuting class actions, and she intends to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and her counsel.

51. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendant's liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

COUNT I
Violation of the Video Rental Privacy Act
(M.C.L. § 445.1712)

52. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set forth herein.

53. Plaintiff brings this claim individually and on behalf of members of the Class against Defendant Condé Nast.

54. As a magazine publisher that sells subscriptions to consumers, Condé Nast is engaged in the business of selling written materials at retail. *See* M.C.L. § 445.1712.

55. By subscribing to *Bon Appétit* and *Self*, Plaintiff purchased written materials directly from Condé Nast. *See* M.C.L. § 445.1712.

56. Because Plaintiff purchased written materials directly from Condé Nast, she is a "customer" within the meaning of the VRPA. *See* M.C.L. § 445.1711(a).

57. At all times relevant, and beginning on the dates Plaintiff initiated her *Bon Appétit* and *Self* subscriptions, Condé Nast disclosed Plaintiff's Personal Reading Information, which identified her as a *Bon Appétit* and *Self* subscriber, in at least two ways.

58. First, Condé Nast disclosed mailing lists containing Plaintiff's Personal Reading Information to data mining companies including Insource, and others, who then supplemented the mailing lists with additional sensitive information from their own databases, before sending the mailing lists back to Condé Nast.

59. Second, Condé Nast sold its mailing lists containing Plaintiff's Personal Reading Information—enhanced with additional information from data miners—to third parties, including other consumer-facing companies, direct-mail advertisers, and organizations soliciting monetary contributions, volunteer work, and votes.

60. Because the mailing lists included the additional information from the data miners, the lists were more valuable, and Condé Nast was able to increase its profits gained from the mailing list sales.

61. By selling or otherwise disclosing its subscriber lists, Condé Nast disclosed to persons other than Plaintiff records or information concerning her purchase of written materials from Condé Nast. *See* M.C.L. § 445.1712.

62. The information Condé Nast disclosed indicates Plaintiff's name and address, as well as the fact that she subscribed to *Bon Appétit* and *Self*. Accordingly, the records or information disclosed by Condé Nast indicate Plaintiff's identity. *See* M.C.L.§ 445.1712.

63. Plaintiff and the members of the Class never consented to Condé Nast disclosing their Personal Reading Information to anyone.

64. Worse yet, Plaintiff and the members of the Class did not receive notice before Condé Nast disclosed their Personal Reading Information to third parties.

65. On information and belief, Condé Nast's disclosures of Plaintiff's and the Class's Personal Reading Information were not made pursuant to a court order, search warrant, or grand jury subpoena.

66. Condé Nast's disclosures of Plaintiff's and the Class's Personal Reading Information were not made to collect payment for their subscriptions.

67. Condé Nast's disclosures of Plaintiff's Personal Reading Information were made to data miners, direct-mail advertisers, and organizations soliciting monetary contributions, volunteer work, and votes—all in order to increase Condé Nast's revenue. Accordingly, Condé Nast's disclosures were not made for the exclusive purpose of marketing goods and services directly to Plaintiff and the members of the Class.

68. By disclosing Plaintiff's Personal Reading Information, Condé Nast violated Plaintiff's and the Class's statutorily-protected right to privacy in their reading habits. *See* M.C.L. § 445.1712.

69. Additionally, because Plaintiff and the members of the Class paid for their Condé Nast subscriptions, and Condé Nast was obligated to comply with the VRPA, Condé Nast's unlawful disclosure of Plaintiff's and the other Class members' Personal Reading Information deprived Plaintiff and the Class members of the full value of their paid-for subscriptions. Because Plaintiff and the other Class members ascribe monetary value to the privacy of their Personal Reading Information, Condé Nast's unlawful sale and disclosure of their Personal Reading Information caused her to receive less value than she paid for, thereby causing her economic harm.

70. Likewise, because Plaintiff and the other Class members ascribe monetary value to the privacy of their Personal Reading Information, a magazine subscription that keeps their Personal Reading Information private is more valuable than one that does not.

71. Accordingly, had Plaintiff been adequately informed of Condé Nast's disclosure practices, she would not have been willing to purchase her *Bon Appétit* and *Self* subscriptions at the price charged, if at all. Thus, Condé Nast's unlawful disclosures caused Plaintiff economic harm.

72. Condé Nast's disclosure of Plaintiff's Personal Reading Information to third parties has also caused an influx of third party print advertisements and marketing calls to her cellular phone.

73. As a result of Condé Nast's unlawful and continued disclosure of their Personal Reading Information, Plaintiff and the members of the Class have suffered privacy and economic

injuries. On behalf of herself and the Class, Plaintiff seeks: (1) an injunction requiring Defendant Condé Nast to obtain consent from Michigan subscribers prior to the disclosure of their Personal Reading Information as required by the VRPA; (2) actual damages, including disgorgement, or $5,000.00, whichever is greater, per Class member pursuant to M.C.L. § 445.1715(a); and (3) costs and reasonable attorneys' fees pursuant to M.C.L. § 445.1715(b).

COUNT II
Unjust Enrichment

74. Plaintiff repeats the allegations contained in the paragraphs above as if fully set forth herein.

75. Plaintiff brings this claim individually and on behalf of the members of the Class against Defendant.

76. Plaintiff and the Class members conferred benefits on Condé Nast by providing Condé Nast with their Personal Reading Information and paying Condé Nast for their magazine subscriptions. Condé Nast received and retained the information and money belonging to Plaintiff and the Class when Plaintiff and the Class subscribed to Condé Nast publications.

77. Because Condé Nast received and processed Plaintiff's and the Class's subscription payments and Personal Reading Information, and because Condé Nast has employees handling customer accounts and billing as well as customer data, Condé Nast appreciates or has knowledge of such benefits.

78. Under the VRPA, Plaintiff and the Class members were entitled to confidentiality in their Personal Reading Information as part of their subscriptions.

79. Under principles of equity and good conscience, because Condé Nast failed to comply with the VRPA, Condé Nast should not be allowed to retain the full amount of money Plaintiff and the Class paid for their subscriptions or the money it received by selling Plaintiff's

and the Class's Personal Reading Information.

80. Plaintiff and the other Class members have suffered actual damages as a result of Condé Nast's unlawful conduct in the form of the value Plaintiff and the other Class members paid for and ascribed to the confidentiality of their Personal Reading Information. This amount is tangible and will be calculated at trial.

81. Additionally, Plaintiff and the Class members have suffered actual damages inasmuch as Condé Nast's failure to inform them that it would disclose their Personal Reading Information caused them to purchase magazine subscriptions when they otherwise would not have.

82. Further, a portion of the purchase price of each Condé Nast magazine subscription sold to Plaintiff and the other Class members was intended to ensure the confidentiality of Plaintiff's and the other Class members' Personal Reading Information, as required by the VRPA. Because Plaintiff and the other Class members were denied services that they paid for and were entitled to receive—i.e., confidentiality of their Personal Reading Information—and because Plaintiff and the Class would have commanded a discount to voluntarily forego those benefits, they incurred actual monetary damages.

83. To prevent inequity, Condé Nast should return to Plaintiff and the Class the value they ascribe to confidentiality of their Personal Reading Information and all money derived from Condé Nast's sale and disclosure of Plaintiff's and the Class's Personal Reading Information.

84. Accordingly, Plaintiff and the Class members seek an order declaring that Condé Nast's conduct constitutes unjust enrichment, and awarding Plaintiff and the Class restitution in an amount to be calculated at trial equal to the amount of money obtained by Condé Nast through its sale and disclosure of Plaintiff's and the Class's Personal Reading Information.

PRAYER FOR RELIEF

85. WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks a judgment against Defendant as follows:

A. For an order certifying the Class under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as representative of the Class and Plaintiff's attorneys as Class Counsel to represent the Class.

B. For an order declaring that Defendant's conduct as described herein violates the Video Rental Privacy Act, M.C.L. § 445.1712;

C. For an order finding in favor of Plaintiff and the Class on all counts asserted herein;

D. For an award of actual damages, including disgorgement and restitution, or $5,000, whichever is greater, to Plaintiff and each Class member, as provided by the Video Rental Privacy Act, M.C.L. § 445.1715(a);

E. For prejudgment interest on all amounts awarded;

F. For an order of restitution and all other forms of equitable monetary relief;

G. For injunctive relief as pleaded or as the Court may deem proper; and;

H. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit.

JURY DEMAND

Plaintiff demands a trial by jury on all causes of action and issues so triable.

Dated: July 20, 2015

Respectfully submitted,

BURSOR & FISHER, P.A.

By: *<u>/s/ Joseph I. Marchese</u>*
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Attorneys for Plaintiff

EXHIBIT A

House Legislative Analysis Section
Washington Square Building, Suite 1025
Lansing, Michigan 48909
Phone: 517/373-6466

PRIVACY: SALES, RENTALS OF VIDEOS, ETC.

House Bill 5331 as enrolled
Second Analysis (1-20-89)

Sponsor: Rep. David Honigman
House Committee: Judiciary
Senate Committee: Judiciary

THE APPARENT PROBLEM:

During the period when Congressional confirmation hearings were being held on the nomination of Robert Bork to the Supreme Court, a Washington weekly obtained and published a list of videotapes rented under Bork's wife's account. Many found this to be an unwarranted invasion of privacy, and the incident prompted the introduction in Congress of a bill to protect the privacy of those who rent or buy videotapes. Many in Michigan also believe that one's choice in videos, records, and books is nobody's business but one's own, and suggest the enactment of a statute to explicitly protect a consumer's privacy in buying and borrowing such items.

THE CONTENT OF THE BILL:

The bill would create a new public act to preserve personal privacy with respect to the purchase, rental, or borrowing of written materials, sound recordings, and video recordings. Except as otherwise provided by law, a retailer, lender, or renter of such items could not disclose information — such as selections made — on a particular customer to any person other than that customer. Such information could be disclosed with the customer's written permission, under a court order, to the extent reasonably necessary to collect past-due payment, for the exclusive purpose of marketing goods and services directly to the consumer, or under a search warrant. Violation of the bill would be a misdemeanor.

FISCAL IMPLICATIONS:

The House Fiscal Agency says that the bill would have no fiscal implications. (1-18-89)

ARGUMENTS:

For:

The bill would recognize that a person's choice in reading, music, and video entertainment is a private matter, and not a fit subject for consideration by gossipy publications, employers, clubs, or anyone else, for that matter. The bill would complement the Library Privacy Act, which exempts library records on a person from disclosure under the Freedom of Information Act and prohibits disclosure absent a court order or the individual's consent.

Response: The bill, while laudable in its aims, may be unnecessary for libraries, which already are subject to civil penalties for violating the Library Privacy Act.

Against:

The bill could offer more in the way of recourse for injured parties if it provided for civil damages as well as criminal misdemeanor penalties. Civil remedies not only offer a person recompense for harm done: they free a person from having to rely on a prosecutor's office to pursue a case.

EXHIBIT B

1 Start 2 Results 3 Data Card 4 Request 5 Finished

Conde Nast - Enhanced Database Mailing List

The Conde Nast Enhanced Database is overlaid with E-Tech and InfoBase Lifestyle data and includes subscribers to Vogue, W, Glamour, Allure, Self, Teen Vogue, GQ, Details, Architectural Digest, Brides, Lucky, Golf Digest, Golf World, Vanity Fair, Bon Appetit, Conde Nast Traveler, Wired, The New Yorker.

Get Count | Get Pricing | Get More Information

SEGMENTS		*COUNTS THROUGH 05/31/2015*
6,588,000	TOTAL UNIVERSE / BASE RATE	$110.00/M
6,588,000	ACTIVE SUBSCRIBERS	$110.00/M
628,000	30 DAY HOTLINE SUBSCRIBERS	+ $17.00/M
1,643,000	3 MONTH HOTLINE SUBSCRIBERS	+ $14.00/M
3,248,000	12 MONTH FORMER SUBSCRIBERS	$70.00/M
73,000	LAST 30 DAY CHANGE OF ADDRESS	+ $14.00/M
	CATALOG RATE	$80.00/M
	FUNDRAISING	$70.00/M
	NONPROFIT	$80.00/M

POPULARITY:	■■■■■ 100
MARKET:	CONSUMER
CHANNELS:	
SOURCE:	98% PAID 61% DTP
PRIVACY:	UNKNOWN
DMA?:	YES - MEMBER
STATUS:	PREFERRED PROVIDER
GEO:	USA
GENDER:	58% FEMALE 36% MALE

DESCRIPTION

The Conde Nast Enhanced Database is overlaid with E-Tech and InfoBase Lifestyle data and includes subscribers to Vogue, W, Glamour, Allure, Self, Teen Vogue, GQ, Details, Architectural Digest, Brides, Lucky, Golf Digest, Golf World, Vanity Fair, Bon Appetit, Conde Nast Traveler, Wired, The New Yorker.

Active subscribers selectable by the following income ranges:

Under $15,000

$15,000 - $19,000

$20,000 - $29,000

$30,000 - $39,000

$40,000 - $49,000

$50,000 - $74,000

$75,000 - $99,999

$100,000 - $124,999

SELECTS	
3 MONTH HOTLINE	$14.00/M
30 DAY HOTLINE	$17.00/M
3RD PARTY BLOW-IN	$10.00/M
6 MONTH HOTLINE	$9.00/M
ACTIVE SUBSCRIBERS	
AGE/INCOME	$14.00/M
CATALOG/PRODUCT BUYERS	$14.00/M
CHANGE OF ADDRESS	$14.00/M
ETHNIC/ETHNICITY	$14.00/M
GENDER/PAID	$9.00/M
GIFT GIVERS	$14.00/M
HOME ADDRESS / BUSINESS ADDRESS	$14.00/M
INCOME RANGES	
LIFESTYLE INTEREST ENHHANCEMENTS	$14.00/M
MARITAL STATUS	$14.00/M
NET WORTH	
NEW TO FILE	$14.00/M
NIELSEN COUNTY	$9.00/M
PRESENCE OF CHILDREN	$14.00/M
PUBLICATION TITLE	
RELIGION/RELIGIOUS	$14.00/M
RUNNING CHARGE	$8.00/M
SOURCE / NEW TO FILE / RENEWALS	$14.00/M
STATE/SCF/ZIP	$9.00/M
VOTER PARTY	$14.00/M

ADDRESSING	
KEY CODING	$2.00/M
EMAIL	$59.00/F
FTP	$59.00/F

$125,000+

Adult Age Ranges (Active subscriber counts)

18-24 = 220,658

25-34 = 867,846

35-44 = 978,871

45-54 = 1,156,504

55-64 = 1,178,913

65-74 = 720,538

75+ = 443,222

Note: A signed list rental agreement from mailer is required on an annual basis. List owner will not rent to sweepstakes, surveys, contests or telemarketing offers. Email Addresses are not available.

3,000 Minimum will apply on all reuse orders.

ORDERING INSTRUCTIONS

- To order this list, contact your List Broker and ask for NextMark List ID #299643 or click here to place your request.
- 10,000 NAME MINIMUM ORDER $0.00 MINIMUM PAYMENT
- 85% NET NAME AVAILABLE ON ORDERS OF 50,000 OR MORE ($15.00/M RUN CHARGE)
- EXCHANGE IS AVAILABLE
- REUSE IS AVAILABLE ON ORDERS OF 3,000
- CANCELLATION FEE AT $100.00/F

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RELATED LISTS

- HEARST MASTERFILE
- CONSUMER REPORTS
- SMITHSONIAN MAGAZINE
- BONNIER CORPORATION ENHANCED MASTERFILE
- I-BEHAVIOR DATABASE
- TIME INC. AFFLUENT MEDIA GROUP ENHANCED MASTERFILE
- MEREDITH DATABASE - ENHANCED MASTERFILE
- NATIONAL GEOGRAPHIC SOCIETY ENHANCED MASTERFILE
- AMERICAN LUNG ASSOCIATION DONOR MASTERFILE
- TIME INC. MAGAZINES GROUP ENHANCED MASTERFILE

EXHIBIT C

1 Start 2 Results 3 Data Card 4 Request 5 Finished

Conde Nast - Woman's Group Enhanced Database Mailing List

The Conde Nast Women's Group Enhanced Database is comprised of the female subscribers to the Conde Nast titles. This database is overlaid with E-Tech and InfoBase Lifestyle data and includes female subscribers to Vogue, W, Glamour, Allure, Self, Teen Vogue, GQ, Details, Architectural Digest, Brides, Lucky, Golf Digest, Golf World, Vanity Fair, Bon Appetit, Conde Nast Traveler, Wired, The New Yorker.

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SEGMENTS		COUNTS THROUGH 05/31/2015
3,646,774	TOTAL UNIVERSE / BASE RATE	$110.00/M
3,646,774	ACTIVE FEMALE SUBSCRIBERS	+ $14.00/M
414,503	30 DAY HOTLINE FEMALE SUBSCRIBERS	+ $31.00/M
1,028,630	3 MONTH HOTLINE FEMALE SUBSCRIBERS	+ $28.00/M
	CATALOG RATE	$80.00/M
	FUNDRAISING	$70.00/M
	NONPROFIT	$80.00/M

DESCRIPTION

The Conde Nast Women's Group Enhanced Database is comprised of the female subscribers to the Conde Nast titles. This database is overlaid with E-Tech and InfoBase Lifestyle data and includes female subscribers to Vogue, W, Glamour, Allure, Self, Teen Vogue, GQ, Details, Architectural Digest, Brides, Lucky, Golf Digest, Golf World, Vanity Fair, Bon Appetit, Conde Nast Traveler, Wired, The New Yorker.

Note: A signed list rental agreement from mailer is required on an annual basis. List owner will not rent to sweepstakes, surveys, contests or telemarketing offers. Email Addresses are not available.

3,000 Minimum will apply on all reuse orders.

ORDERING INSTRUCTIONS

- To order this list, contact your List Broker and ask for NextMark List ID #299838 or click here to place your request.
- 10,000 NAME MINIMUM ORDER $0.00 MINIMUM PAYMENT
- 85% NET NAME AVAILABLE ON ORDERS OF 50,000 OR MORE ($8.00/M RUN CHARGE)

POPULARITY:	96
MARKET:	CONSUMER
CHANNELS:	
SOURCE:	98% PAID 61% DTP
PRIVACY:	UNKNOWN
DMA?:	YES - MEMBER
STATUS:	PREFERRED PROVIDER
GEO:	USA
GENDER:	100% FEMALE

SELECTS	
3 MONTH HOTLINE	$14.00/M
30 DAY HOTLINE	$17.00/M
3RD PARTY BLOW-IN	$10.00/M
6 MONTH HOTLINE	$9.00/M
AGE/INCOME	$14.00/M
CATALOG/PRODUCT BUYERS	$14.00/M
CHANGE OF ADDRESS	$14.00/M
ETHNIC/ETHNICITY	$14.00/M
GENDER/PAID	$9.00/M
GIFT GIVERS	$14.00/M
HOME ADDRESS / BUSINESS ADDRESS	$14.00/M
HUNTING / FISHING INTEREST	$14.00/M
LIFESTYLE INTEREST ENHHANCEMENTS	$14.00/M
MARITAL STATUS	$14.00/M
NEW TO FILE	$14.00/M
NIELSEN COUNTY	$9.00/M
PRESENCE OF CHILDREN	$14.00/M
PRODUCT	$14.00/M
RELIGION/RELIGIOUS	$14.00/M
RUNNING CHARGE	$8.00/M
SOURCE / NEW TO FILE / RENEWALS	$14.00/M
STATE/SCF/ZIP	$9.00/M
VOTER PARTY	$14.00/M

ADDRESSING	
KEY CODING	$2.00/M
EMAIL	$59.00/F

- EXCHANGE IS AVAILABLE
- REUSE IS AVAILABLE ON ORDERS OF 3,000
- CANCELLATION FEE AT $100.00/F

FTP	$59.00/F

RELATED LISTS

- TIME INC. CORPORATE DATABASE
- BOARDROOM MASTERFILE
- HEARST MASTERFILE - LIFESTYLE
- MEREDITH DATABASE - ENHANCED MASTERFILE
- HIGHLIGHTS FOR CHILDREN ENHANCED MASTERFILE
- ALLURE MAGAZINE
- GLAMOUR MAGAZINE
- CONDE NAST - MEN'S GROUP ENHANCED DATABASE
- GUTHY-RENKER MASTERFILE
- HEARST MASTERFILE

Get Count | Get Pricing | Get More Information

EXHIBIT D

1 Start 2 Results 3 Data Card 4 Request 5 Finished

Conde Nast - Religious Subscribers Mailing List

Now Enhanced with E-Tech Data! This masterfile is comprised of subscribers to upscale publications by Condé Nast. Titles include: Vogue, W, Glamour, Allure, Self, Teen Vogue, GQ, Details, Architectural Digest, Brides, Lucky, Golf Digest, Golf World, Vanity Fair, Bon Appetit, Conde Nast Traveler, Wired, The New Yorker.

Get Count | Get Pricing | Get More Information

SEGMENTS		*COUNTS THROUGH 05/31/2015*
4,117,384	TOTAL UNIVERSE / BASE RATE	$110.00/M
151,512	ACTIVE BUDDHIST SUBSCRIBERS	+ $14.00/M
2,061,720	ACTIVE CATHOLIC SUBSCRIBERS	+ $14.00/M
84,791	ACTIVE EASTERN ORTHODOX SUBSCRIBERS	+ $14.00/M
50,419	ACTIVE HINDU SUBSCRIBERS	+ $14.00/M
71,887	ACTIVE ISLAMIC SUBSCRIBERS	+ $14.00/M
287,213	ACTIVE JEWISH SUBSCRIBERS	+ $14.00/M
6,281	ACTIVE LUTHERAN SUBSCRIBERS	+ $14.00/M
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In re ZAPPOS.COM, INC., Customer Data Security Breach Litigation.

No. 3:12–cv–00325–RCJ–VPC.
MDL No. 2357.

United States District Court,
D. Nevada.

Signed June 1, 2015.

Background: Consumers brought class actions against online retailer for damages resulting from theft of consumers' personal information following a security breach. Retailer moved to dismiss.

Holdings: The District Court, Robert C. Jones, J., held that:

(1) devaluation of consumers' personal information did not constitute an injury-in-fact;

(2) increased threat of identity theft and fraud did not constitute an injury-in-fact; and

(3) purchase of credit monitoring services did not constitute an injury-in-fact.

Motion granted.

1. Federal Courts ⚷2078

Lack of standing is a defect in subject-matter jurisdiction and may properly be challenged through a motion to dismiss for lack of subject-matter jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

2. Federal Courts ⚷2078

In a facial attack to subject-matter jurisdiction, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

3. Federal Courts ⚷2081

When considering a facial attack on subject-matter jurisdiction, the court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

4. Federal Civil Procedure ⚷103.2, 103.3

Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent, fairly traceable to the challenged action, and redressable by a favorable ruling. U.S.C.A. Const. Art. 3, § 2, cl. 1.

5. Federal Civil Procedure ⚷103.2

When a party's allegations of injury rest on future harm, Article III standing arises only if that harm is certainly impending, or there is a substantial risk that the harm will occur; allegations of possible future injury are not sufficient. U.S.C.A. Const. Art. 3, § 2, cl. 1.

6. Federal Civil Procedure ⚷103.2

The party invoking federal jurisdiction has the burden of establishing actual or imminent injury required for Article III standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

7. Federal Civil Procedure ⚷164
Federal Courts ⚷2134

To establish Article III standing in a class action, the named plaintiffs attempting to represent the class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent; if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. U.S.C.A. Const. Art. 3, § 2, cl. 1.

8. Antitrust and Trade Regulation ⚷290

Consumers' allegation that online retailer's data breach resulted in a devaluation of their personal information did not demonstrate that consumers suffered an injury-in-fact, as required to establish Article III standing; even assuming that consumers' personal information had monetary value on the black market, consumers failed to allege any facts explaining how their personal information became less valuable as a result of the breach or that they attempted to sell their information and were rebuffed because of a lower price-point attributable to the breach. U.S.C.A. Const. Art. 3, § 2, cl. 1.

9. Federal Civil Procedure ⚷103.2

To establish an injury-in-fact, as required for Article III standing, based on a risk of future harm, the plaintiff must face a credible threat of harm, and that harm must be both real and immediate. U.S.C.A. Const. Art. 3, § 2, cl. 1.

10. Federal Civil Procedure ⚷103.2

To establish an injury-in-fact, as required for Article III standing, it is not enough that a credible threat may occur at some point in the future; rather, the threat must be impending. U.S.C.A. Const. Art. 3, § 2, cl. 1.

11. Federal Civil Procedure ⚷103.2

A risk of future harm is not substantial, and thus cannot constitute an injury-in-fact for Article III standing purposes, unless the plaintiff can allege that the feared harm will likely be avoided only with judicial intervention; but where a credible threat will come to pass only if an independent third party takes specific action that would culminate in harm to the plaintiff, the alleged injury is less likely to confer standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

12. Antitrust and Trade Regulation ⚷290

Increased threat of identity theft and fraud allegedly faced by consumers as a result of online retailer's data breach did not constitute an injury-in-fact sufficient to confer Article III standing; fact that more than three years had passed without consumers making a single allegation of actual theft or fraud demonstrated that any risk of future harm was not immediate, breach did not expose consumers' entire credit card numbers, and there was no indication that consumers' information appeared in any place where others might obtain and misuse it. U.S.C.A. Const. Art. 3, § 2, cl. 1.

13. Antitrust and Trade Regulation ⚷290

Consumers' purchasing of credit monitoring services following online retailer's data breach did not constitute an injury-in-fact sufficient to confer Article III standing; although consumers' fears of identity theft and fraud were rational, consumers could not create standing by inflicting harm on themselves to ward off a speculative, rather than imminent, injury.

14. Federal Civil Procedure ⚷103.2

Costs incurred to prevent future harm is not enough to confer Article III standing, even when such efforts are sensible. U.S.C.A. Const. Art. 3, § 2, cl. 1.

15. Antitrust and Trade Regulation ⚷290

Even if consumers affected by online retailer's data breach adequately alleged a loss of privacy as a result of the breach, they failed to show how that loss amounted to a concrete a particularized injury, and thus the alleged loss of privacy did not constitute an injury-in-fact sufficient to confer Article III standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

16. Antitrust and Trade Regulation ⚷358

Consumers' allegations that they were harmed, as a result of online retailer's data breach, by a decrease in the value of the retailer's services did not demonstrate that consumers suffered an injury-in-fact, as required for Article III standing; consumers failed to explain how the breach impacted the value of the goods they purchased from retailer, and failed to allege facts showing how the price they paid for such goods incorporated some particular sum that was understood by both parties to be allocated towards the protection of customer data. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Ben Barnow, Erich Schork, Barnow and Associates, P.C., Chicago, IL, Brent A. Carson, Robert A. Winner, Winner and Carson, Raleigh C. Thompson, Robert R. McCoy, Morris Law Group, Las Vegas, NY, D. Greg Blankinship, Jeremiah Frei–Pearson, Shin Young Hahn, Finkelstein, Blankinship, Frei–Pearson & Garber, LLP, White Plains, NY, Jeffrey B. Bell, Julia B. Strickland, Stephen J. Newman, Stroock & Stroock & Lavan, LLP, Kara M. Wolke, Marc L. Godino Glancy Prongay & Murray, LLP, Jon A. Tostrud, Tostrud Law Group, P.C. Los Angeles, CA, Reginald V. Terrell The Terrell Law Group Oakland, CA, Peter Mougey, Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A. Pensacola, FL, Rachel Soffin, Tamra Carsten Givens, Morgan & Morgan, P.A., Tampa, FL, Scott WM Weinstein, Morgan & Morgan P.A, Fort Myers, FL, Lance A. Harke, Howard M. Bushman, Harke Clasby & Bushman, LLP, Miami Shores, FL, Mark Gray, Gray & White Louisville, KY, Richard L. Coffman, The Coffman Law Firm, Beaumont, TX, Edward K. Wood, Wood Law Firm, LLC, Birmingham, AL, Christine R. Fitzgerald, Belcher, Starr & Fitzgerald, LLP, Boston, MA, David C. Omara, William M. O'Mara, The Omara Law Firm, P.C., Reno, NV, Lawrence Lee Jones, II, Jones Ward, PLC, Louisville, KY, Charles T. Lester, Jr., Fort Thomas, KY, Brian C. Frontino, Los Angeles, CA, for Plaintiff.

ORDER

ROBERT C. JONES, District Judge.

This multidistrict litigation case arises out of a security breach of Zappos.com's customer data. Pending before the Court is a Motion to Dismiss, (ECF No. 217), filed by Amazon.com, Inc. doing business as Zappos.com ("Zappos"). Also pending is Zappos's Motion to Strike Prayers for Punitive Damages and Restitution. (ECF No. 219). Zappos has also filed a Motion for Leave to File Excess Pages. (ECF No. 218). The Court has considered all of the briefing on the pending Motions. For the reasons contained herein, the Motion to Dismiss is GRANTED, and the Motion to Strike is DENIED as moot.

I. FACTS AND PROCEDURAL HISTORY

On January 15, 2012, Zappos's servers located in Kentucky and Nevada were targeted by a hacker or group of hackers. The servers contained the personal identifying information of approximately 24 million Zappos's customers. On January 16, 2012, Zappos sent an email to its customers notifying them that its servers had been breached and that data had been stolen, including customers' names, account numbers, passwords, email addresses, billing and shipping addresses, phone numbers, and the last four digits of their credit cards used to make purchases. Shortly thereafter, a number of lawsuits were filed against Zappos seeking damages.

On June 14, 2012, the U.S. Judicial Panel on Multidistrict Litigation ("JPML") granted Zappos's motion to create the present case pursuant to 28 U.S.C. § 1407, transferring six extra-district actions to this District, consolidating them with three actions from this District, and assigning the consolidated case to this Court. (Transfer Order, ECF No. 1). Zappos moved to compel arbitration and stay the case. While that motion was pending, the JPML transferred an additional action to be consolidated with the instant case. (Conditional Transfer Order, ECF No. 5). The Court denied the motion to compel arbitration because the arbitration contract was "browsewrap" not requiring any objective manifestation of assent (as opposed to a "clickwrap" agreement), and there was no evidence that Plaintiffs had knowledge of the offer such that assent could be implied merely by use of the website. (*See* Sept. 27, 2012 Order 7–10, ECF No. 21).

Plaintiffs then amended their pleadings into two separate consolidated class action complaints, and Zappos filed a motion to dismiss the amended complaints for lack of standing and for failure to state a claim. (ECF No. 62). On September 9, 2013, the Court granted in part and denied in part Zappos's motion. (ECF No. 114). Thereafter, Plaintiffs Preira, Ree, Simon, Hasner, Habashy, and Nobles ("the Preira Plaintiffs") filed their Second Amended Consolidated Complaint (the "Preira SAC"). (ECF No. 118). And Plaintiffs Stevens, Penson, Elliot, Brown, Seal, Relethford, and Braxton (the "Stevens Plaintiffs") filed their Second Amended Consolidated Class Action Complaint (the "Stevens SAC"). (ECF No. 119).

On November 4, 2013, Zappos moved for dismissal of the Preira SAC and the Stevens SAC. (ECF No. 122). Zappos also moved to strike Plaintiffs' prayers for punitive damages and restitution. (ECF No. 124). While those motions were pending, the parties engaged in mediation in an attempt to reach a settlement. The parties stipulated to stay the proceedings various times, each time representing to the Court that settlement negotiations were progressing. (*See* ECF Nos. 192, 196, 201). After the third stipulation to stay, which was filed on September 17, 2014, and in reliance on the parties' representation that a settlement agreement was close, the Court entered an order denying Zappos's still pending motion to dismiss and motion to strike without prejudice. (ECF No. 202).

Despite the progress made during mediation as to class-wide relief, a final agreement could not be reached between the parties due to a disagreement over attorneys' fees. However, Plaintiffs filed a motion on December 4, 2014 to enforce a supposed settlement. (ECF No. 207), claiming that a cap on the fees class counsel would request was not material to the settlement. After responding to Plaintiffs' arguments regarding whether an enforceable settlement had been reached, Zappos renewed its previous dismissal arguments by filing the instant Motions on January 30, 2015. (ECF Nos. 217, 219). Plaintiffs then requested an extension of time to oppose the Motions pending the Court's determination of the motion to enforce. On March 27, 2015, the Court, finding that no final settlement had been reached, denied the motion to enforce and ordered Plaintiffs to respond to the instant Motions so that the case might proceed. Accordingly, the Court now considers the merits of Zappos's Motion to Dismiss the Preira and Stevens SACs pursuant to Rule 12(b)(1) for lack of standing.

II. LEGAL STANDARD

[1–3] "Lack of standing is a defect in subject-matter jurisdiction and may properly be challenged under Rule 12(b)(1)." *Wright v. Incline Vill. Gen. Imp. Dist.*, 597 F.Supp.2d 1191, 1199 (D.Nev.2009) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89

L.Ed.2d 501 (1986)). Zappos argues that the Preira and Stevens SACs fail to establish Plaintiffs' standing to sue. This is considered a "facial" challenge to subject-matter jurisdiction. *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.,* 594 F.2d 730, 733 (9th Cir.1979). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir.2004). If the movant's challenge is a facial one, then the "court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff." *Nevada ex rel. Colo. River Comm'n of Nev. v. Pioneer Cos.,* 245 F.Supp.2d 1120, 1124 (D.Nev.2003) (citing *Love v. United States,* 915 F.2d 1242, 1245 (9th Cir.1989)).

III. DISCUSSION

Zappos contends that Plaintiffs lack standing in this case because they have not alleged any actual damages arising from the data breach. Plaintiffs contend that their injury stems from an increased risk that they will become victims of identity theft or other fraudulent activities because their personal information has been jeopardized. None of the Plaintiffs, however, allege that they have suffered such harm as of yet. Moreover, only three of the twelve named Plaintiffs have taken the additional step of purchasing credit monitoring services to protect against the allegedly increased threat of fraud. In addition to the increased threat of harm, Plaintiffs further argue that they have standing based on damage to the intrinsic value of their data.

The Court was presented with similar arguments when ruling on Zappos's previous motion to dismiss. At that time, the Court determined that Plaintiffs' allegations "that they have had to pay money to monitor their credit scores and secure their financial information due to the increased risk of criminal fraud" were sufficient to establish standing. (Sept. 9, 2013 Order 5). However, given developments in the caselaw dealing with standing of data-breach victims, and because Article III standing is an "indispensable part of a plaintiff's case" rather than a pleading requirement, the Court finds it appropriate to review its prior ruling. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[4, 5] "Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 149, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010). When a party's allegations of injury rest on future harm, standing arises only if that harm is "*certainly* impending," *Clapper v. Amnesty Int'l USA,* —— U.S. ——, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (internal quotation marks and citation omitted), "or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus,* —— U.S. ——, 134 S.Ct. 2334, 2342, 189 L.Ed.2d 246 (2014) (citation omitted). Allegations "of *possible* future injury are not sufficient." *Clapper,* 133 S.Ct. at 1147 (quotation marks and citation omitted).

[6, 7] The party invoking federal jurisdiction has the burden of establishing actual or imminent injury. *Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. 2130. In a class action, the named plaintiffs attempting to represent the class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin,* 422 U.S. 490, 502, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974).

1. Decreased value in Plaintiffs' personal information

[8] The Court deals first with Plaintiffs' last theory of standing. Plaintiffs attempt to establish standing by arguing that the data breach resulted in a devaluation of their personal information. Plaintiffs allege that a "robust market" exists for the sale and purchase of consumer data such as the personal information that was stolen during the breach, the value of this data apparently being appraised at between $30.49 and $44.62. (Stevens SAC ¶¶ 51–52). Plaintiffs claim that the Zappos security breach deprived them of the "substantial value" of their personal information, which they are entitled to recover. (*Id.* ¶ 54).

The Court does not buy this argument. Even assuming that Plaintiffs' data has value on the black market, Plaintiffs do not allege any facts explaining how their personal information became less valuable as a result of the breach or that they attempted to sell their information and were rebuffed because of a lower price-point attributable to the security breach. *See Galaria v. Nationwide Mut. Ins. Co.,* 998 F.Supp.2d 646, 660 (S.D.Ohio 2014) (rejecting a similar argument because the named plaintiffs failed to allege that the data security breach actually prevented them from selling their information at the price they claimed the data was worth); *see also In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litg.,* 45 F.Supp.3d 14, 30 (D.D.C.2014) (same). Thus, the Court finds that these allegations do not establish standing.

2. Increased threat of future harm

Plaintiffs' purported standing rests largely on the theory that they suffer an increased threat of future identity theft and fraud as a result of Zappos's security breach. Courts are divided on what constitutes sufficient injury-in-fact to establish standing in the context of a data security breach. The division arises, at least in part, from the Supreme Court's recent holding in *Clapper v. Amnesty International.*

In *Clapper,* the plaintiffs, a group of lawyers, challenged the constitutionality of a section of the Foreign Intelligence Surveillance Act ("FISA") that authorizes surveillance of individuals who are not United States persons and are believed to be located outside of the United States. 133 S.Ct. at 1142. The plaintiffs alleged that their work required them to engage in sensitive international communication with individuals that they suspected were targets of surveillance under FISA. *Id.* There was no evidence, however, that their communications had been targeted or that the Government would imminently target their communications. Nevertheless, the plaintiffs claimed that their injury arose from an increased risk that their communications could be monitored in the future.

The Court held that the alleged harm was entirely speculative and did not support standing since the future injury was not "certainly impending." *Id.* at 1148. The Court explained that the plaintiffs' arguments "rest[ed] on their highly speculative fear" that (1) the Government would decide to target non-U.S. persons with whom they communicate; (2) that in doing so, the Government would choose to invoke its authority under FISA rather than some other method of surveillance; (3) that the Article III judges who serve on the Foreign Intelligence Surveillance Court would conclude the surveillance comported with the Fourth Amendment; (4) that the Government would succeed in intercepting communications of plaintiffs' contacts; and (5) plaintiffs would be parties to the particular communications intercepted by the Government. *Id.*

This "highly attenuated chain of possibilities," the Court concluded, did not satisfy "the requirement that injury must be certainly impending." *Id.* The Court was also not willing "to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors," *id.* at 1150, and it rejected the Second Circuit's reasoning that standing could be based on "an objectively reasonable likelihood" that the plaintiffs' communications with their foreign contacts would be intercepted in the future, *id.* at 1147.

The majority of courts dealing with data-breach cases post-*Clapper* have held that absent allegations of actual identity theft or other fraud, the increased risk of such harm alone is insufficient to satisfy Article III standing. *See, e.g., Green v. eBay Inc.,* No. CIV.A.14–1688, 2015 WL 2066531, at *5 (E.D.La. May 4, 2015) (finding no standing where plaintiff's data was accessed during a security breach because there were no allegations that the information had been used or any indication that its use was imminent); *Storm v. Paytime, Inc.,* 90 F.Supp.3d 359, 366, No. 14–cv–1138, 2015 WL 1119724, at *6 (M.D.Pa. Mar. 13, 2015) (finding no standing where plaintiffs did not allege that they actually suffered any form of identity theft as a result of the defendant's data breach); *Peters v. St. Joseph Servs. Corp.,* 74 F.Supp.3d 847, 853–54, 2015 WL 589561, *4–*5 (S.D.Tex.2015) (finding no standing where plaintiff did not allege actual identity theft or fraud despite the possibility "that fraudulent use of her personal information could go undetected for long periods of time"); *Galaria,* 998 F.Supp.2d at 654 (finding no standing where plaintiffs alleged their personal information was stolen and disseminated but did not allege that their data had been misused); *In re SAIC,* 45 F.Supp.3d at 26 (finding no standing where plaintiffs allegations of potential identity theft, which had not yet occurred, were "entirely dependent on the actions of an unknown third party"); *Lewert v. P.F. Chang's China Bistro, Inc.,* No. 14–cv–4787, 2014 WL 7005097, at *3 (N.D.Ill. Dec. 10, 2014) (finding no standing where plaintiffs did not allege that identity theft had occurred but only that it "*may* happen in coming years"); *Remijas v. Neiman Marcus Grp., LLC,* No. 14c1735, 2014 WL 4627893, at *3 (N.D.Ill. Sept. 16, 2014) (finding no standing where plaintiffs' alleged injury was not "concrete" because it was based on "potential future fraudulent charges"); *Burton v. MAPCO Exp., Inc.,* 47 F.Supp.3d 1279, 1280–81 (N.D.Ala.2014) (finding no standing despite plaintiff's allegations of unauthorized charges on his debit card because plaintiff did not allege that he actually had to pay for the charges); *U.S. Hotel & Resort Mgmt., Inc. v. Onity, Inc.,* No. CIV.13–1499, 2014 WL 3748639, at *5 (D.Minn. July 30, 2014) (recognizing that "[i]n the 'lost data' context . . . a majority of the courts . . . hold that plaintiffs whose confidential data has been exposed, or possibly exposed by theft or a breach of an inadequate computer security system, but who have not yet had their identity stolen or their data otherwise actually abused, lack standing to sue the party who failed to protect their data"); *In re Barnes & Noble Pin Pad Litig.,* No. 12–cv–8617, 2013 WL 4759588, at *3 (N.D.Ill. Sept. 3, 2013) ("Merely alleging an increased risk of identity theft or fraud is insufficient to establish standing.").

Courts in the Ninth Circuit, however, have held the opposite.[1] *See In re Adobe*

1. Some courts outside the Ninth Circuit have also found standing in data breach cases

Sys., Inc. Privacy Litig., 66 F.Supp.3d 1197, 1214 (N.D.Cal.2014) (finding standing where hacker "spent several weeks" in Adobe's servers collecting customers' information despite no allegations that the plaintiffs' data had been misused); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.,* 996 F.Supp.2d 942, 962 (S.D.Cal.2014) (finding standing where the plaintiffs "alleged a 'credible threat' of impending harm" based on a data breach). These cases were decided in light of the Ninth Circuit's holding in *Krottner v. Starbucks Corp.,* 628 F.3d 1139 (9th Cir.2010).

In *Krottner,* employees of Starbucks sued the company when a laptop containing unencrypted names, addresses, and social security numbers of approximately 97,000 employees was stolen. 628 F.3d at 1140. Although some of the plaintiffs enrolled in credit monitoring services, they did not allege that any theft or other fraud actually occurred. *Id.* at 1142. Starbucks challenged the employees' standing since their allegations of harm were based solely on an "increased risk of future identity theft." *Id.* The court found the allegations sufficient to confer standing, holding that "[i]f a plaintiff faces 'a credible threat of harm' and that harm is 'both real and immediate, not conjectural or hypothetical,' the plaintiff has met the injury-in-fact requirement for standing under Article III." *Id.* at 1143.

While other courts have criticized this test for being too lax post-*Clapper, see Peters,* 74 F.Supp.3d at 855–56, 2015 WL 589561, at *6–*7 (recognizing the pre-*Clapper* split among the Third, Seventh, and Ninth Circuits on the issue of standing but finding that *Clapper* "[a]rguably ... resolved the circuit split" and claiming that the *Clapper* "holding compels the conclusion" that plaintiffs lack standing to the extent the claims "are premised on the heightened risk of future identity theft/fraud"); *Galaria,* 998 F.Supp.2d at 656 (finding that the reasoning in *Clapper* "seems to preclude the Ninth Circuit's even lower 'not merely speculative' standard for injury-in-fact" articulated in *Krottner*); *In re SAIC,* 45 F.Supp.3d at 28 (impliedly accusing *Krottner* of being "thinly reasoned" and stating that, post-*Clapper,* the " 'credible threat of harm' standard is clearly not supportable"), the *Adobe* and *Sony* courts found that *Clapper* did not overrule *Krottner* and that, in fact, *Clapper* and *Krottner* are quite compatible.

In *Sony,* the court found that "although the Supreme Court's word choice in *Clapper* differed from the Ninth Circuit's word choice in *Krottner,* stating that the harm must be 'certainly impending,' rather than 'real and immediate,' the Supreme Court's decision in *Clapper* did not set forth a new Article III framework, nor did the Supreme Court's decision overrule previous precedent requiring that the harm be 'real and immediate.' " 996 F.Supp.2d at 961.

Likewise, the *Adobe* court reasoned that "*Clapper* did not change the law governing Article III standing." 66 F.Supp.3d at 1213. "*Clapper* merely held that the Second Circuit had strayed from [the] well-established standing principles by accepting a too-speculative theory of future injury." *Id.* The court recognized the unique context in which *Clapper* was decided—a constitutional challenge to a national defense law—and concluded that *Krottner* and *Clapper* are not "clearly irreconcilable." *Id.* at 1214. The court determined that the "difference in wording [between

where the plaintiffs do not allege actual identity theft or fraud, but those cases are relatively few. *See Moyer v. Michaels Stores, Inc.,* No. 14C561, 2014 WL 3511500, at *6 (N.D.Ill. July 14, 2014) (concluding "that the elevated risk of identity theft stemming from the data breach at Michaels is sufficiently imminent to give Plaintiffs standing").

the two tests] is not substantial and that "*Krottner's* phrasing is closer to *Clapper's* 'certainly impending' language than it is to the Second Circuit's 'objectively reasonable likelihood' standard that the Supreme Court reversed in *Clapper.*" " *Id.*

[9] This Court agrees that *Clapper* does not necessarily overrule *Krottner.* The *Krottner* test is composed of two parts: (1) the plaintiff must face "a credible threat of harm," *and* (2) "that harm [must be] 'both real and immediate.'" 628 F.3d at 1143. Both parts of the test must be met before the future harm equates to an injury-in-fact. Thus, it is not enough that a plaintiff face a credible threat of harm if that harm is not real, i.e. concrete, and immediate, i.e. certainly impending. *Krottner,* therefore, may be interpreted to require the same immediacy of harm that the Supreme Court emphasized in *Clapper.*

Furthermore, the Supreme Court explained post-*Clapper* that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending' *or* there is a 'substantial risk' that the harm will occur." *Driehaus,* 134 S.Ct. at 2341 (emphasis added). So to the extent that the *Krottner* test is not as rigid as the standard articulated in *Clapper,* surely it embodies *Driehaus's* "substantial risk" language.[2] Accordingly, this Court finds itself bound by *Krottner. See In re Adobe,* 66 F.Supp.3d at 1214–15.

[10] However, just because *Krottner* is controlling does not consequently mean that its outcome dictates the Court's conclusion as to standing here, due to the unique posture of this case. Immediacy is a common theme found in cases that discuss standing based on an alleged future harm. *See Nelsen v. King Cnty.,* 895 F.2d 1248, 1254 (9th Cir.1990) (denying standing where plaintiffs failed to show "a credible threat of immediate future harm"). It is not enough that a credible threat may occur at some point in the future; rather, the threat must be impending. *See Defenders of Wildlife,* 504 U.S. at 564, 112 S.Ct. 2130 (holding that a general intent to observe an endangered species in the future did not satisfy the immediacy requirement). It therefore follows that even if a plaintiff faces a real threat, she has no standing until that threat is immediate. *See Whitmore v. Arkansas,* 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (stating that "[a]llegations of possible future injury do not satisfy the requirements of Article III").

[11] Similarly, a risk is surely not substantial unless the plaintiff can allege that the feared harm will likely be avoided only with judicial intervention. *See Monsanto Co.,* 561 U.S. at 152, 130 S.Ct. 2743 (finding that plaintiffs would have been subjected to a substantial risk of future harm were it not for the district court's "elimination of [the] likelihood"). But where a credible threat will come to pass only if an independent third party takes specific action that would culminate in harm to the plaintiff, the alleged injury is less likely to

2. *Clapper* recognized that future harm could create standing if the harm posed a "substantial risk." 133 S.Ct. at 1150 n. 5; *see also Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153–54, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010) (using this test to determine standing). In acknowledging this alternative articulation, though presumably not an alternative test, the Court stated that the impending harm does not need to be "literally certain." *Clapper,* 133 S.Ct. at 1150 n. 5 Instead, the Court emphasized that "plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm" and that plaintiffs "cannot rely on speculation about 'the unfettered choices made by independent actors not before the court.'" *Id.* (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 562, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

confer standing. *See Clapper,* 133 S.Ct. at 1150.

[12] Enter the facts of this case. Zappos's servers were breached in January 2012. Plaintiffs allege that the personal information of 24 million Zappos's customers was stolen. Of those 24 million customers, only twelve are before the Court seeking damages against Zappos. Of those twelve, only three determined that the increased threat of identity theft and fraud was sufficiently severe to purchase credit monitoring services. Of those three, not one alleges to have detected any irregularity whatsoever in regards to unauthorized purchases or other manifestations that their personal information has been misused. Yet Plaintiffs still claim that the threat they face is immediate, though there is no indication when or if that threat will materialize.

Given the stipulated stays and other delays in this case, the Court must decide whether the alleged threat of future harm is properly considered certainly impending three-and-a-half years after the breach occurred. Even if Plaintiffs' risk of identity theft and fraud was substantial and immediate in 2012, the passage of time without a single report from Plaintiffs that they in fact suffered the harm they fear must mean something. Determining what the lapsed time means, however, requires the Court to engage in speculation—precisely what the Supreme Court has counseled against. *Clapper,* 133 S.Ct. at 1149–50 (refusing standing based on speculation). It could signify that Plaintiffs are in the clear, meaning that the data obtained by the hacker was not useful in effectuating acts of theft or fraud. Or it could mean that the hacker is simply sitting on the information until the time is "right," which could be a few more years down the road. Or the lapsed time might mean a number of other scenarios. It is simply unclear.

If the Court assumes that the hacker or some other nefarious third-party remains in possession of Plaintiffs' personal information, then the threat may as yet be credible. In fact, Plaintiffs claim that cybercriminals "often hold onto stolen personal and financial information for several years before using and/or selling the information to other identity thieves," (Preira SAC ¶ 21; Stevens SAC ¶ 42), indicating that the alleged harm is not merely speculative despite the years that have passed without an occurrence of theft or fraud. But a harm that is "not merely speculative" does not constitute an injury-in-fact sufficient to confer standing. *See Galaria,* 998 F.Supp.2d at 656.

Indeed, there must be a point at which a future threat can no longer be considered certainly impending or immediate, despite its still being credible; otherwise, an "objectively reasonable likelihood" of harm would be enough to establish standing. *See id.* (citing *Clapper,* 133 S.Ct. at 1147). After all, the plaintiffs in *Clapper* engaged in the exact type of communication that could be monitored under FISA, making their allegations of future harm quite credible even if not certainly impending. *Clapper,* 133 S.Ct. at 1148–50. The more time that passes without the alleged future harm actually occurring undermines any argument that the threat of that harm is immediate, impending, or otherwise substantial. *See Storm,* 90 F.Supp.3d at 366, 2015 WL 1119724, at *6 ("Indeed, putting aside the legal standard for imminence, a layperson with a common sense notion of 'imminent' would find this lapse of time, without any identity theft, to undermine the notion that identity theft would happen in the near future.").

The Court therefore finds that the increased threat of identity theft and fraud stemming from the Zappos's security breach does not constitute an injury-in-fact sufficient to confer standing. The years that have passed without Plaintiffs making a single allegation of theft or fraud demonstrate that the risk is not immediate. *Krottner,* 628 F.3d at 1143. The possibility that the alleged harm could transpire in the as-of-yet undetermined future relegates Plaintiffs' injuries to the realm of speculation. *See Green,* 2015 WL 2066531, at *4 (finding the threat of identity theft and fraud not certainly impending because, rather than alleging actual theft or fraud, plaintiff claimed that he had to "be vigilant *for many years* in checking for fraud" because criminals "may hold the information for later use").

The degree of Plaintiffs' speculation is heightened further by the fact that the future harm is based entirely on the decisions or capabilities of an independent, and unidentified, actor. *Clapper,* 133 S.Ct. at 1150 (refusing to endorse standing that rests on speculation about the decisions of independent actors). Should the person or persons in possession of Plaintiffs' information choose not to misuse the data, then the harm Plaintiffs fear will never occur. Likewise, if the person or persons in possession of Plaintiffs' information are unable to use the data to wreak the havoc assumedly intended, then Plaintiffs' alleged damages would also not coalesce. *See Peters,* 74 F.Supp.3d at 854, 2015 WL 589561, at *5 (acknowledging that the risk of future harm to the victim of a data security breach is, "no doubt, indefinite," but finding that the plaintiff's allegations of future harm were based solely on conjecture). Plaintiffs' damages at this point rely almost entirely on conjecture. *See Krottner,* 628 F.3d at 1143 (holding that standing cannot be based on conjecture but must be real and immediate).

The Court also notes the factual differences between the instant case and the *Adobe* and *Sony* cases. In *Adobe,* the plaintiffs alleged that the hackers had spent several weeks targeting Adobe's systems and that the hackers used Adobe's own system to decrypt customer credit cards. 66 F.Supp.3d at 1214–15. Not only were entire credit card numbers obtained, but some of the stolen data began to surface on the Internet within a year of the breach. *Id.* The hackers had even utilized the information to discover vulnerabilities in Adobe's products. *Id.* It was therefore clear that the threat faced by the *Adobe* plaintiffs was certainly impending. In *Sony,* the named plaintiffs were deprived of services as a result of the security breach for which they had paid money, and at least some of the plaintiffs had experienced unauthorized charges to their credit cards and one plaintiff was forced to close two bank accounts. 996 F.Supp.2d at 956–57.

Unlike the plaintiffs in *Adobe* whose entire credit card numbers were stolen as a result of the security breach, Plaintiffs here allege that only their credit card "tails," the last four digits of a credit card, were accessed during Zappos's breach. Also unlike the plaintiffs in *Adobe* whose information began to surface on the Internet shortly after the breach, Plaintiffs here make no allegations that their data has appeared in any place where others might obtain and misuse it. Unlike the plaintiffs in *Sony* who experienced an actual loss, albeit temporarily, of the services for which they had paid Sony to provide, the usefulness of the goods Plaintiffs purchased from Zappos was in no way impacted by the security breach in this case. And unlike some of the plaintiffs in *Sony* who dealt with actual unauthorized charges on credit cards, Plaintiffs here do not allege one instance of financial fraud.

But perhaps the most distinguishing element between this case and *Adobe* and *Sony* is the amount of time from when the breach occurred to when the respective motions to dismiss were ruled upon. In *Adobe,* the data security breach occurred in July and August of 2013. 66 F.Supp.3d at 1206–08. The cases against Adobe were filed between November 2013 and January 2014. *Id.* The Court ruled on the motion to dismiss on September 4, 2014, just over a year from when the breach first occurred. So recently after the breach, and given that the plaintiffs' information had already begun showing up on the Internet, the court reached the reasonable conclusion that the threat of additional harm was imminent. Similarly, the court in *Sony* ruled on the issue of Article III standing on January 21, 2014, approximately two-and-a-half years after the breach in that case had occurred. 996 F.Supp.2d at 955. Given the actual financial damages allegedly experienced by the named plaintiffs, the threat of future additional harm remained imminent at that time. In this case, however, there are no allegations of actual financial harm or that Plaintiffs' personal information has been disseminated over the Internet.[3] Instead, three-and-a-half years after Zappos's security breach Plaintiffs have not sought leave to amend their Complaints to include any facts relating to instances of actual identity theft or financial fraud.

Finally, even if Plaintiffs suffer identity theft or fraud at some point in the future, there may be a genuine issue regarding whether the Zappos's security breach is the reason for the damages then incurred. *Peters,* 74 F.Supp.3d at 854, 2015 WL 589561, at *5 ("It may even be impossible to determine whether the misused information was obtained from exposure caused by the Data Breach or from some other source."). While this is obviously a question for another day, the Court notes that Plaintiffs would of course have to show that any damage occurring in the future is fairly traceable to the Zappos's breach. *Monsanto Co.,* 561 U.S. at 149, 130 S.Ct. 2743. Since today so much of our personal information is stored on servers just like the ones that were hacked in this case, it is not unrealistic to wonder whether Plaintiffs' hypothetical future harm could be traced to Zappos's breach. An inference could of course be drawn that the future harm arose from Zappos's breach, but it would be Plaintiffs' burden to establish that element of standing. *Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. 2130. For all these reasons, the Court finds that Plaintiffs have not alleged a threat of future harm sufficiently imminent to confer standing under *Clapper* and *Krottner.*

3. Costs to mitigate

[13] Plaintiffs Hasner, Preira, and Habashy next argue that even if the increased threat of future harm does not constitute an injury-in-fact, their purchasing of credit monitoring services does. However, in *Clapper* the Supreme Court rejected a similar argument raised by the plaintiffs there that they had standing because of expenditures made to protect the confidentiality of their communications. 133 S.Ct. at 1151. The Court explained that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* "If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III

3. Plaintiffs Hasner and Noble do allege that after the breach, their AOL email accounts were accessed by a third party who sent unauthorized advertisements to others from the accounts. (Preira SAC ¶¶ 11, 16). The AOL accounts used the same passwords as Hasner's and Noble's Zappos accounts. Besides the advertisements, however, no additional misuse of the accounts or actual damages is alleged. Moreover, Hasner and Noble also took quick remedial measures by changing the passwords on their AOL accounts. (*Id.*).

standing simply by making an expenditure based on a nonparanoid fear." *Id.*

Courts have generally interpreted this holding to mean that "in order for costs incurred in an effort to mitigate the risk of future harm to constitute injury-in-fact, the future harm being mitigated must itself be imminent." *In re Adobe,* 66 F.Supp.3d at 1217; *see also Storm,* 90 F.Supp.3d at 367, 2015 WL 1119724, at *7 (finding no compensable injury when plaintiff incurred credit monitoring costs); *In re SAIC,* 45 F.Supp.3d at 26 ("The cost of credit monitoring and other preventative measures, therefore, cannot create standing."). The Court's finding here that the threat of future theft or fraud is not sufficiently imminent to confer standing compels the conclusion that incurring costs to mitigate that threat cannot serve as the basis for this action. *See Clapper,* 133 S.Ct. at 1151 ("Thus, allowing respondents to bring this action based on costs they incurred in response to a speculative threat would be tantamount to accepting a repackaged version of respondents' first failed theory of standing.").

[14] The Court realizes that this is a frustrating result where Plaintiffs' fears of identity theft and fraud are rational, and it recognizes that purchasing monitoring services is a responsible response to a data breach. Nevertheless, costs incurred to prevent future harm is not enough to confer standing, *Clapper,* 133 S.Ct. at 1150–51, "even when such efforts are sensible," *In re SAIC,* 45 F.Supp.3d at 26. "There is, after all, nothing unreasonable about monitoring your credit after a data breach," but even when fears of future harm are not unfounded, plaintiffs simply "cannot create standing by 'inflicting harm on themselves' to ward off an otherwise speculative injury." *Id.* (quoting *Clapper,* 133 S.Ct. at 1151).[4]

As one court reasoned:

> Hackers are constantly seeking to gain access to the data banks of companies around the world. Sometimes, they are successful. Other times not. Despite many companies' best efforts and tremendous expense to secure and protect their data systems, an industrious hacker every so often may find a way to access their data. Millions of people, out of reasonable fear and prudence, may decide to incur credit monitoring costs and take other preventative steps, which the hacked companies often freely provide. However, for a court to require companies to pay damages to thousands [and in this case millions] of customers, when there is yet to be a single case of identity theft proven, strikes us as overzealous and unduly burdensome to business. There is simply no compensable injury yet, and courts cannot be in the business of prognosticating whether a particular hacker was sophisticated or malicious enough to both be able to successfully read and manipulate the data and engage in identity theft.

Storm, 90 F.Supp.3d at 367, 2015 WL 1119724, at *7. However, once a third party misuses a person's personal information, there is clearly an injury that can be compensated with money damages. *Id.* "In that situation, a plaintiff would be free to

4. The Court finds this to be true notwithstanding Zappos's questionable customer service in response to the data breach. Plaintiffs allege that once Zappos notified customers of the breach it "shut down its customer service phone lines for a week." (Preira SAC ¶ 4). Also perplexing, and undoubtedly offensive to its customers, is Zappos's apparent decision to not offer free credit monitoring services to its customers, which is a common gesture in these types of cases. Nevertheless, these deficiencies in Zappos's customer care do not establish standing where Plaintiffs fail to allege actual damages or an immediate threat of future harm.

return to court and would have standing to recover her losses." *Id.*

To the extent that Plaintiffs allege that there are potential class members who have suffered identity theft or other fraud as a result of the Zappos's security breach, (*see* Preira SAC ¶¶ 5, 35), the Court agrees that those individuals would have standing. Yet Plaintiffs would not be the proper representatives of such a class, as they do not allege that they have suffered these same damages. *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) ("We have repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members."). Moreover, even if this case were not dismissed for lack of standing, the Court would not certify a class as broadly defined as Plaintiffs propose specifically because a majority of the putative class cannot claim any measurable damages.

[15, 16] Therefore, based on the forgoing reasons, the Court is granting Zappos's Motion to Dismiss.[5] But the Court is also granting Plaintiffs leave to amend their Complaints for a third time in the event an occurrence of actual misuse of the stolen data has transpired between the dates the Preira and Stevens SACs were filed and now. And although the Court finds no standing based on the facts as currently pleaded, the case will be dismissed without prejudice.

CONCLUSION

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (ECF No. 217) is GRANTED without prejudice. Plaintiffs are granted leave to amend their Complaints to allege instances of actual identity theft or fraud.

IT IS FURTHER ORDERED that Defendant's Motion to Strike (ECF No. 219) is DENIED as moot.

IT IS FURTHER ORDERED that Defendant's Motion for Leave (ECF No. 218) is GRANTED.

IT IS SO ORDERED.

5. Plaintiffs claim they have standing on the alternative theories that the breach caused them a loss of privacy and that it resulted in a diminished value of the services provided by Zappos. (Resp. 5, ECF No. 231). Neither of these arguments is persuasive. Even if Plaintiffs adequately allege a loss of privacy, they have failed to show how that loss amounts to a concrete and particularized injury. *See O'Shea v. Littleton,* 414 U.S. 488, 493, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) ("Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as a result of [the defendant's] conduct."). Plaintiffs do not claim that they have suffered any damages due to a loss of privacy, and so the Court finds that this theory is insufficient to establish standing. Furthermore, Plaintiffs' claims that they are harmed by an alleged decrease in the value of Zappos's services are unavailing. Plaintiffs do not explain how the data breach impacted the value of the goods they purchased from Zappos. Nor do Plaintiffs allege facts showing how the price they paid for such goods incorporated some particular sum that was understood by both parties to be allocated towards the protection of customer data. The Court finds that this theory of standing also fails. To the extent Plaintiffs claim to have standing arising from any other perceived harm, (*see* Resp. 5), the Court finds that each proposed theory fails because not one of them demonstrates that Plaintiffs have actually been damaged in a concrete and particularized way. *See O'Shea,* 414 U.S. at 493, 94 S.Ct. 669.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY MERCHANDISE INC., Plaintiff, -against- BALENCIAGA AMERICA, INC. Defendant.	Civil Action No.:_______________ **COMPLAINT**

Plaintiff City Merchandise Inc. ("Plaintiff"), for its complaint against defendant Balenciaga America, Inc. ("Defendant"), states and alleges the following:

NATURE OF THE ACTION AND RELIEF SOUGHT

1. This is an action at law and in equity for copyright infringement under the Copyright Act of 1976 (the "Copyright Act"), 17 U.S.C. §§ 101 *et seq*.

2. This action arises by reason of Defendant's unauthorized creation, display, distribution and sale of merchandise which depicts designs that are strikingly and substantially similar to designs exclusively owned by Plaintiff.

3. For example, set forth below on the left is are images of a tote bag and a purse bearing an original design created by Plaintiff and offered to the public, and to the immediate right of Plaintiff's items are corresponding images of a tote bag and a purse offered to the public by Defendant.

Plaintiff's Tote Bag

Defendant's Tote Bag

Plaintiff's Purse

Defendant's Purse

4. Clearly, the "total concept and feel" between the designs on the Plaintiff's items and Defendant's items are identical. The overall effect of Defendant's knock-off design is not only confusingly similar to Plaintiff's authentic design, but it is also virtually indistinguishable. Indeed, the design on Defendant's infringing items mimics every key element of Plaintiff's design.

5. Defendant has manufactured its versions of the tote bag and purse shown above, along with several other products that bear copies of Plaintiff's original design, without the permission, authorization, or approval of Plaintiff. For these and other reasons, Plaintiff seeks injunctive relief, recovery of Plaintiff's actual damages and Defendant's profits and/or statutory damages, attorneys' fees and costs and additional relief set forth below.

THE PARTIES

6. Plaintiff City Merchandise Inc. ("Plaintiff") is a corporation organized and existing under the laws of the State of New York, with a principal place of business located at 228 40th Street, Brooklyn, New York 11232. Plaintiff possesses over 30 years of experience in the designing, manufacturing, distribution and sale of high quality, affordable souvenirs and apparel throughout the United States and the Caribbean.

7. Upon information and belief, defendant Balenciaga America, Inc. ("Defendant") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 50 Hartz Way, Secaucus, New Jersey 07094, and a corporate office located at 65 Bleecker Street, Third Floor, New York, New York 10012. Upon information and belief, Defendant is a company with upscale fashion boutiques located in Paris, France and New York, New York, and is, in part, engaged in the business of manufacturing, distributing, advertising and selling throughout the world, including within this District, high-end luxury handbags, pocketbooks, clutch bags, tote bags, brief cases, wallets, purses, apparel, jewelry, home products, fragrances, and related items. Upon information and belief, Defendant is a corporate affiliate or subsidiary of Balenciaga, S.A., which is an entity organized and existing

under the laws of France, with its principal place of business in Paris, France, and Gucci Group, NV, which is an entity organized and existing under the laws of Netherlands, with a principal place of business located in Amsterdam, Netherlands.

JURISDICTION AND VENUE

8. This Court has subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338(a) because the claims herein arise under the Copyright Act. This Court has supplemental jurisdiction over Plaintiff's related state and common law claims pursuant to 28 U.S.C. §1367.

9. This Court has personal jurisdiction over Defendant because it transacts business within this State and has caused and continues to cause tortious injury to Plaintiff within this State, and because a substantial part of the events giving rise to the claims herein occurred in this State.

10. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and 1400(a) because Defendant does substantial business in this District and a substantial part of the events giving rise to the claims herein occurred in this District.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

A. Plaintiff's Striking and Distinctive Designs

11. Plaintiff is one of the leading manufacturers, designers, suppliers and distributors of affordable, high quality souvenirs and apparel in the United States and Caribbean. It has been in business since 1986, and services over 2,000 accounts in over 100 cities. Established in New York City, Plaintiff frequently specializes in the creation of products bearing designs that appeal

to tourists who visit the Big Apple, many of which feature its iconic skyline. To maintain its competitive edge in the market place, Plaintiff devotes a substantial amount of time, energy and funds towards the frequent creation of unique designs for products that will be commercially successful.

12. In or around November 2014, Plaintiff created two closely related versions of a pictorial design that features the New York City skyline viewed from an up-close, direct vantage point (collectively, the "Design"). The Design encompasses a collage of portions of recognized NYC landmarks prominently featured in the forefront with several other buildings interspersed therein. The Design also features an airbrushed hot pink sky, accented with clouds. In addition, large, purple, fanciful cursive letters, unevenly bordered in white, float above the skyline. The letters opulently glisten and fittingly read, "New York City".

13. Among other things, the Design includes Plaintiff's unique and original interpretations and/or use of the New York City skyline, employing original artwork, whimsical and appealing layouts and arrangements, compilations and/or collages, skyline perspectives, depicted objects and environmental elements, color schemes and shading, highlighting and bordering, shapes and sizes.

14. The Design is original work of authorship created by Plaintiff, embodying subject matter protected by copyright. Plaintiff is the sole and exclusive owner of all right, title, and interest in and to the copyright pertaining to the Design.

15. In or about late 2014/early 2015, Plaintiff created and began publically selling high quality, affordable souvenirs bearing the Design, including tote bags (which retailed for

approximately $19.99), coin purses (which retailed for approximately $5.99), and cosmetic bags (which retailed for approximately $9.99 (collectively, the "NYC Skyline Products").

16. Plaintiff's NYC Skyline Products were sold throughout the State of New York, through a wide variety of channels, including, but not limited to, gift shops and airport souvenir stores.

17. Plaintiff has applied for and obtained from the United States Copyright Office a copyright registration for the Design bearing registration numbers VA 2-103-817 ("New York Pink Collage With Purple Letters"). The effective date of registration for the copyright covering the Design is February 8, 2018. A copy of the Certificate of Registration, together with the Design for which the registration has been obtained, is annexed hereto as **Exhibit A.**

18. The Design represents a valuable asset and goodwill of Plaintiff.

B. Defendant's Infringing Activities

19. Upon information and belief, well after Plaintiff obtained exclusive rights in the Design and commenced publicly selling the NYC Skyline Products, Defendant began manufacturing, importing, distributing, advertising, marketing, offering for sale, and selling several products bearing a design that is a flagrant knock-off Plaintiff's Design. Upon information and belief, such products include shoulder bags, tote bags, wallets, clutch bags, pouches, hoodies, skirts and scarves (collectively, the "Infringing Products"). Upon information and belief, the price range for the Infringing Products varies from approximately $500.00 to approximately $2,300.00. Copies of the Infringing Products that Plaintiff has been able to identify to date are included on **Exhibit B** annexed hereto.

20. Defendant has boasted that it is one of France's most prestigious fashion labels and is allegedly world-renown for innovative, trendsetting couture clothing and fashion accessories, and that its "designs" are among the most sought-after fashions in the industry.

21. Upon information and belief, Defendant's advertising, promotional, and marketing efforts have resulted in widespread favorable public acceptance and recognition of merchandise, including Defendant's Infringing Products. The Infringing Products are sold throughout the United States (and likely abroad), including in New York and this District, through a variety of channels, including, but not limited to, upscale retail stores, such as Barney's, Bergdorf Goodman, Neiman Marcus, Saks Fifth Avenue and Balenciaga's own high-end luxury boutiques in Manhattan and Paris. Upon information and belief, the Infringing Products are also sold on multiple websites, including, but not limited to, those of the aforementioned retail stores listed above, as well as e-commerce sites such as NET-A-PORTER and FARFETCH.

22. A visual comparison of the designs featured on the Infringing Products (*see, e.g.,* Exhibit B) to Plaintiff's Designs which are featured on its NYC Skyline Products (*see, e.g.,* Exhibit A) reveal that the Infringing Products bear designs that are copies of Plaintiff's Design and are virtually indistinguishable.

23. Upon information and belief, Defendant's creative director, Demna Gvasalia, participated in and directed the design of the Infringing Products.

24. The fact that Defendant has knocked-off Plaintiff's Design has already been highlighted to the public by at least one respected fashion critic. The editor-in-chief of

Fashionista.com, one of the most influential voices covering fashion news with a monthly readership of over 2.5 million, humorously chided Mr. Gvasalia for copying the Design on Plaintiff tote bag (which could be purchased by a tourist at a Hudson News gift shop in JFK Airport for approximately $19.99), whereas Defenant's tote bag retails for nearly $2,000.00. She posted the following tweet on Twitter:

25. Significantly, Defendant has been repeatedly publically scorned in fashion magazines and by online fashion observers for its willingness to copy the work of others. For

example, after Defendant introduced a $2,145.00 extra-large shopper blue tote bag that was virtually identical to IKEA's classic blue tote bag that retails for 99 cents, the British daily online newspaper *Daily Mail* published an article demanding to know if it was "High fashion, or a high priced knock-off? A copy of the article is annexed hereto as **Exhibit C**.

26. Similarly, in reporting that Defendant had been accused by celebrity rapper and music producer Swizz Beatz (husband of Alicia Keys) of infringing record label Ruff Ryder's well-recognized logo by using it on one of its shirts, the *Hollywood Reporter* prefaced its article by stating that "Balenciaga's Demna Gvasalia is no stranger to *um*, borrowing memorable logos and adding his own Balenciaga-branded spin." A copy of the article is annexed hereto as **Exhibit D**.

27. Remarkably, in an article appearing in *People* magazine on December 20, 2017, Mr. Gvasalia candidly conceded that "[e]very garment I do is based on a garment that already exists; I don't invent anything new."

28. Based upon its dubious reputation in the fashion industry for appropriating the work of others, as well as public statements attributed to Mr. Gvasalia, it should not be surprising that Defendant has copied Plaintiff's Design in connection with the Infringing Products and is passing it off as its own

FIRST CLAIM FOR RELIEF
(Copyright Infringement)

29. The allegations of each of the foregoing paragraphs are repleaded and incorporated by reference as though fully restated herein.

30. The Design is an original work of authorship, embodying subject matter protected by copyright. Plaintiff is the sole and exclusive owner of all right, title, and interest in and to the copyright.

31. Plaintiff has applied for and obtained from the United States Copyright Office a copyright registration for the Design bearing registration number VA 2-103-817, with an effective date of February 9, 2018. The copyright registration is annexed hereto as **Exhibit A.**

32. Defendant had access to the Design by virtue of the fact that the NYC Skyline Souvenirs have been available for sale to the public through multiple channels, including airport souvenir stores and gift shops in New York City.

33. In or about February 2018, it came to Plaintiff's attention that Defendant was engaged in the manufacturing, advertising, marketing, distribution and sale of the Infringing Products which bear designs that are reproductions, counterfeits, knock-offs and/or colorable imitations that are strikingly and substantially similar to, and nearly indistinguishable from, Plaintiff's Design which is depicted on the NYC Skyline Souvenirs.

34. Annexed hereto as **Exhibit B** are images of Defendant's Infringing Products.

35. Defendant has performed each of the acts complained of in the preceding paragraphs without the permission, consent or authority of Plaintiff, and has therefore violated Plaintiff's copyright in the Design.

36. Defendant has committed and is continuing to commit acts of copyright infringement against Plaintiff. Further, Defendant's acts are willful, intentional and purposeful, and committed with prior notice and/or knowledge of Plaintiff's copyright. At a minimum,

Defendant was willfully blind and acted in reckless disregard of Plaintiff's copyright.

37. As a result of such activities, Defendant is liable to Plaintiff for willful copyright infringement under 17 U.S.C. § 501.

38. Not only has Defendant damaged Plaintiff, but it has also been unjustly enriched, and will be unjustly enriched, by reason of its copyright infringement, in that Defendant has achieved or will achieve sales and profits, and the opportunity to earn future sales and profits, as a direct and proximate result of its unlawful conduct described herein. The total amount by which Defendant has been, or will be, unjustly enriched will be proved at trial.

39. As a direct and proximate result of Defendant's infringement of Plaintiff's copyright and exclusive rights under the copyright laws, Plaintiff is entitled to the maximum amount of statutory damages pursuant to 17 U.S.C. § 504(c), and such statutory damages should be enhanced in accordance with 17 U.S.C. § 504(c)(2) because of Defendant's willful copyright infringement. Alternatively, at Plaintiff's election, pursuant to 17 U.S.C. § 504(b), Plaintiff shall be entitled to his actual damages, plus Defendants' profits from infringement, as will be proven at trial.

40. Pursuant to Section 502 of the Copyright Act, 17 U.S.C. § 502, Plaintiff is entitled to injunctive relief to prevent Defendant from infringing Plaintiff's copyrighted Design. Plaintiff has no adequate remedy at law. Indeed, Defendant's unlawful acts have also caused and will continue to cause irreparable and inherently unquantifiable injury and harm to Plaintiff's business and reputation unless such activity is enjoined. As long as Defendant persists in using and selling the Infringing Products, many consumers are likely to conclude that it is Plaintiff, and

not Defendant, who engaged in illegal copyright infringement, especially in light of the disparity in pricing between the NYC Skyline Souvenirs and the Infringing Products.

41. Pursuant to Section 503 of the Copyright Act, 17 U.S.C. § 503, Plaintiff is entitled to impoundment and destruction of all infringing products, including the Infringing Products.

42. Pursuant to Section 505 of the Copyright Act, 17 U.S.C. §505, Plaintiff is entitled to an award of its costs and reasonable attorney's fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully demands judgment as follows:

A. That Defendant, its agents, servants, employees, officers, directors, affiliates, subsidiaries, attorneys, successors and assigns and all those in active concert with Defendant, be enjoined pendente lite and permanently from:

(i) directly or indirectly infringing Plaintiff's copyright annexed hereto as **Exhibit A**;

(ii) manufacturing, reproducing, displaying, promoting, advertising, importing, exporting, distributing, selling, offering for sale or holding for sale any items which infringe Plaintiff's rights in the Design (including, without limitation, the Infringing Products identified on **Exhibit B** annexed hereto);

(iii) representing that any article of the enjoined merchandise manufactured, reproduced, displayed, promoted, advertised, imported, exported, distributed, sold, or held for sale by Defendant is sponsored, approved or authorized by Plaintiff; and

(iv) aiding, abetting, encouraging or inducing another to do any of the acts herein enjoined.

B. That Plaintiff have and recover from Defendant such actual damages as Plaintiff may prove at trial and that Defendant accounts to Plaintiff for all unauthorized sales of Defendant's products that infringe the Design, including the Infringing Products, and all profits derived therefrom; or, in the alternative, with regard to the acts of copyright infringement, Defendant pay to Plaintiff statutory damages under the Copyright Act, and that the award be increased due to the willful nature of the infringement.

C. That Defendant be required to pay Plaintiff exemplary and punitive damages to deter Defendant from any further or willful infringement, as the Court finds appropriate.

D. That Defendant be required to pay to Plaintiff the costs of this action, and reasonable attorneys' fees to be allowed by the Court.

E. That Defendant, and those in concert or participation with them, be required to deliver up to Plaintiff within five (5) days of entry of judgment, or at such earlier time as the Court may order, all merchandise and material in its direct or indirect possession or under its direct or indirect control which is subject to the injunctive order of this Court, including, without limitation, all products, catalogs, brochures, drawings, designs, promotional materials, plates, screens, matrices, film positives and negatives, and any other materials for making the same, for the purpose of destruction or other disposition as Plaintiff may elect.

F. That Defendant be required to withdraw from its customers, retailers and all others all of the Infringing Products, including offering reimbursement for same, and delivering up the same to Plaintiff for destruction or other disposition as Plaintiff may elect.

G. That Defendant be required to file with the court and serve Plaintiff's counsel within thirty (30) days after entry of judgment a report in writing under oath, setting forth in detail the manner and form in which it has complied with the above.

H. That Plaintiff have such other and further relief the Court deems just and proper.

JURY DEMAND

Plaintiff City Merchandise Inc. hereby demands a trial by jury in this action.

TOPTANI LAW PLLC

By: *Edward Toptani*
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Suite 1410
New York, New York 100
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Attorneys for Plaintiff

New York, New York
July 26, 2018

Title: Signs of the times at Glasgow airport

Pages: 48 - 51


Signs of the times at Glasgow airport

Author: Gillian Naylor

Text: Signs of the times at Glasgow airport
by Gillian Naylor
The introduction of a comprehensive sign system for the new airport at Glasgow has led to the design of a special house style - the first of its kind in Britain.
Glaspow Airport, designed by Sir Basil Spence, Glover & Ferguson as a replacement for Renfrew, was opened last May. Since then more than 700,000 passengers have used it, most of them commuters, some of them holiday makers, for at the moment about 85 per cent of its traffic is domestic. However, the Ministry of Aviation, who provided the initial brief (Glasgow Corporation took over responsibility during the course of the building programme), specified that the airport should be capable of expansion, so that it could, if the volume of air traffic continues to increase, double its size and handling capacity without sacrificing its present character.
Kinneir Associates, who were commissioned to work on the signposting for the airport, were therefore asked to produce a flexible system, one that could be easily expanded and adapted to meet changing conditions and needs. They were brought in two years ago when the plans were at drawing board stage, and were briefed by the architects, who drew up a schedule of signs, and indicated their probable location. The original brief was of course modified during the course of meetings involving the designers, architects, and the two clients -the ministry, and Glasgow Corporation.

Costs and quantities
In all, some 300 signs were produced; as well as the directional and 'location' signs within the building, the approaches to the airport are well signposted (so well, in fact, that several passengers to Prestwick have found their way there!). So far the total cost

of producing the signs is in the region of £11,000, £6,000 of which has been spent on a special sign which stands on a roundabout at the approach to the airport, 6, and on the roof sign. These costs, however, represent only a small fraction of the total bill (£2 million for the airport building, and £4.5 million for the whole project).
The majority of the signs within the airport are ceiling suspended; they are not internally illuminated, and will be easy to resite if and when the need arises. They are made of sheets of Perspex laminated together; the colour is sprayed on, with Scotchcal lettering acting like a transfer (it is pasted on before the spraying process, and then stripped off). The lettering is white, and the letterforms, designed by Kinneir Associates, are the same as those used for British Rail (DESIGN 171/76-77). The directional signs are colour coded blue, red and green, the colours relating to the departure piers (at the moment there are two, but a third will be added as air traffic increases). All the other signs have white lettering against a dark blue background. Very few symbols are used, and translations are given only at the check-in desks, for few overseas visitors use the airport.

Directing passengers and planes
The designers' immediate task, therefore, was relatively simple, for at the present stage in its development this is an uncomplicated building. Passengers entering the airport are referred, by visual means, to a flight indicator board, z, above the check-in desks. This gives detailed information about departures times, flight numbers and departure gates, etc - as well as basic information about arrivals. Having checked in, the passengers then go up a short flight of stairs to the main concourse, where a larger indicator board repeats details of flights, giving fuller information about arrivals. These electronic indicator boards, made by Solari, an Italian firm, are an integral part of the signposting system, and Glasgow is the first airport in this country to use them. Here, clearly laid out, (Kinneir Associates advised on the layout and choice of typeface), are all the details the passenger needs to know about his flight, repeating the verbal information given at the check-in desks.
Ceiling suspended signs in the vicinity of the Solari board then direct the passenger to the relevant departure pier, where each flight has its own waiting room with a further check-in desk, so that passengers who have got themselves so far by visual directions can verify that they are in the right place. Similarly, passengers from incoming flights are directed to the arrivals hall at ground floor level to collect their baggage, and then out again to the coaches or the car park. (The planes, too, are equally independent, for the airport operates a self-marshalling system - the pilots taxi-ing to a pre-arranged bay, clearly numbered on the piers,'.) The aim was to keep the airport quiet and relaxed, and to cut down the public address system which, the management believes, can be confusing and irritating, especially at peak hours.

Making sure that signs are seen
But although the signs are large and bold, and their legibility impeccable, a few have been incorrectly sited. For example, the

(caption)

1 A good letterform must enable a message to be clearly conveyed, and the well sited bay number, above, does this with a minimum of fuss. I serves as a marshalling point for incoming aircraft..
arshalling point for incoming aircraft..

2 Clarity is lost, however, through the poor siting of the 'Enquiries' board, and its upward pointing arrow. Does it, or does it not, refer to the
Solari indicator board below ?

management found that some of the passengers failed to notice the large signs hanging over the main staircase; the 'passengers only' signs above the gates to the piers, 5 also ignored and, in the main entrance, most people went to the check-in desks for enquiries rather than looking up at the Solari board. All this suggests that people tend to look ahead rather than up when they are in unfamiliar surroundings, but there is no research available to confirm such a generalisation, and most designers and architects working on the siting of signs have to proceed more or less on a trial and error basis. In this case, the obvious care that went into the siting of the signs, and the simple layout of the building, reaffirms the need for research. Designers will no doubt always have to work in a pragmatic way, but there would be less chance of error if some basic patterns of 'visual behaviour' could be established.
Kinneir Associates are now re-siting some of the signs. Those above the staircase will be lowered, and the 'passengers only' message above the piers will be repeated on the doors. Signs are also being designed for the staff quarters, and for various 'spot' locations such as fire hydrants, dustbins, etc. which were not included in the original brief.
Unexpected clutter At the moment, the airport remains more or less as the architects and designers planned it, with the minimum of visual clutter. This means that the few foreign elements that have crept in tend to stick out like sore thumbs. For example, handwritten notices forbidding entry, warning children and banishing dogs (problems unforeseen when the airport was planned), were sellotaped to some of the doors pending the arrival of new signs. And although the handwritten signs have now disappeared, others which do not conform to the house style have taken their place. Again, some of the airlines are cluttering the check-in area with sales material and ugly seating plans, and surely the 'Rent-a-car' billboards in the arrivals hall slipped in without the architects' approval ?
But, in spite of this, Glasgow remains a remarkably tidy airport. It is, in fact, the first in this country to have its own house style, also designed by Kinneir Associates. R. A. Read, the airport manager, decided to take this step when he inherited some ground equipment from the Ministry of Aviation. Kinneir Assoiates designed a symbol, and a livery for the airport's vehicles, forklift trucks and flight ladders, etc. The symbol, reminiscent of the St Andrew's Cross, with arrows pointing in and out, appears on all the equipment, on the roundabout sign, 6 and on the airport flag. The house colours are blue and yellow (the vans have yellow striped tops so that they are clearly visible from the air,3). The designers, who are well satisfied with the way the house style has been applied, supplied working drawings of every vehicle.
Eventually, the house style will be extended to include the stationery, menu cards and tableware, etc. Staff badges have already been designed. (Uniforms were included in the house style; these were, according to Kinneir Associates, the most difficult part of

the brief, for they had to call in outside advice, and the result was something of a fiasco. The final compromise solution, while not outstanding, is neat and unobtrusive.)
As a result of the work at Glasgow, Kinneir Associates is now producing signs for Belfast Airport. They have also been appointed design consultants to the British Airports Authority, and in this capacity are working on a new house style for the authority and on new signing systems for Gatwick, Heathrow, Stansted and Prestwick.

(caption)

3 and 4 The house style in use. In a, the yellow stripes (yellow and blue are the house colours) make the vans clearly visible, even from the air, and, 4, a gangway is enlivened by the symbol.
5 Though the signs themselves are impeccable some are poorly sited, such as the 'passengers only' sign, just visible on the left of this illustration, which tends to be ignored.
6 The special sign which stands on a roundabout at the approach to the airport. Its boldness and clarity are impressive, and faithfully reflect the character of the building which follows.

United States of America

United States Patent and Trademark Office

Reg. No. 5,387,983

Registered Jan. 23, 2018

Int. Cl.: 25

Trademark

Principal Register

Off-White LLC (ILLINOIS LIMITED LIABILITY COMPANY)
C/o Bellizio + Igel Pllc
305 Madison Avenue, 40th Floor
New York, NEW YORK 10165

CLASS 25: Apparel for men and women, namely, jackets, sweatshirts, pants, jeans, pullovers, sweaters, shirts, neckwear, socks, belts, hats, caps, shoes, boots and sneakers

FIRST USE 6-6-2016; IN COMMERCE 6-6-2016

The mark consists of two intersecting dual-sided arrows.

SER. NO. 87-248,697, FILED 11-28-2016

UNITED STATES PATENT AND TRADEMARK OFFICE
DEPARTMENT OF COMMERCE

Joseph Matal

Performing the Functions and Duties of the
Under Secretary of Commerce for
Intellectual Property and Director of the
United States Patent and Trademark Office

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

XCLUSIVE-LEE, INC., Plaintiff, v. JELENA NOURA "GIGI" HADID, Defendant.	Civil Action No.: 19-cv-520 COMPLAINT AND JURY DEMAND

COMPLAINT FOR COPYRIGHT INFRINGEMENT

Plaintiff, XCLUSIVE-LEE, INC. ("Xclusive" or "Plaintiff"), brings this complaint in the United States District Court for the Eastern District of New York against JELENA NOURA "GIGI" HADID ("Hadid" or "Defendant"), alleging as follows:

PARTIES

1. Xclusive is a New York Domestic Business Corporation with a principal place of business in Rego Park, New York.
2. Hadid is an American fashion model. In 2016, Hadid was named International Model of the Year by British Fashion Council. Hadid has modeled for Versace, Chanel, Elie Saab, Fendi, Marc Jacobs, Anna Sui, Miu Miu, Balmain, Diane Von Furstenberg, Tommy Hilfiger, Fenty, Puma, Isabel Marant, and Giambattista Valli. Hadid has also starred in advertising campaigns for Guess, Versace, Penshoppe, Balmain F/W 2015, Topshop, Max Mara, and Stuart Weitzman. Hadid has appeared on the covers of magazines such as *Vogue* (United States, Paris, Italy, Britain, Japan, Spain, Australia, Brazil, the Netherlands, Germany, Italy,

China), *Schön!*, *Numéro*, *Allure*, *W Magazine* and *Teen Vogue* as well as *WSJ Magazine*, *Elle Canada*, *Dazed* and *Harper's Bazaar*.[1] Hadid maintains and is personally responsible for her official Instagram account, which has over 44 million followers worldwide. Hadid resides in New York, New York.

JURISDICTION AND VENUE

3. This is a civil action seeking damages for copyright infringement under the copyright laws of the United States (17 U.S.C. § 101 et seq.).
4. This Court has jurisdiction under 17 U.S.C. § 101 et seq.; 28 U.S.C. § 1331 (federal question); and 28 U.S.C. § 1338(a) (copyright).
5. Defendant is subject to personal jurisdiction in New York.
6. Venue is proper in this district under 28 U.S.C. § 1391(b) and (c) and 1400(a) because the events giving rise to the claims occurred in this district, Defendant engaged in infringement in this district, Plaintiff resides in this district, and Defendant is subject to personal jurisdiction in this district.
7. This Court also has personal jurisdiction over Defendant, and venue in this District is proper under 28 U.S.C. § 1400(a). This Court also has personal jurisdiction over Defendant, and venue in this District is proper under 28 U.S.C. § 1400(a).

[1] https://en.wikipedia.org/wiki/Gigi_Hadid

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

8. Xclusive is the copyright holder of "Gigi Hadid on Oct 11, 2018" ("Copyrighted Photograph"), which was captured on October 11, 2018 in New York City. [Exhibit 1].
9. On October 12, 2018, Hadid copied and uploaded Copyrighted Photograph to Hadid's Instagram account.
10. As a result of Hadid's actions described in Paragraph 11, Copyrighted Photograph was posted and publicly displayed to the following URLs:
    - www.instagram.com/gigihadid/?hl-en. (Last visited October 15, 2018) [Exhibit 3]
    - www.instagram.com/p/Boz7ASBHBDt/?hl=en&taken-by=gigihadid (Last visited October 15, 2018). [Exhibit 4]. (together "Instagram Posts")
11. Hadid copied and posted Copyrighted Photograph to Hadid's Instagram account without license or permission from Xclusive.
12. Hadid's Instagram account is followed by more than forty-three million (43,000,000) individuals throughout the world. [Exhibit 4].
13. More than 1.6 million (1,600,00) followers commented on Instagram Posts within four days of October 12, 2018. [Exhibit 4].
14. Prior to October 12, 2018, Hadid had first-hand knowledge that copying and posting photographs, of herself or other subject matters, to her Instagram or other social media accounts that she did not properly license or otherwise receive permission from the copyright holder constituted copyright infringement.
15. Specifically, Hadid was named as a defendant and served with a copy of a complaint and summons in a suit alleging copyright infringement, *Peter Cepeda v. Jelena Noura "Gigi" Hadid and IMG Worldwide, Inc.*, 1:17-cv-00989-LMB-MSN (E.D. Va.) (2017).

16. Although the case was settled prior to the discovery stage of litigation, the facts alleged in *Cepeda* are nearly identical to the facts alleged in the present case, including the allegation Hadid copied and posted Plaintiff Cepeda's copyrighted photograph (of Hadid on a public street in New York City) to Hadid's Instagram and Twitter accounts without license or permission from Cepeda.

17. As of the date of this filing, Hadid's Instagram account includes at least fifty (50) examples of uncredited photographs of Hadid in public, at press events, or on the runway. [Exhibit 5]. Most if not all of these photographs were posted by Hadid without license or permission from the copyright holder.

COUNT I: INFRINGEMENT OF COPYRIGHT PURSUANT TO 17 U.S.C. § 101 ET SEQ.

18. Xclusive incorporates herein by this reference each and every allegation contained in each paragraph above.

19. Xclusive is the copyright owner or licensee of exclusive rights under United States copyright with respect to Copyrighted Photograph, which is the subject of a valid and complete application before the United States Copyright Office for Certificate of Copyright Registration by the Register of Copyrights.

20. Among the exclusive rights granted to each Xclusive under the Copyright Act are the exclusive rights to reproduce and distribute the Copyrighted Photograph to the public.

21. Xclusive is informed and believes Hadid, without the permission or consent of Xclusive, copied and used Copyrighted Photograph on Hadid's Instagram account. In doing so, Hadid violated Xclusive's exclusive rights of reproduction and distribution. Hadid's actions constitute infringement of Xclusive's copyright and exclusive rights under copyright.

22. Xclusive is informed and believes that the foregoing act of infringement was willful and intentional, in disregard of and with indifference to the rights of Xclusive.

23. As a result of Hadid's infringement of Xclusive's copyright and exclusive rights under copyright, Xclusive is entitled to statutory damages, including any profits realized by Hadid attributable to the infringement, pursuant to 17 U.S.C. § 504 for Hadid's infringement of Copyrighted Photograph.

COUNT II: CONTRIBUTORY INFRINGEMENT

24. Xclusive is informed and believes that Hadid, without the permission or consent of Xclusive, knowingly made available Copyrighted Photograph to innumerable individuals and media outlets by posting Copyrighted Photograph to Hadid's 43 million (43,000,000) Instagram followers.

25. Xclusive is informed and believes that Hadid, without the permission or consent of Xclusive, had knowledge or reason to know of such contributory infringement.

26. As a result of Hadid's actions, Xclusive is entitled to actual damages or such other and further relief as is just and proper.

PRAYER FOR RELIEF

WHEREFORE, Xclusive prays for judgment against Hadid as follows:

A. Declaring that Hadid's unauthorized conduct violates Xclusive's rights under the Federal Copyright Act;

B. Immediately and permanently enjoining Hadid, its officers, directors, agents, servants, employees, representatives, attorneys, related companies, successors, assigns, and all others in active concert or participation with them from copying and republishing Xclusive's Copyrighted Photograph without consent or otherwise infringing Xclusive's copyright or other rights in any manner;

C. Ordering Hadid to account to Xclusive for all gains, profits, and advantages derived by Hadid by their infringement of Xclusive's copyright or such damages as are proper, and since Hadid intentionally infringed Xclusive's copyright, for the maximum allowable statutory damages for each violation;

D. Awarding Xclusive actual and/or statutory damages for Hadid's copyright infringement in an amount to be determined at trial;

E. Awarding Xclusive his costs, reasonable attorney's fees, and disbursements in this action, pursuant to 17 U.S.C. § 505; and

F. Awarding Xclusive such other and further relief as is just and proper.

JURY DEMAND

Xclusive hereby demands a trial by jury on all claims for which there is a right to jury trial.

Respectfully submitted,

Dated: January 28, 2019

REESE LLP

/s/ Michael R. Reese
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- and -

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Telephone: (434) 233-2727
Facsimile: (888) 965-8083
Email: *david@daviddeal.com*

Counsel for Plaintiff

EXHIBIT 1

EXHIBIT 2

Copyright
United States Copyright Office

COPYRIGHT HOME

Home | My Profile | Help | Contact Us | Log Out

<< Back

Case Summary:

Case #:	1-7053724741	Type of Case:	Work of the Visual Arts	Opened:	10/19/2018
Title:	Gigi Hadid on Oct 11, 2018			Contact Name:	I-Sheng Li
Fee Due:	55.00	Service Fee Paid:	55.00	Claim Status:	Pending

Submit Your Work(s)

To complete your submission, please submit the required copy(ies) of your work. You may (1) upload electronic files if the work meets the requirements; otherwise, you must (2) send the work by mail (do not do both).

(1) Upload your work(s): Please perform the following steps for the case(s) in the table below.
Step 1: Click the "Select files to upload" button. Using your computer's browser, select your files for the corresponding work then click the "Start upload" button.
Step 2: After uploading all files for this work, click the corresponding "Complete Your Submission" button. Files cannot be uploaded later than 5 days after your first file is received.

Please note: Files cannot be returned or deleted once uploaded. To avoid delays and/or a later effective date of registration, please verify the following before uploading a copy of your work(s):

- It is a category of work that may be uploaded
- It is an acceptable file type
- It is an acceptable file size

Upload Your Work(s)

1 - 1 of 1

Case Details	Step 1: Select & Upload Files	Step 2: Complete Your Submission
Case #: 1-7053724741 Title: Gigi Hadid on Oct 11, 2018 Volume: Number: Issue Date: Type of Work: Work of the Visual Arts	Claim submission completed; no further action required Click here for more information View Uploaded File Names	

Updates

1 - 1 of 1

Comments	Activity Type	Status	Created
Submitted by GR8IMGES on 10/19/2018	Upload Deposit	Received	10/19/2018 11:10:37 AM

(2) Send Your Work(s) by Mail:

- Click the "Create Shipping Slip" button in the table below; a Shipping Slip link will appear in the Attachments column.
- Click the Shipping Slip link and print out and attach the shipping slip(s) to your deposit copy(ies). For multiple cases, be sure to attach shipping slips to the corresponding copies.
- Mail the deposit copy(ies) within 30 days to the Copyright Office address at the bottom of the slip.Note: Your effective date of registration will be based on the date on which we receive the copies **with corresponding shipping slips attached**.

Click "Home" after uploading files(s) or printing shipping slip(s). You may verify the submission in the open Cases table on your eCO Home page.

Send Your Work(s) by Mail

Create Shipping Slip

No Records

Attachment Name	File Type	Size	Date and Time	Comments

Privacy Act Notice: Sections 408-410 of title 17 of the United States Code authorize the Copyright Office to collect the personally identifying information requested on this form in order to process the application for copyright registration. By providing this information you are agreeing to routine uses of the information that include publication to give legal notice of your copyright claim as required by 17 U.S.C. § 705. It will appear in the Office's online catalog. If you do not provide the information requested, registration may be refused or delayed, and you may not be entitled to certain relief, remedies, and benefits under the copyright law.

<< Back

Case Summary:

Case #:	1-7053724741	Type of Case:	Work of the Visual Arts	Opened:	10/19/2018
Title:	Gigi Hadid on Oct 11, 2018			Contact Name:	I-Sheng Li
Fee Due:	55.00	Service Fee Paid:	55.00	Claim Status:	Pending

EXHIBIT 3

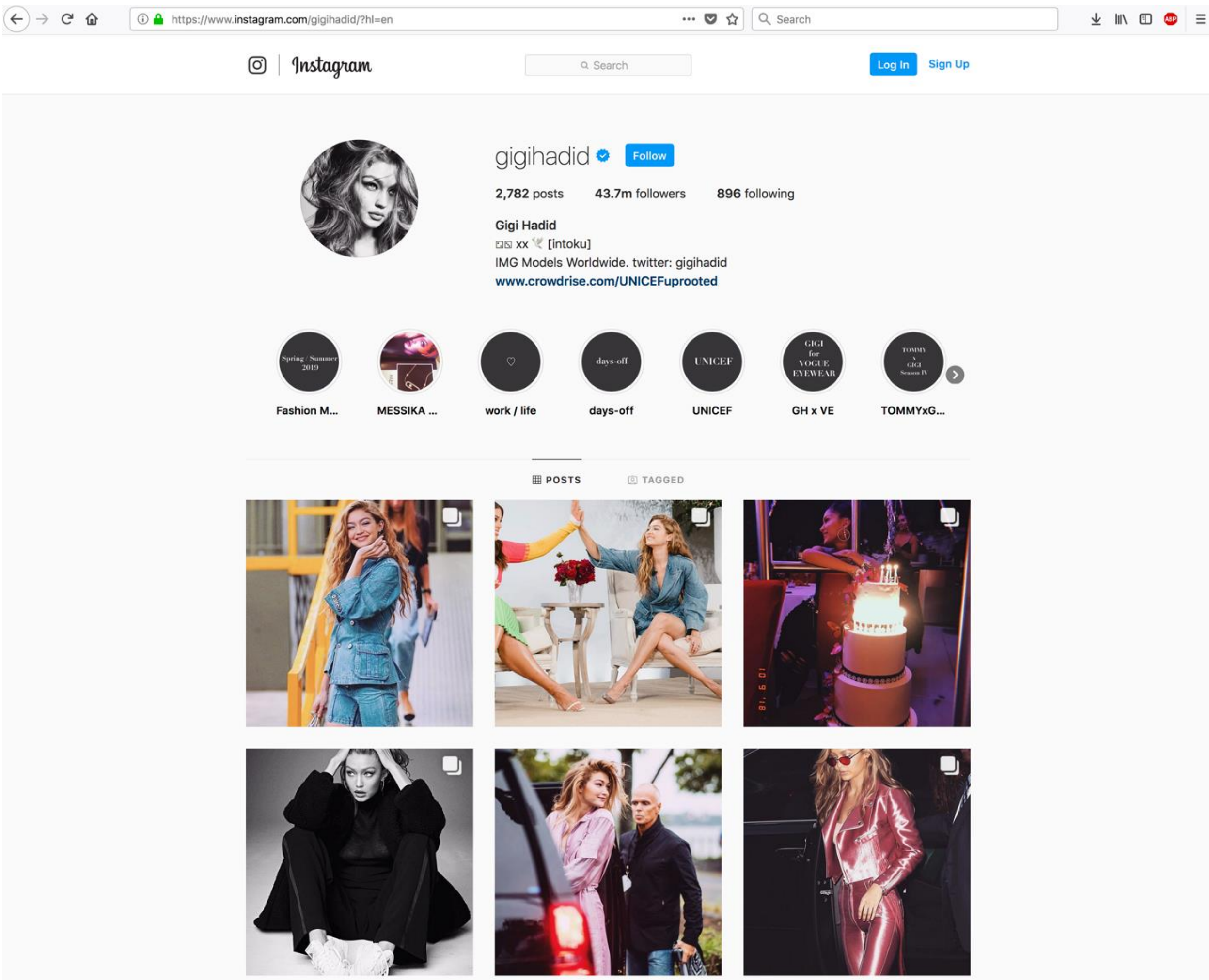
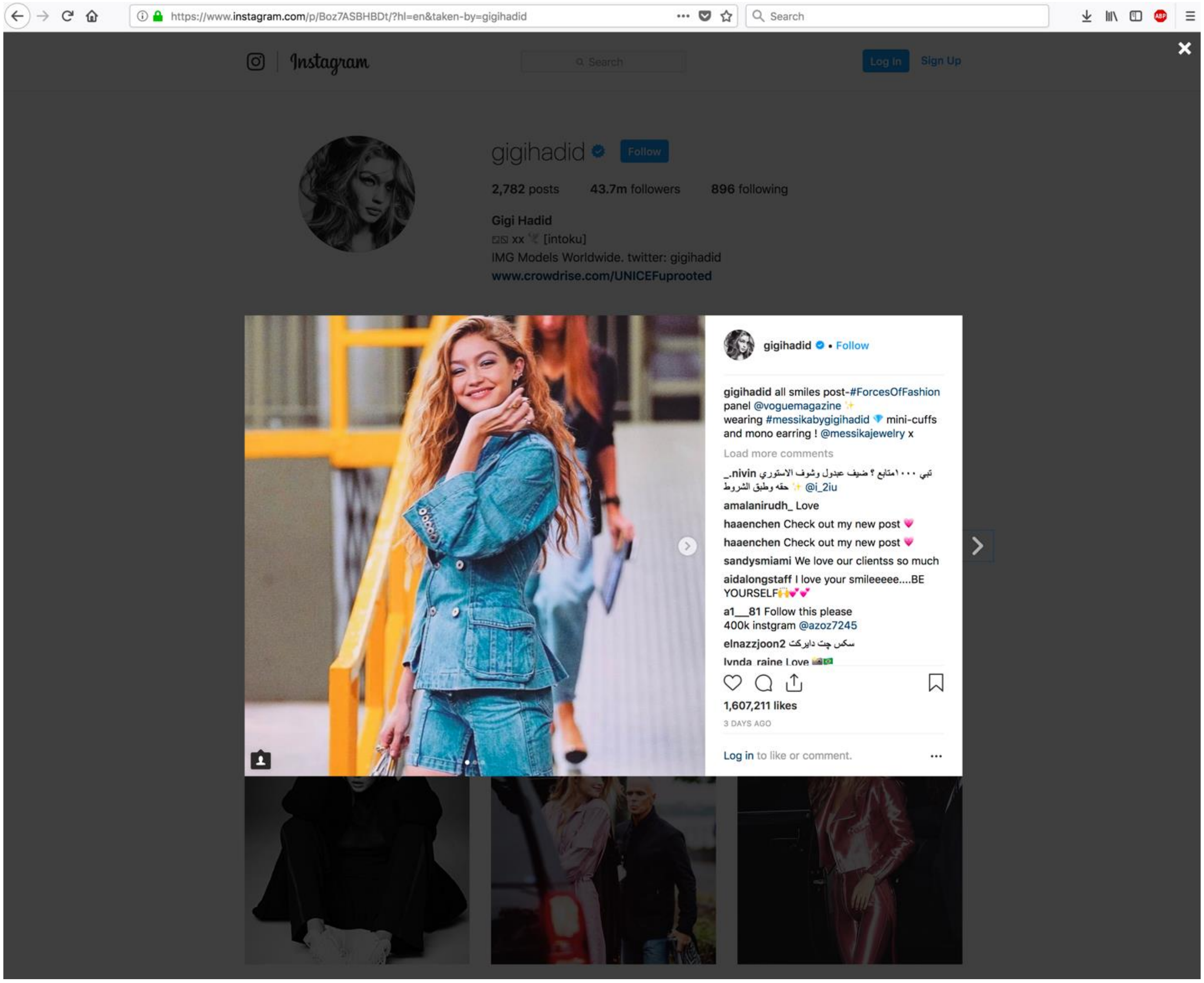

https://www.instagram.com/gigihadid/?hl=en
Search
Instagram
Search
Log In
Sign Up
gigihadid
Follow
2,782 posts 43.7m followers 896 following
Gigi Hadid
xx [intoku]
IMG Models Worldwide. twitter: gigihadid
www.crowdrise.com/UNICEFuprooted
Fashion M...
MESSIKA ...
work / life
days-off
UNICEF
GH x VE
TOMMYxG...
POSTS
TAGGED

EXHIBIT 4


https://www.instagram.com/p/Boz7ASBHBDt/?hl=en&taken-by=gigihadid
Instagram
Log In
Sign Up
gigihadid
Follow
2,782 posts 43.7m followers 896 following
Gigi Hadid
xx [intoku]
IMG Models Worldwide. twitter: gigihadid
www.crowdrise.com/UNICEFuprooted
gigihadid • Follow
gigihadid all smiles post-#ForcesOfFashion panel @voguemagazine wearing #messikabygigihadid mini-cuffs and mono earring ! @messikajewelry x
Load more comments
amalanirudh_ Love
haaenchen Check out my new post
haaenchen Check out my new post
sandysmiami We love our clientss so much
aidalongstaff I love your smileeeee....BE YOURSELF
a1__81 Follow this please 400k instgram @azoz7245
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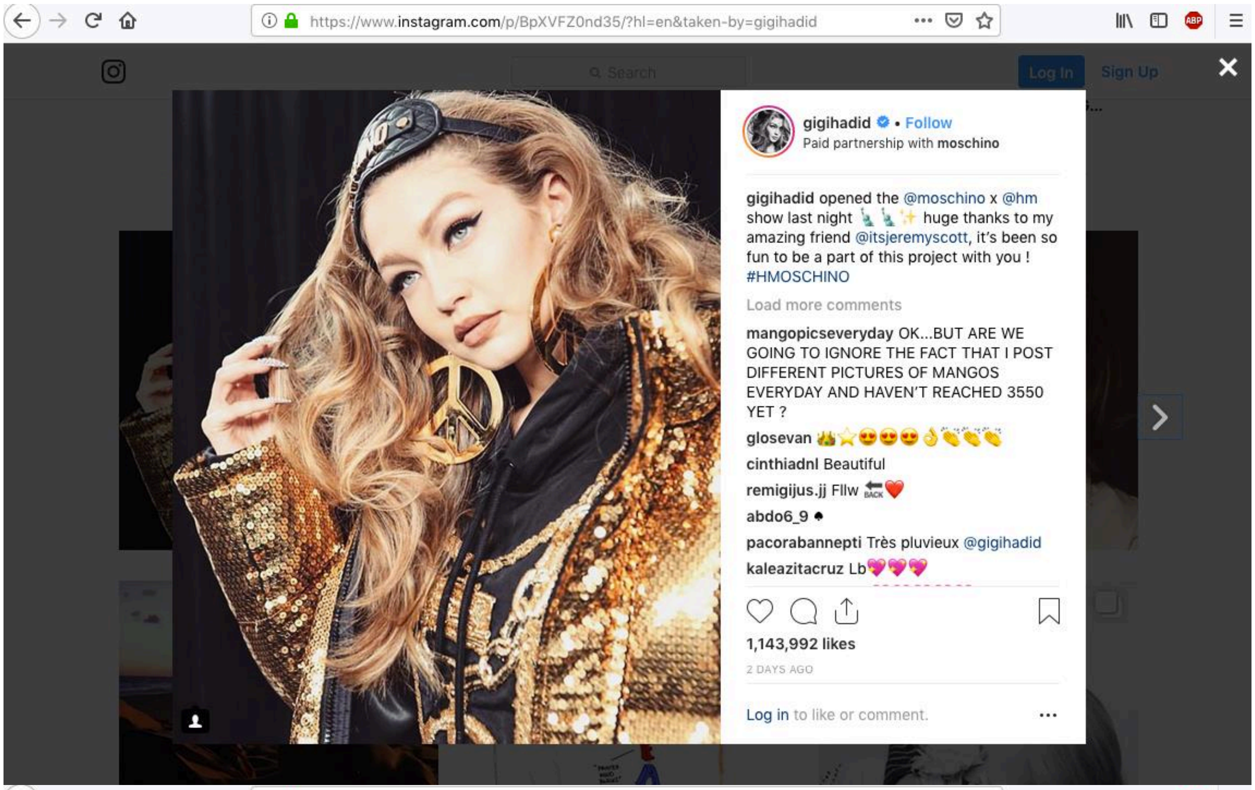
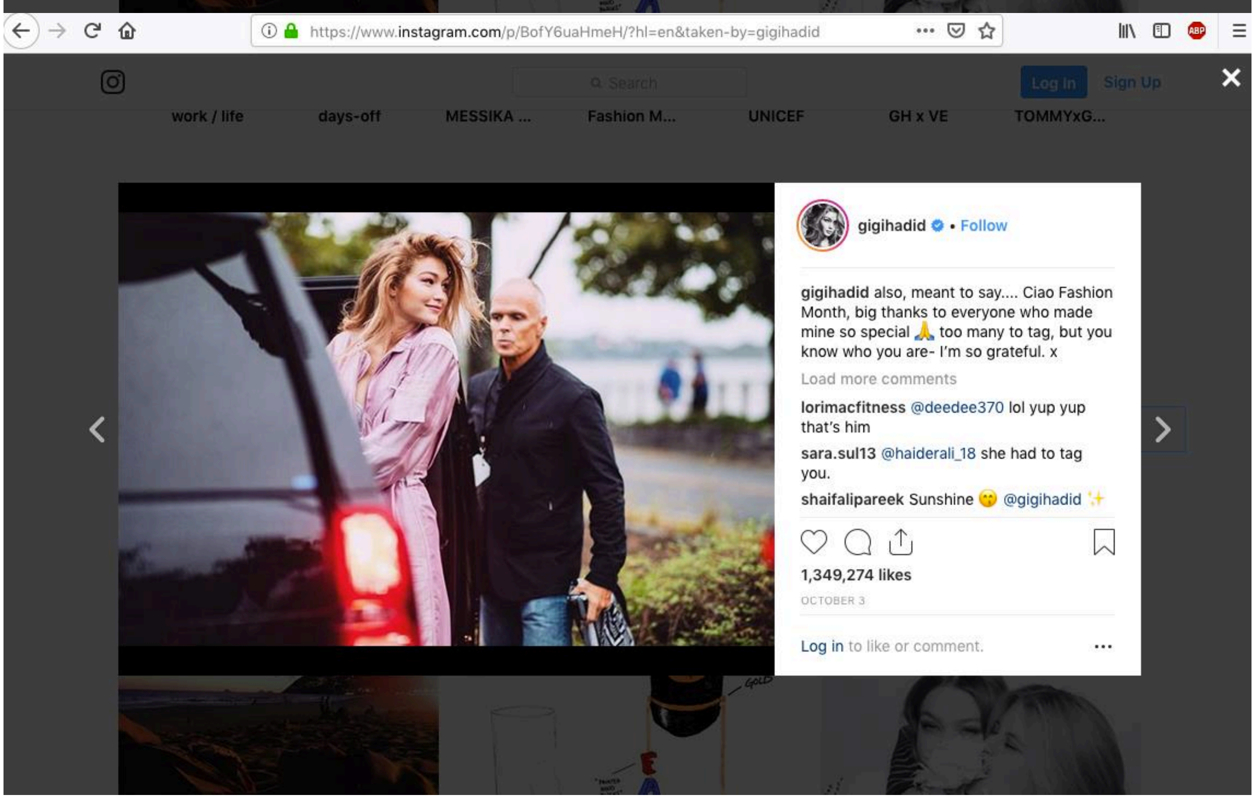
3 DAYS AGO
Log in to like or comment.

EXHIBIT 5


https://www.instagram.com/p/BpXVFZ0nd35/?hl=en&taken-by=gigihadid
Log In
Sign Up
gigihadid • Follow
Paid partnership with moschino
gigihadid opened the @moschino x @hm show last night huge thanks to my amazing friend @itsjeremyscott, it's been so fun to be a part of this project with you ! #HMOSCHINO
Load more comments
mangopicseveryday OK...BUT ARE WE GOING TO IGNORE THE FACT THAT I POST DIFFERENT PICTURES OF MANGOS EVERYDAY AND HAVEN'T REACHED 3550 YET ?
glosevan
cinthiadnl Beautiful
remigijus.jj Fllw
abdo6_9
pacorabannepti Très pluvieux @gigihadid
kaleazitacruz Lb
1,143,992 likes
2 DAYS AGO
Log in to like or comment.


https://www.instagram.com/p/BofY6uaHmeH/?hl=en&taken-by=gigihadid
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work / life
days-off
MESSIKA ...
Fashion M...
UNICEF
GH x VE
TOMMYxG...
gigihadid • Follow
gigihadid also, meant to say.... Ciao Fashion Month, big thanks to everyone who made mine so special too many to tag, but you know who you are- I'm so grateful. x
Load more comments
lorimacfitness @deedee370 lol yup yup that's him
sara.sul13 @haiderali_18 she had to tag you.
shaifalipareek Sunshine @gigihadid
1,349,274 likes
OCTOBER 3
Log in to like or comment.


https://www.instagram.com/p/BoemFatH08y/?hl=en&taken-by=gigihadid
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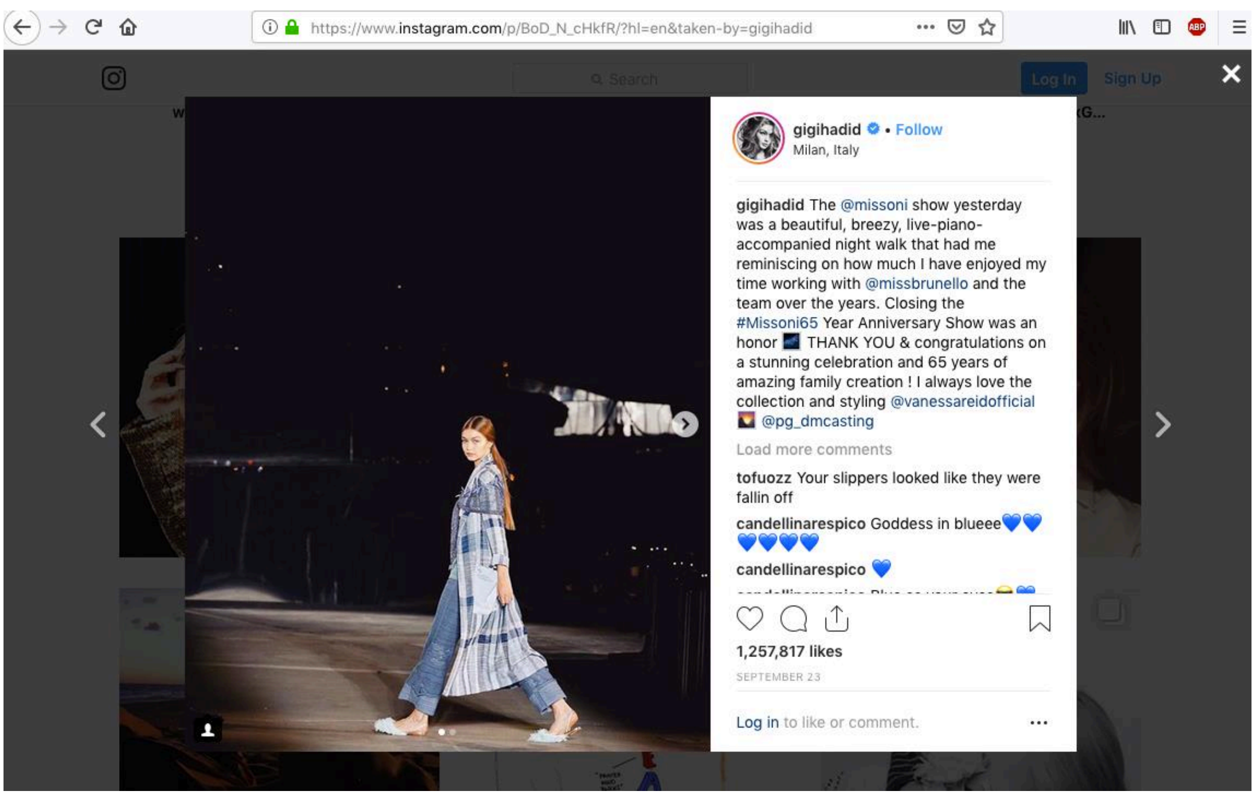
gigihadid • Follow
gigihadid throwing back to a faaaave, this #GigiforVogueEyewear celebration moment, because it's October 3rd ... u know what that means ..!
"on Wednesday's we wear pink.."
Cheers to the 'holiday' that we love to remember once it's already happening #meangirlsday
Load more comments
mildlyorganic barbie doll status 😍❤️
ferrafitness Where's your mini bag? 🤓
queiroz_ingrid This look is everything, love u girl ❤️
heydiana3 😍😍
leonharpley9745 Pretty pretty stooopid
amrodri88 @coreyjonn obsessed with this look
1,960,643 likes
OCTOBER 3
Log in to like or comment.


https://www.instagram.com/p/BoD_N_cHkfR/?hl=en&taken-by=gigihadid
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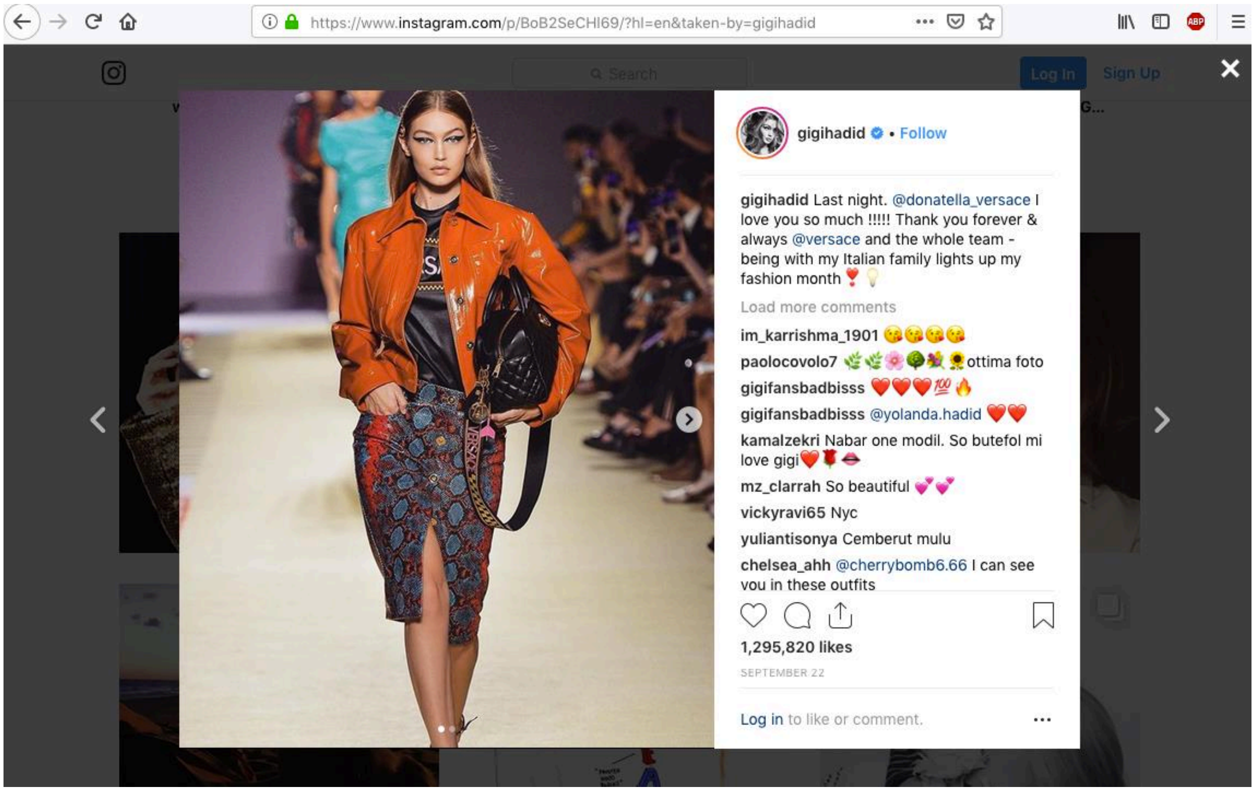
Milan, Italy
gigihadid The @missoni show yesterday was a beautiful, breezy, live-piano-accompanied night walk that had me reminiscing on how much I have enjoyed my time working with @missbrunello and the team over the years. Closing the #Missoni65 Year Anniversary Show was an honor 🌌 THANK YOU & congratulations on a stunning celebration and 65 years of amazing family creation ! I always love the collection and styling @vanessareidofficial 🌄 @pg_dmcasting
Load more comments
tofuozz Your slippers looked like they were fallin off
candellinarespico Goddess in blueee💙💙💙💙💙💙
candellinarespico 💙
1,257,817 likes
SEPTEMBER 23
Log in to like or comment.


https://www.instagram.com/p/BoB2SeCHI69/?hl=en&taken-by=gigihadid
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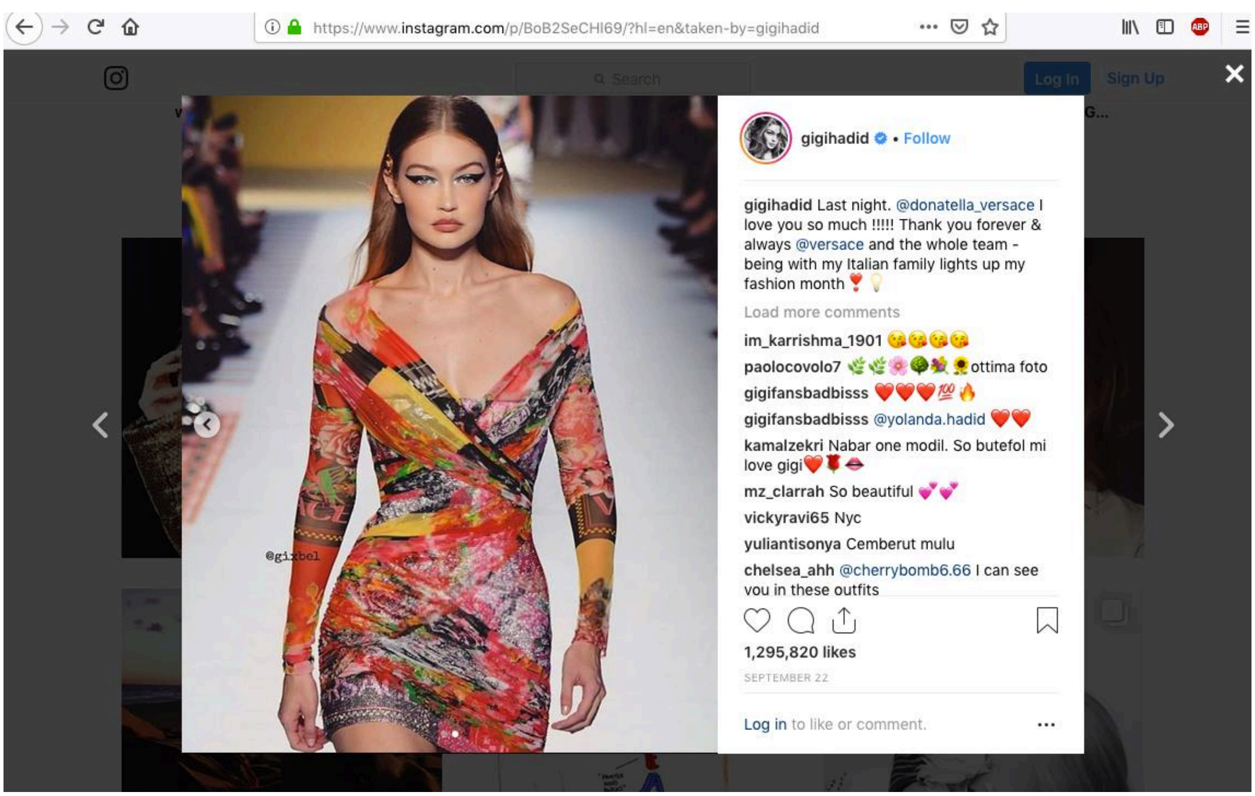
gigihadid • Follow
gigihadid Last night. @donatella_versace I love you so much !!!!! Thank you forever & always @versace and the whole team - being with my Italian family lights up my fashion month
Load more comments
im_karrishma_1901
paolocovolo7 ottima foto
gigifansbadbisss
gigifansbadbisss @yolanda.hadid
kamalzekri Nabar one modil. So butefol mi love gigi
mz_clarrah So beautiful
vickyravi65 Nyc
yuliantisonya Cemberut mulu
chelsea_ahh @cherrybomb6.66 I can see you in these outfits
1,295,820 likes
SEPTEMBER 22
Log in to like or comment.


https://www.instagram.com/p/BoB2SeCHI69/?hl=en&taken-by=gigihadid
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gigihadid Last night. @donatella_versace I love you so much !!!!! Thank you forever & always @versace and the whole team - being with my Italian family lights up my fashion month
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im_karrishma_1901
paolocovolo7 ottima foto
gigifansbadbisss
gigifansbadbisss @yolanda.hadid
kamalzekri Nabar one modil. So butefol mi love gigi
mz_clarrah So beautiful
vickyravi65 Nyc
yuliantisonya Cemberut mulu
chelsea_ahh @cherrybomb6.66 I can see you in these outfits
1,295,820 likes
SEPTEMBER 22
Log in to like or comment.


https://www.instagram.com/p/Bn9Ct0fn7um/?hl=en&taken-by=gigihadid
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gigihadid • Follow
gigihadid Always a beautiful morning walking @FENDI - Grazie Mille & Big Love @karllagerfeld @chaos @amandaharlech @silviaventurinifendi @mariaelenacima @pg_dmcasting @samuel_ellis & the whole team! xxxx LOVE THIS COLLECTION, especially the accessories !
Load more comments
sabinadolaberidze Love this style
pacamp06
heyvanillaco
openhearted81 shandaar
i_am_noemisarah You are my idol
i_am_noemisarah
juveriyarockzz Pretty
vivianeplanzo Como consegue ser tão plena?
1,768,185 likes
SEPTEMBER 20
Log in to like or comment.


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gigihadid @bof
Load more comments
lanimuamakeuparts You two look even better together!! Best sisters in the world!!
aprlln The best sister
sovatsjewelry_official gorgeous ladies...
mirtolik
ghadi_az @rub_zh
emporioluquetti Maravilhosas
ioanaaepure
avniverma17 @hardikrastogi09 sister's can't slayyyy any better
smokeweedboom Tb.
ivanaswasti Check it out! Link on my bio
1,346,266 likes
SEPTEMBER 10
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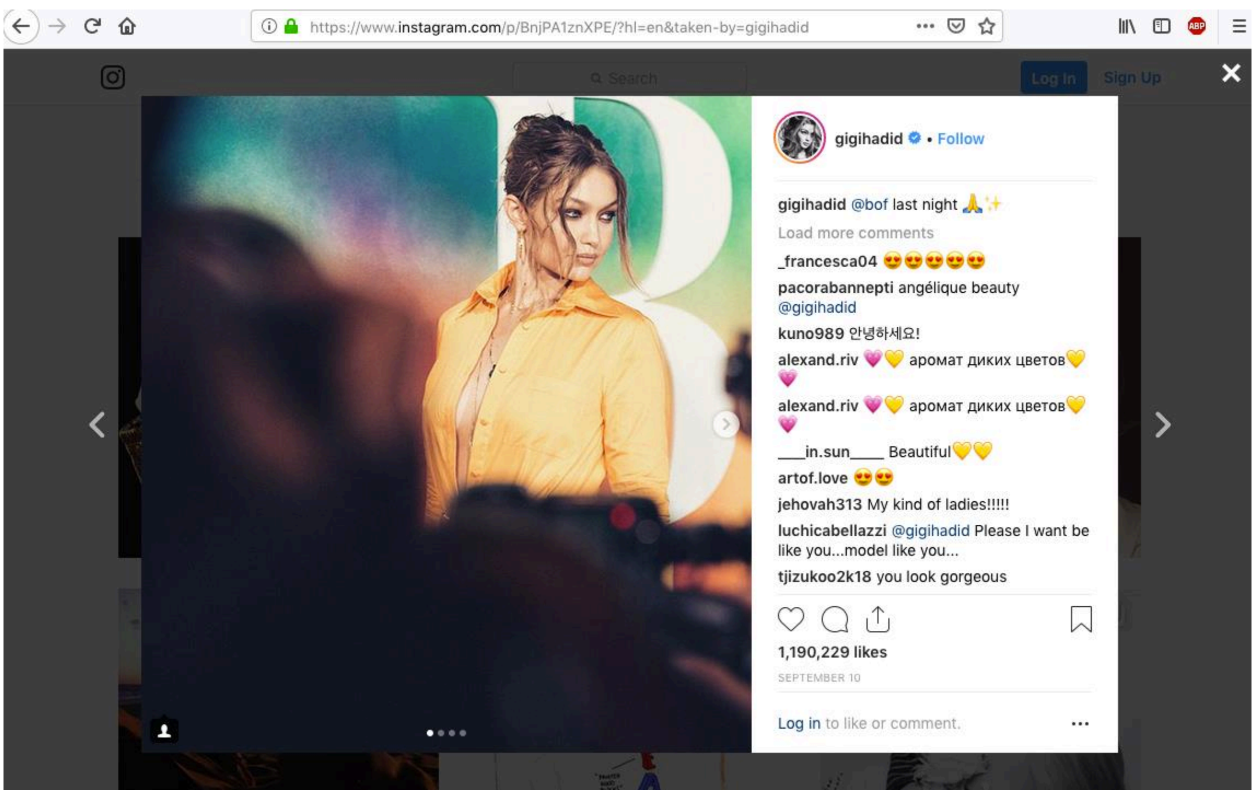
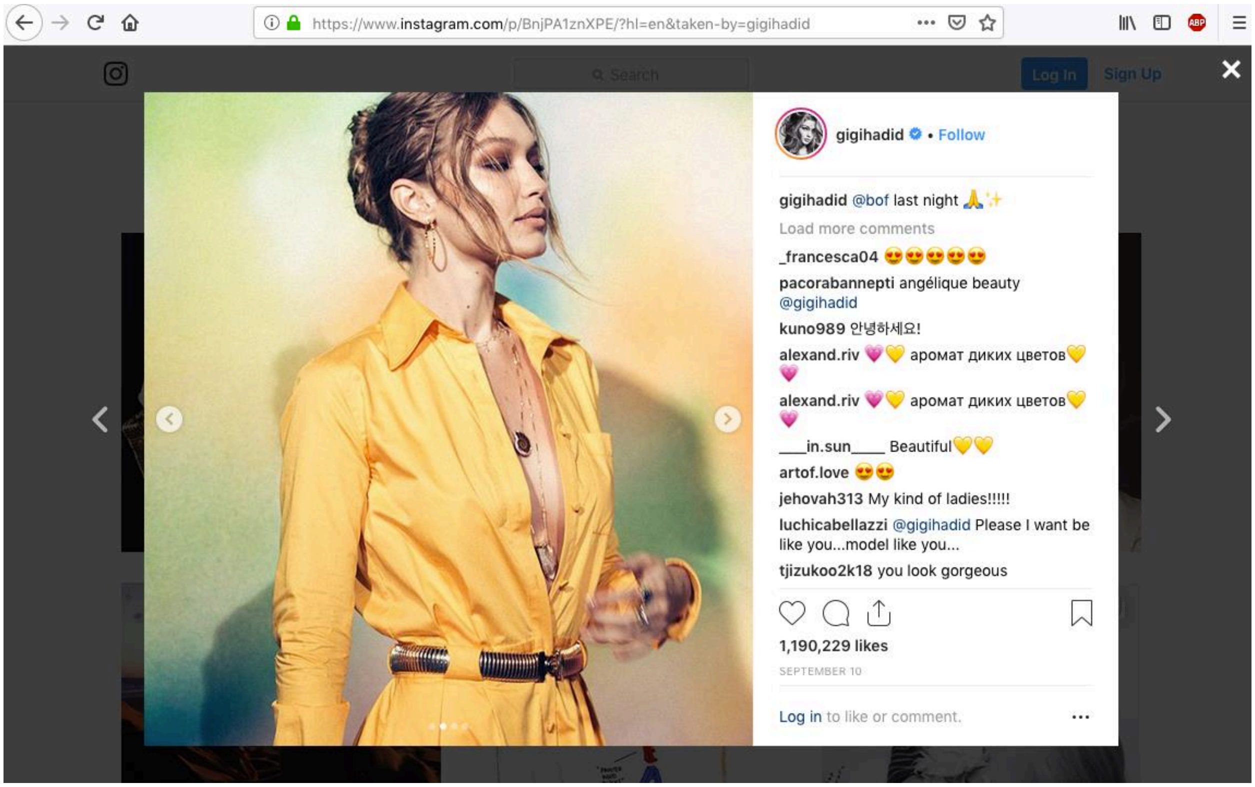
https://www.instagram.com/p/BnjRCQmH_eR/?hl=en&taken-by=gigihadid
gigihadid • Follow
gigihadid @brandonmaxwell saves fashion emergencies with yellow jumpsuits and pink champagne !! 🙏🍾💓 @bof
Load more comments
joha2206 @lauraquintanaflores no suelta el bolsito , 😂😂😂
zzzaffirahhh23_ ❤️❤️❤️
heenastyle Nice Yalow @heenastyle
bushrabasharatt 😍😍😍😍
ioanaaepure 💝💝💝💝
worldpeace_777 💕💓
juliepatterson__ @rach.pat @laur.fall is Gigi wearing hoop earrings?
delorro.au Gorgeous! Delorro is looking for Australian Influencers to launch a new online store store in Australia. Want to help and get 200AUD credit?
951,606 likes
SEPTEMBER 10
Log in to like or comment.


https://www.instagram.com/p/BnjPA1znXPE/?hl=en&taken-by=gigihadid
gigihadid • Follow
gigihadid @bof last night 🙏✨
Load more comments
_francesca04 😍😍😍😍😍
pacorabannepti angélique beauty @gigihadid
kuno989 안녕하세요!
alexand.riv 💗💛 аромат диких цветов💛💗
alexand.riv 💗💛 аромат диких цветов💛💗
___in.sun____ Beautiful💛💛
artof.love 😍😍
jehovah313 My kind of ladies!!!!!
luchicabellazzi @gigihadid Please I want be like you...model like you...
tjizukoo2k18 you look gorgeous
1,190,229 likes
SEPTEMBER 10
Log in to like or comment.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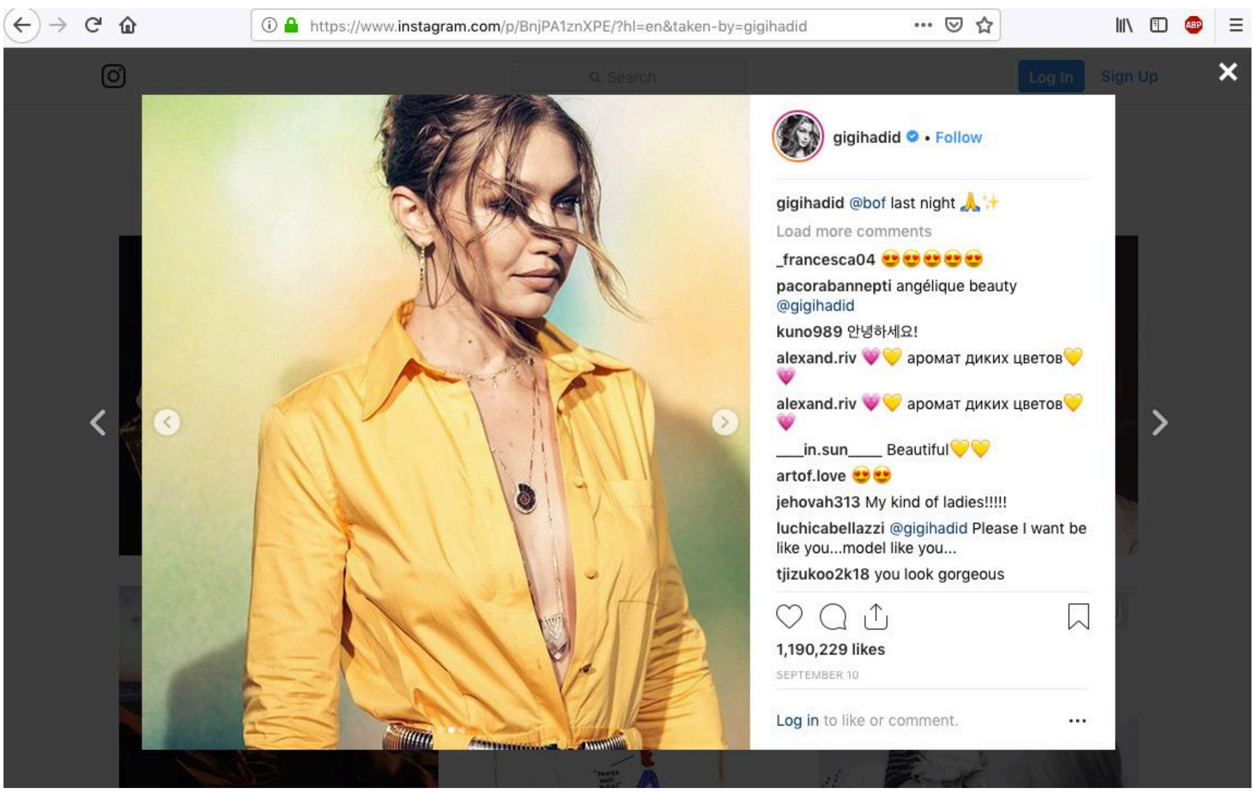
gigihadid @bof last night
Load more comments
_francesca04
pacorabannepti angélique beauty @gigihadid
kuno989 안녕하세요!
alexand.riv аромат диких цветов
alexand.riv аромат диких цветов
___in.sun____ Beautiful
artof.love
jehovah313 My kind of ladies!!!!!
luchicabellazzi @gigihadid Please I want be like you...model like you...
tjizukoo2k18 you look gorgeous
1,190,229 likes
SEPTEMBER 10
Log in to like or comment.


https://www.instagram.com/p/BnjPA1znXPE/?hl=en&taken-by=gigihadid
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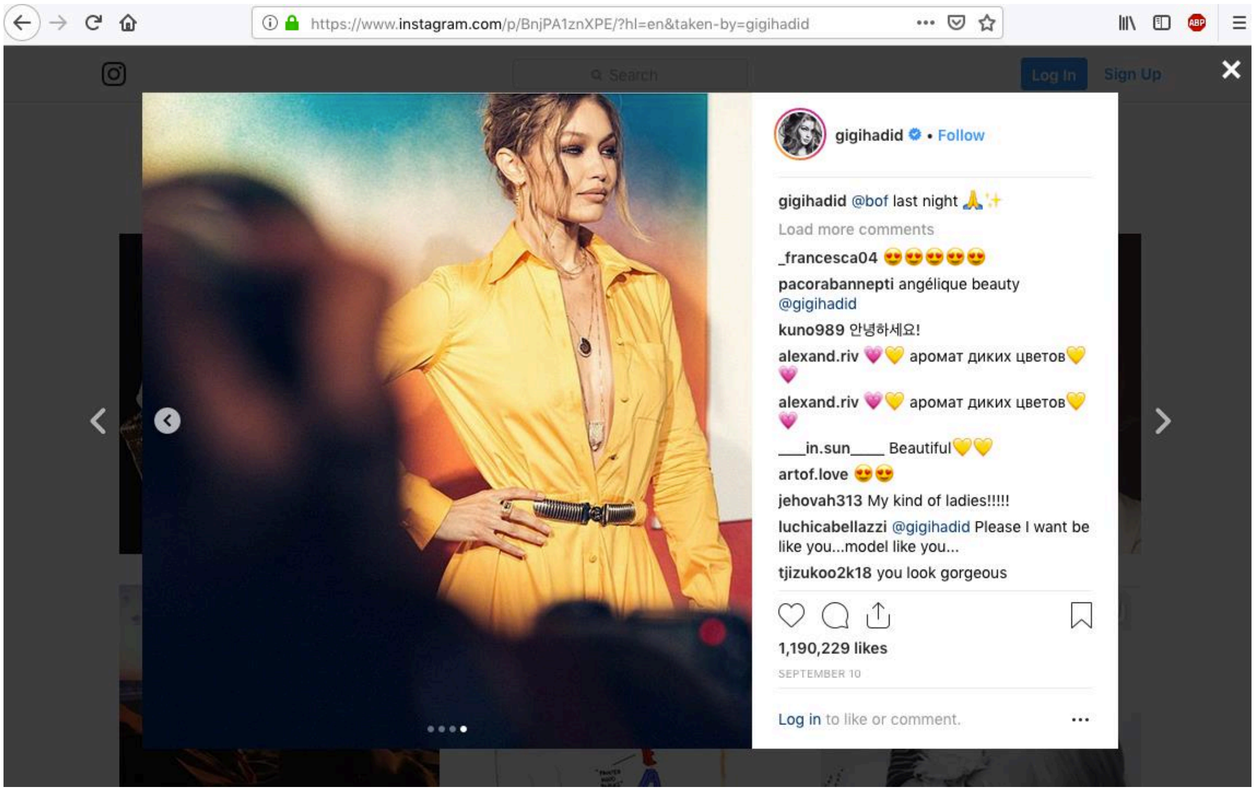
gigihadid @bof last night
Load more comments
_francesca04
pacorabannepti angélique beauty @gigihadid
kuno989 안녕하세요!
alexand.riv аромат диких цветов
alexand.riv аромат диких цветов
___in.sun____ Beautiful
artof.love
jehovah313 My kind of ladies!!!!!
luchicabellazzi @gigihadid Please I want be like you...model like you...
tjizukoo2k18 you look gorgeous
1,190,229 likes
SEPTEMBER 10
Log in to like or comment.


https://www.instagram.com/p/BnjPA1znXPE/?hl=en&taken-by=gigihadid
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Load more comments
_francesca04
pacorabannepti angélique beauty @gigihadid
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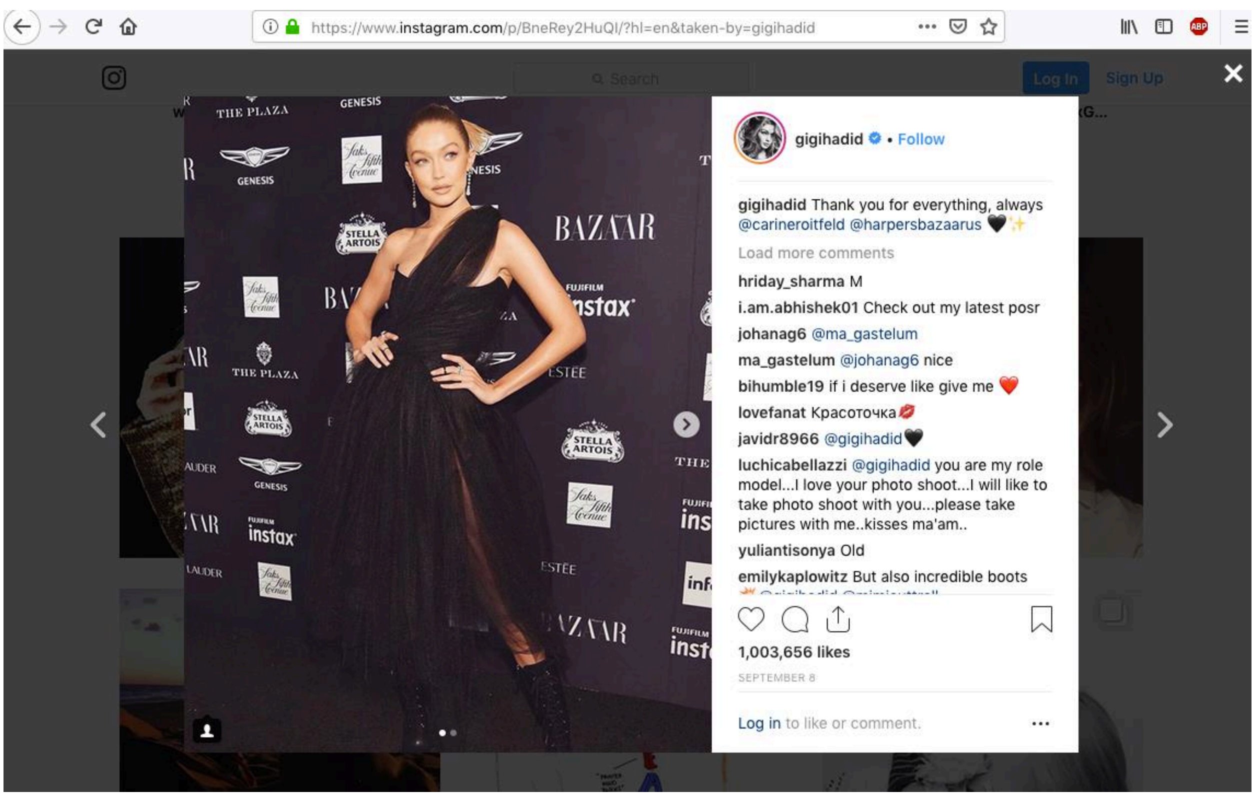
alexand.riv аромат диких цветов
alexand.riv аромат диких цветов
___in.sun____ Beautiful
artof.love
jehovah313 My kind of ladies!!!!!
luchicabellazzi @gigihadid Please I want be like you...model like you...
tjizukoo2k18 you look gorgeous
1,190,229 likes
SEPTEMBER 10
Log in to like or comment.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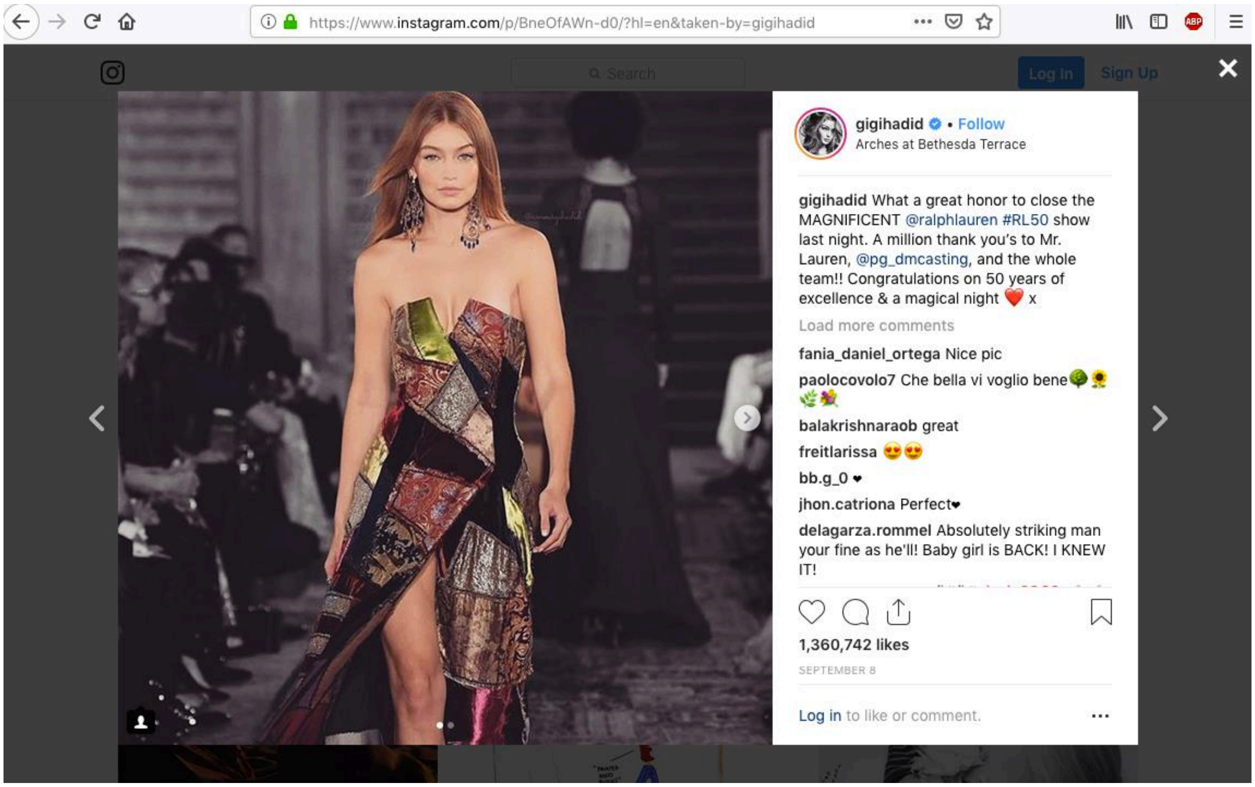
THE PLAZA
GENESIS
BAZAAR
instax
STELLA ARTOIS
gigihadid • Follow
gigihadid Thank you for everything, always @carineroitfeld @harpersbazaarus
Load more comments
hriday_sharma M
i.am.abhishek01 Check out my latest posr
johanag6 @ma_gastelum
ma_gastelum @johanag6 nice
bihumble19 if i deserve like give me
lovefanat Красоточка
javidr8966 @gigihadid
luchicabellazzi @gigihadid you are my role model...I love your photo shoot...I will like to take photo shoot with you...please take pictures with me..kisses ma'am..
yuliantisonya Old
emilykaplowitz But also incredible boots
1,003,656 likes
SEPTEMBER 8
Log in to like or comment.


https://www.instagram.com/p/BneOfAWn-d0/?hl=en&taken-by=gigihadid
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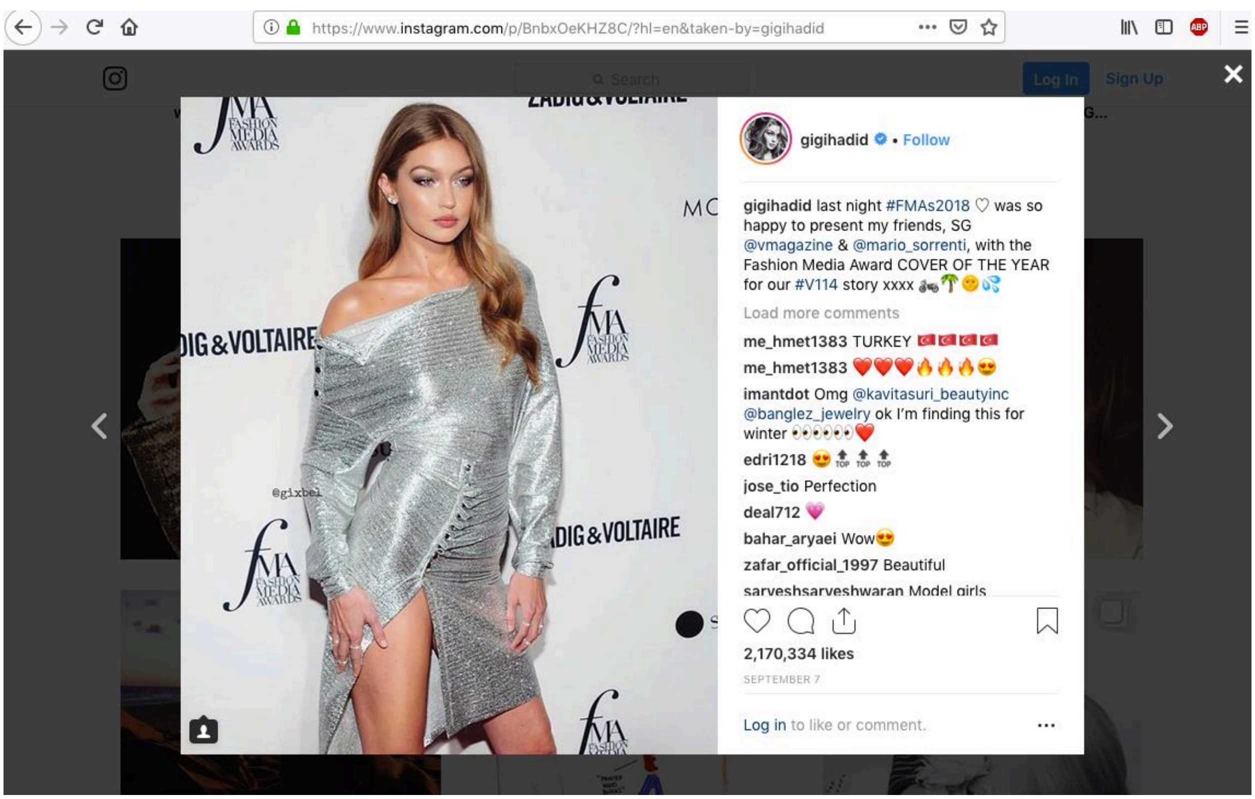
Arches at Bethesda Terrace
gigihadid What a great honor to close the MAGNIFICENT @ralphlauren #RL50 show last night. A million thank you's to Mr. Lauren, @pg_dmcasting, and the whole team!! Congratulations on 50 years of excellence & a magical night x
Load more comments
fania_daniel_ortega Nice pic
paolocovolo7 Che bella vi voglio bene
balakrishnaraob great
freitlarissa
bb.g_0
jhon.catriona Perfect
delagarza.rommel Absolutely striking man your fine as he'll! Baby girl is BACK! I KNEW IT!
1,360,742 likes
SEPTEMBER 8
Log in to like or comment.


https://www.instagram.com/p/BnbxOeKHZ8C/?hl=en&taken-by=gigihadid
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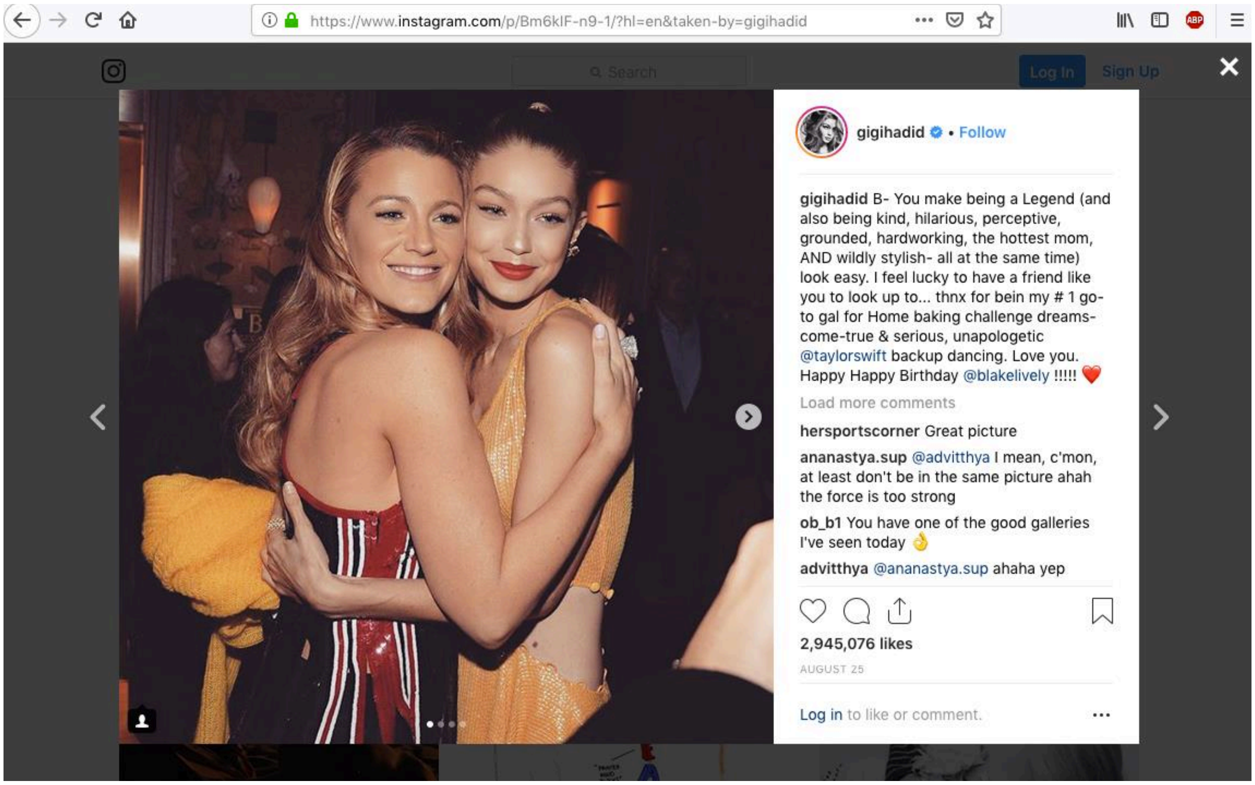
gigihadid last night #FMAs2018 was so happy to present my friends, SG @vmagazine & @mario_sorrenti, with the Fashion Media Award COVER OF THE YEAR for our #V114 story xxxx
Load more comments
me_hmet1383 TURKEY
me_hmet1383
imantdot Omg @kavitasuri_beautyinc @banglez_jewelry ok I'm finding this for winter
edri1218
jose_tio Perfection
deal712
bahar_aryaei Wow
zafar_official_1997 Beautiful
sarveshsarveshwaran Model girls
2,170,334 likes
SEPTEMBER 7
Log in to like or comment.
FASHION MEDIA AWARDS
DIG & VOLTAIRE


https://www.instagram.com/p/Bm6kIF-n9-1/?hl=en&taken-by=gigihadid
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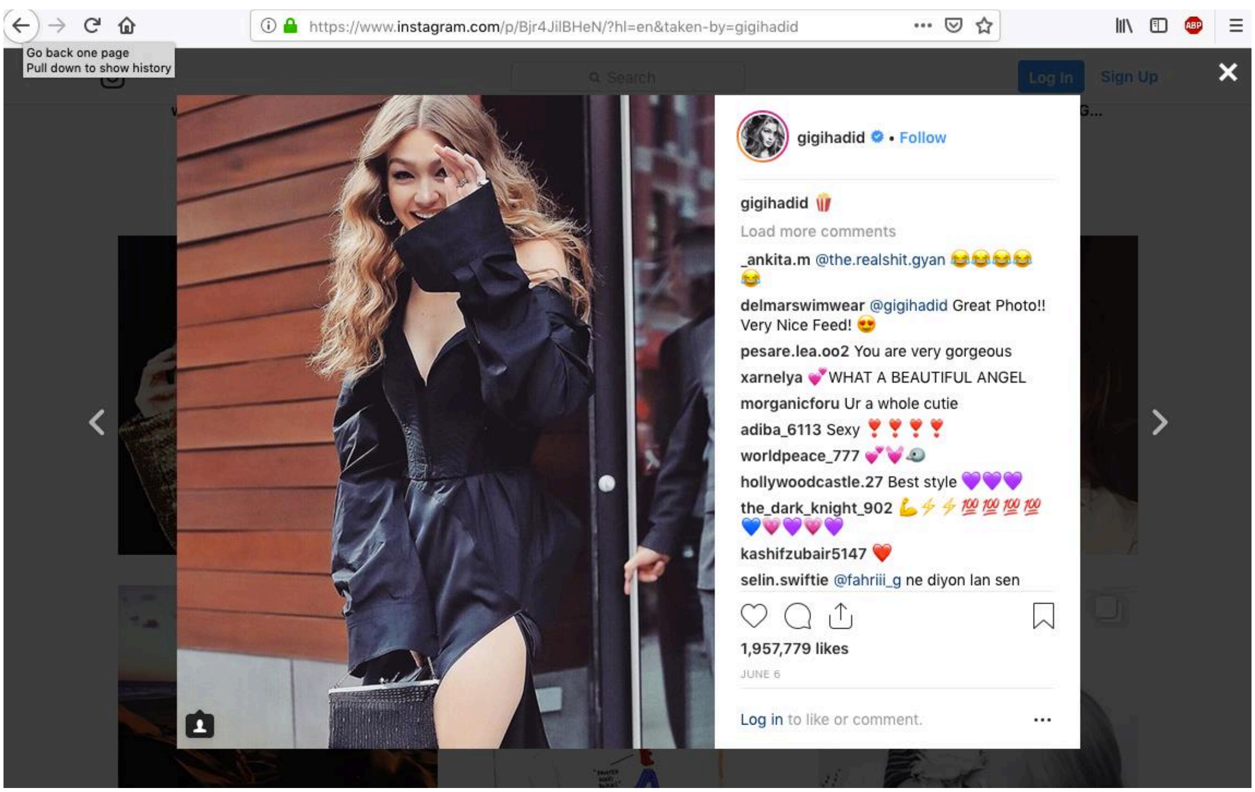
gigihadid • Follow
gigihadid B- You make being a Legend (and also being kind, hilarious, perceptive, grounded, hardworking, the hottest mom, AND wildly stylish- all at the same time) look easy. I feel lucky to have a friend like you to look up to... thnx for bein my # 1 go-to gal for Home baking challenge dreams-come-true & serious, unapologetic @taylorswift backup dancing. Love you. Happy Happy Birthday @blakelively !!!!!
Load more comments
hersportscorner Great picture
ananastya.sup @advitthya I mean, c'mon, at least don't be in the same picture ahah the force is too strong
ob_b1 You have one of the good galleries I've seen today
advitthya @ananastya.sup ahaha yep
2,945,076 likes
AUGUST 25
Log in to like or comment.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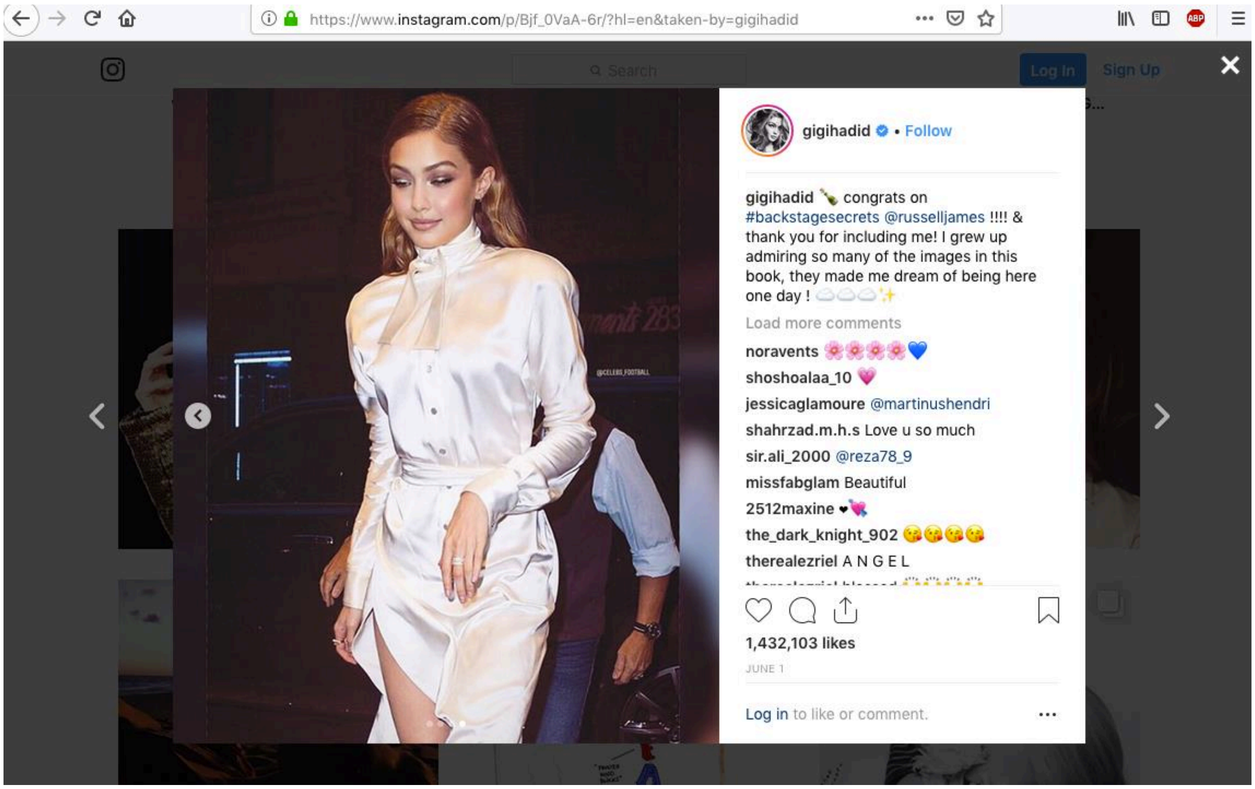
Load more comments
_ankita.m @the.realshit.gyan
delmarswimwear @gigihadid Great Photo!! Very Nice Feed!
pesare.lea.oo2 You are very gorgeous
xarnelya WHAT A BEAUTIFUL ANGEL
morganicforu Ur a whole cutie
adiba_6113 Sexy
worldpeace_777
hollywoodcastle.27 Best style
the_dark_knight_902
kashifzubair5147
selin.swiftie @fahriii_g ne diyon lan sen
1,957,779 likes
JUNE 6
Log in to like or comment.


https://www.instagram.com/p/Bjf_0VaA-6r/?hl=en&taken-by=gigihadid
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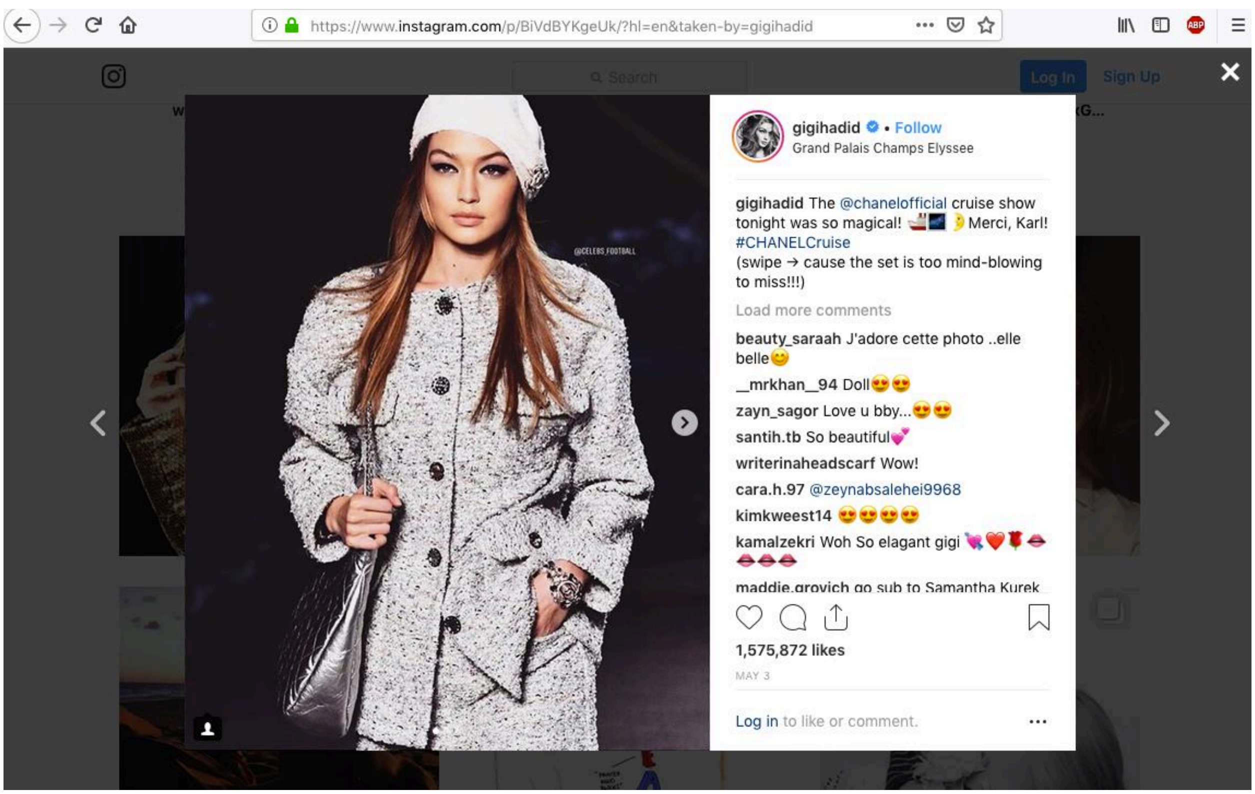
gigihadid congrats on #backstagesecrets @russelljames !!!! & thank you for including me! I grew up admiring so many of the images in this book, they made me dream of being here one day !
Load more comments
noravents
shoshoalaa_10
jessicaglamoure @martinushendri
shahrzad.m.h.s Love u so much
sir.ali_2000 @reza78_9
missfabglam Beautiful
2512maxine
the_dark_knight_902
therealezriel A N G E L
1,432,103 likes
JUNE 1
Log in to like or comment.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Grand Palais Champs Elyssee
gigihadid The @chanelofficial cruise show tonight was so magical! Merci, Karl! #CHANELCruise
(swipe → cause the set is too mind-blowing to miss!!!)
Load more comments
beauty_saraah J'adore cette photo ..elle belle
__mrkhan__94 Doll
zayn_sagor Love u bby...
santih.tb So beautiful
writerinaheadscarf Wow!
cara.h.97 @zeynabsalehei9968
kimkweest14
kamalzekri Woh So elagant gigi
maddie.grovich go sub to Samantha Kurek
1,575,872 likes
MAY 3
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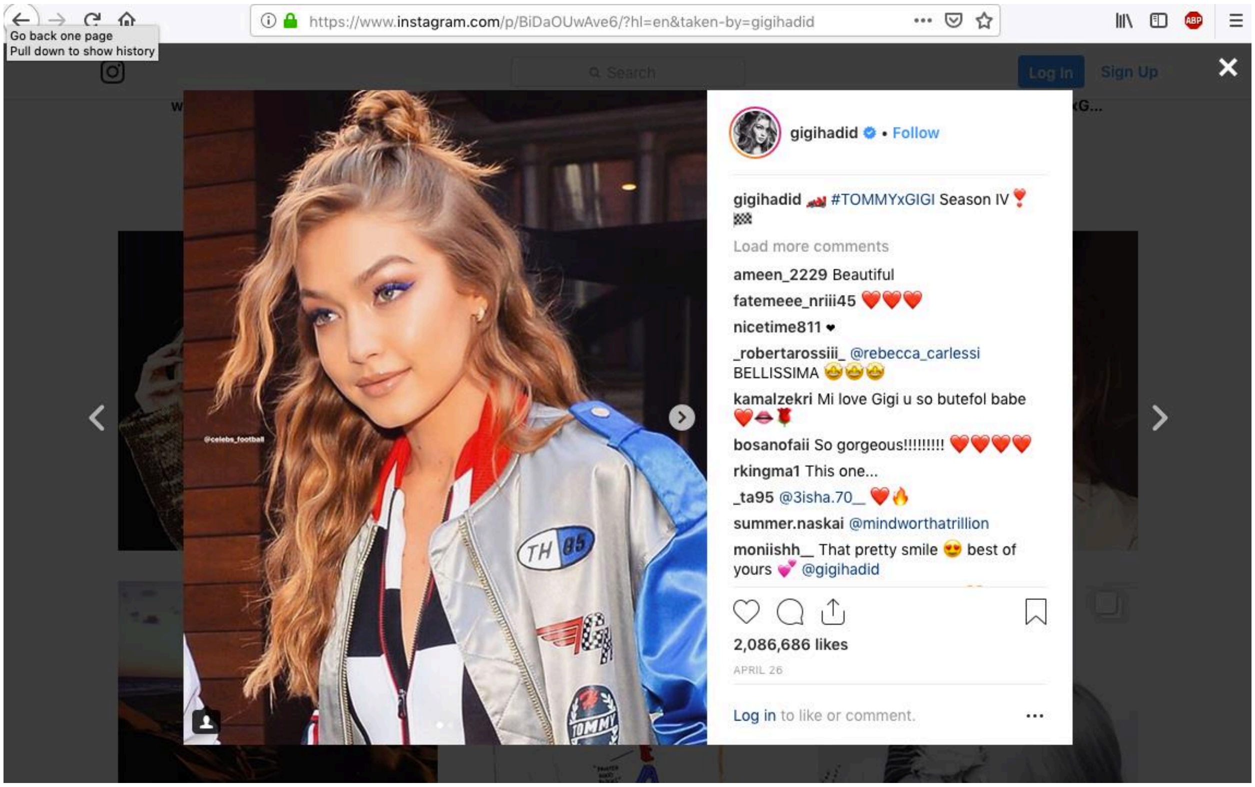
https://www.instagram.com/p/BiDaOUwAve6/?hl=en&taken-by=gigihadid
Go back one page
Pull down to show history
Log In
Sign Up
gigihadid • Follow
gigihadid #TOMMYxGIGI Season IV
Load more comments
ameen_2229 Beautiful
fatemeee_nriii45
nicetime811
robertarossiii @rebecca_carlessi BELLISSIMA
kamalzekri Mi love Gigi u so butefol babe
bosanofaii So gorgeous!!!!!!!!!
rkingma1 This one...
ta95 @3isha.70
summer.naskai @mindworthatrillion
moniishh__ That pretty smile best of yours @gigihadid
2,086,686 likes
APRIL 26
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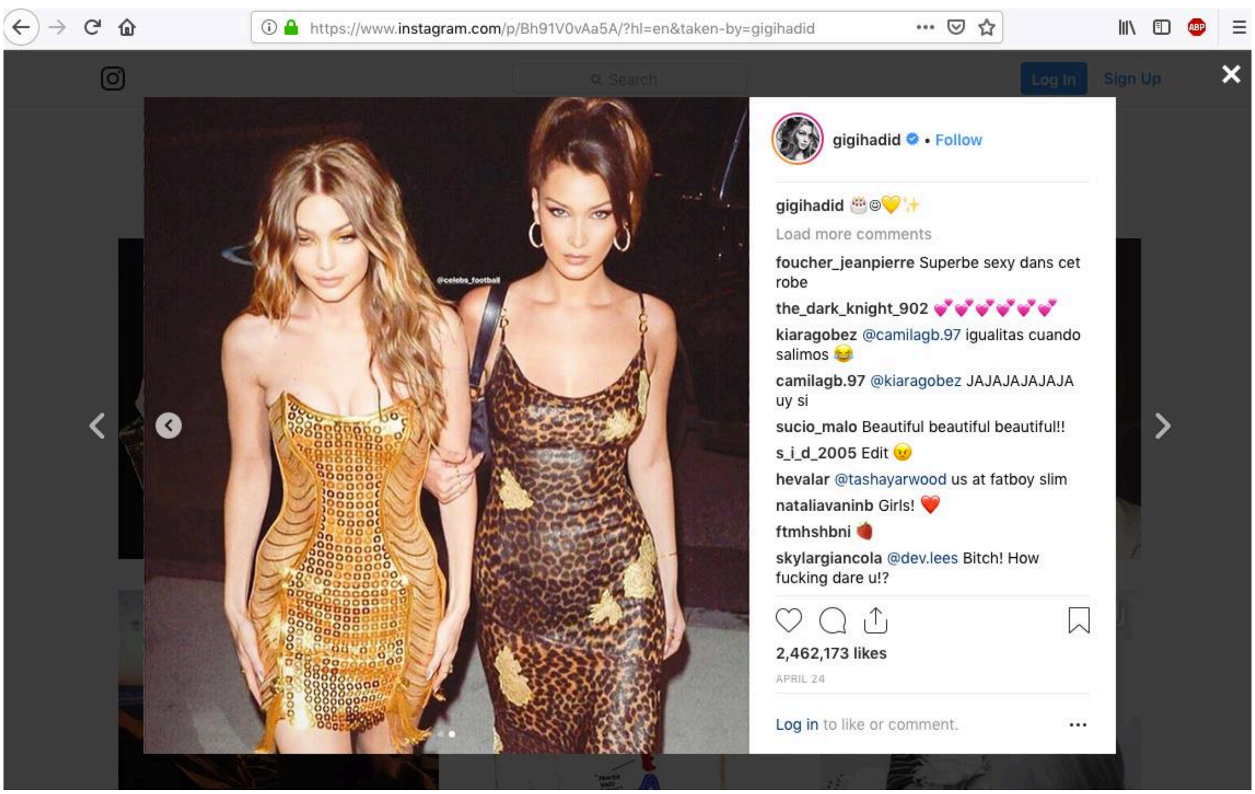
https://www.instagram.com/p/Bh91V0vAa5A/?hl=en&taken-by=gigihadid
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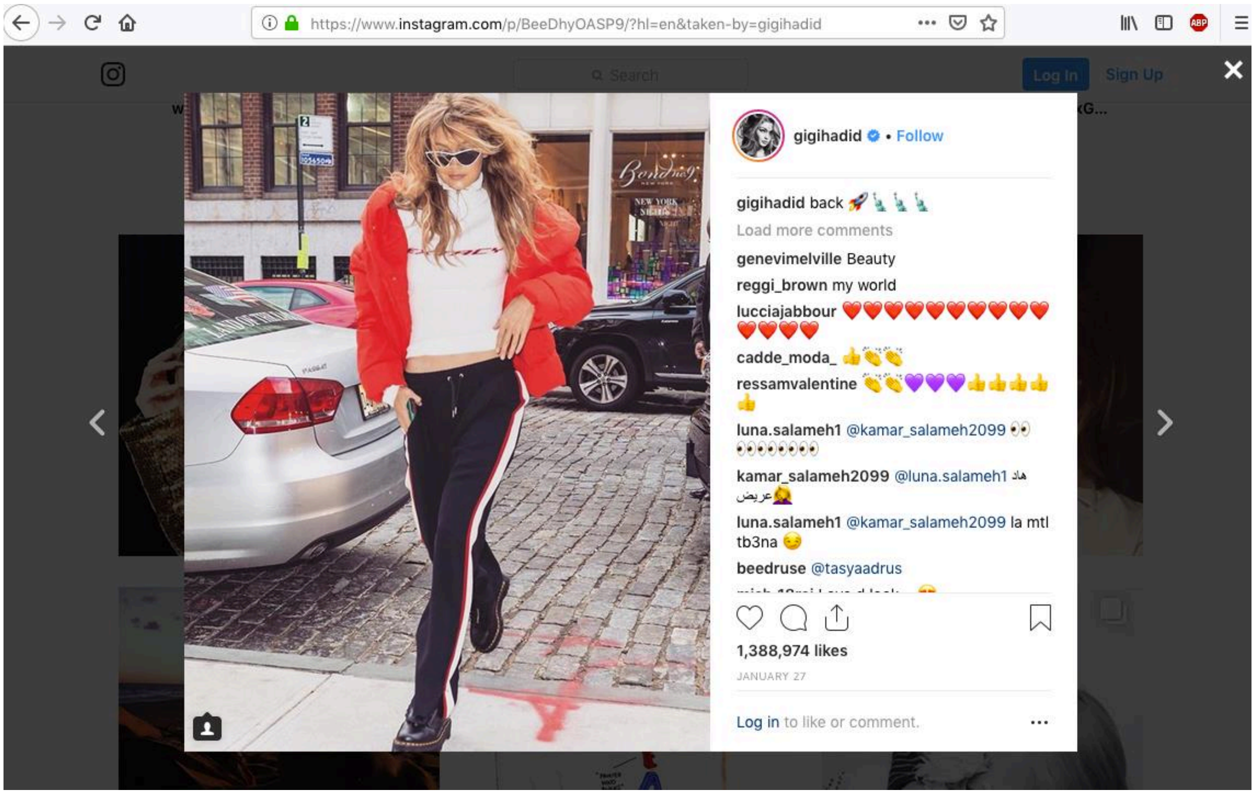
Load more comments
foucher_jeanpierre Superbe sexy dans cet robe
the_dark_knight_902
kiaragobez @camilagb.97 igualitas cuando salimos
camilagb.97 @kiaragobez JAJAJAJAJAJA uy si
sucio_malo Beautiful beautiful beautiful!!
s_i_d_2005 Edit
hevalar @tashayarwood us at fatboy slim
nataliavaninb Girls!
ftmhshbni
skylargiancola @dev.lees Bitch! How fucking dare u!?
2,462,173 likes
APRIL 24
Log in to like or comment.


https://www.instagram.com/p/BeeDhyOASP9/?hl=en&taken-by=gigihadid
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gigihadid back
Load more comments
genevimelville Beauty
reggi_brown my world
lucciajabbour
cadde_moda_
ressamvalentine
luna.salameh1 @kamar_salameh2099
kamar_salameh2099 @luna.salameh1
luna.salameh1 @kamar_salameh2099 la mtl tb3na
beedruse @tasyaadrus
1,388,974 likes
JANUARY 27
Log in to like or comment.


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gigihadid • Follow
gigihadid #EYELOVE @pencilsofpromise @stuartweitzman
& love you my friends @mimicuttrell @patrickta @brycescarlett
Load more comments
ellenpmacpherson @natalyaadams the shoes are goals
maya.w23 @_its.jeff_
sara.fav801 Gorgeous
vijaydantuluri Gorgeous princess osm
fashionwthme Harikaaaaaa
blveniaz ANGEL
erlindaputri21 U look so beautiful in white
preloved.bali.bagus
zalina_mir Выглядит как 30 летняя хотя
1,552,414 likes
NOVEMBER 20, 2017
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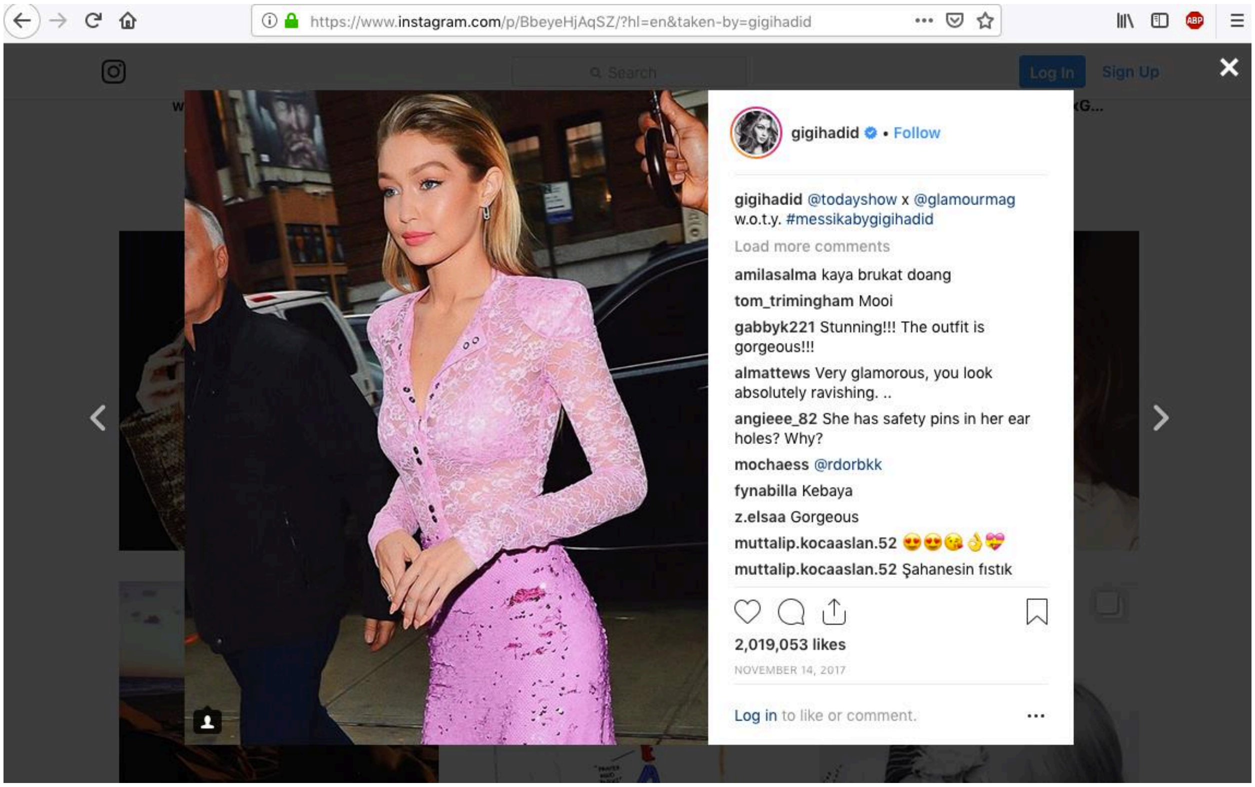
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gigihadid @todayshow x @glamourmag w.o.t.y. #messikabygigihadid
Load more comments
amilasalma kaya brukat doang
tom_trimingham Mooi
gabbyk221 Stunning!!! The outfit is gorgeous!!!
almattews Very glamorous, you look absolutely ravishing. ..
angieee_82 She has safety pins in her ear holes? Why?
mochaess @rdorbkk
fynabilla Kebaya
z.elsaa Gorgeous
muttalip.kocaaslan.52
muttalip.kocaaslan.52 Şahanesin fıstık
2,019,053 likes
NOVEMBER 14, 2017
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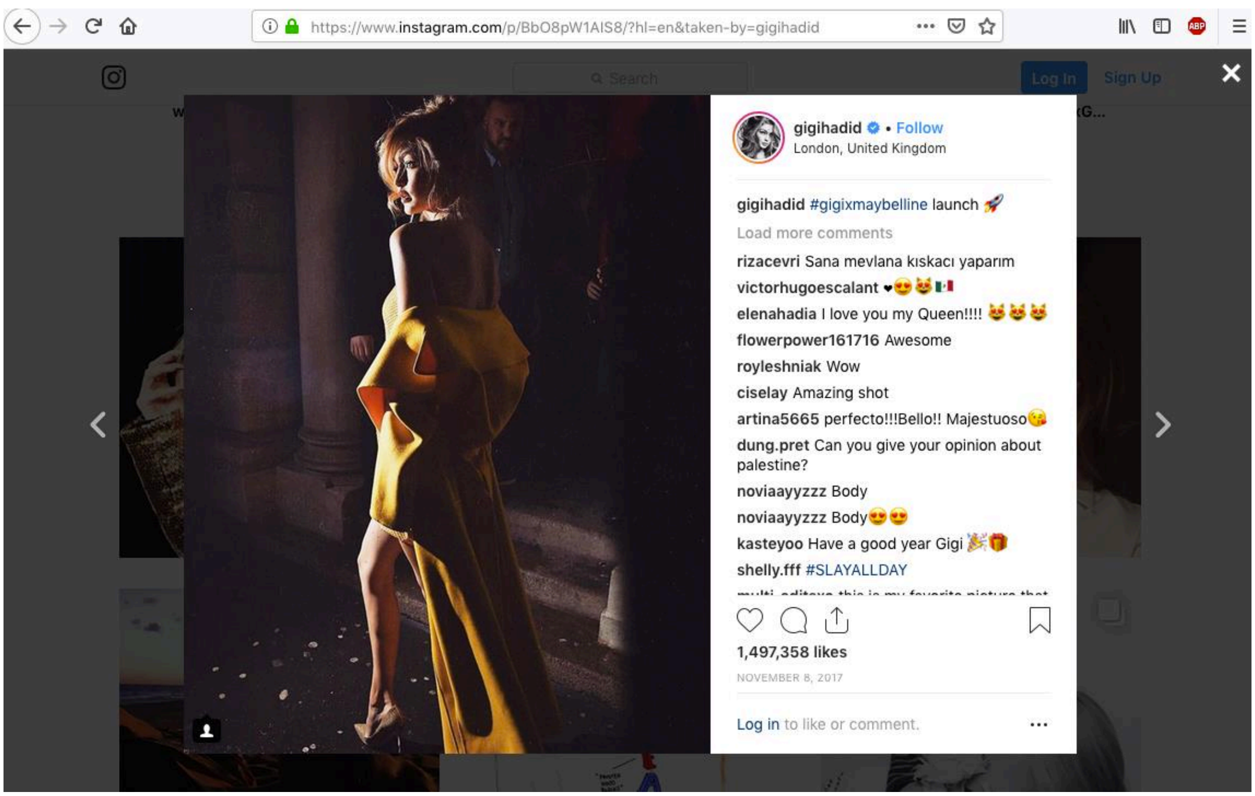
https://www.instagram.com/p/BbO8pW1AIS8/?hl=en&taken-by=gigihadid
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Sign Up
gigihadid • Follow
London, United Kingdom
gigihadid #gigixmaybelline launch
Load more comments
rizacevri Sana mevlana kıskacı yaparım
victorhugoescalant
elenahadia I love you my Queen!!!!
flowerpower161716 Awesome
royleshniak Wow
ciselay Amazing shot
artina5665 perfecto!!!Bello!! Majestuoso
dung.pret Can you give your opinion about palestine?
noviaayyzzz Body
noviaayyzzz Body
kasteyoo Have a good year Gigi
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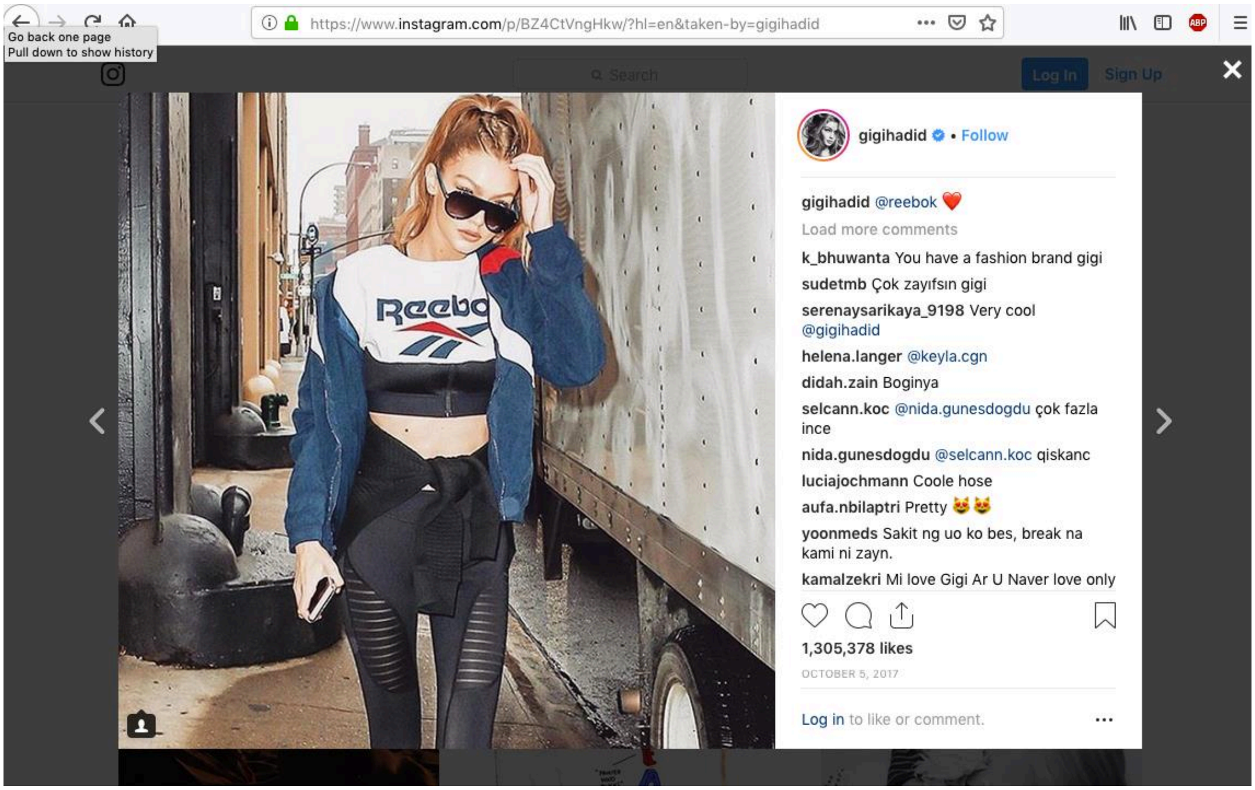

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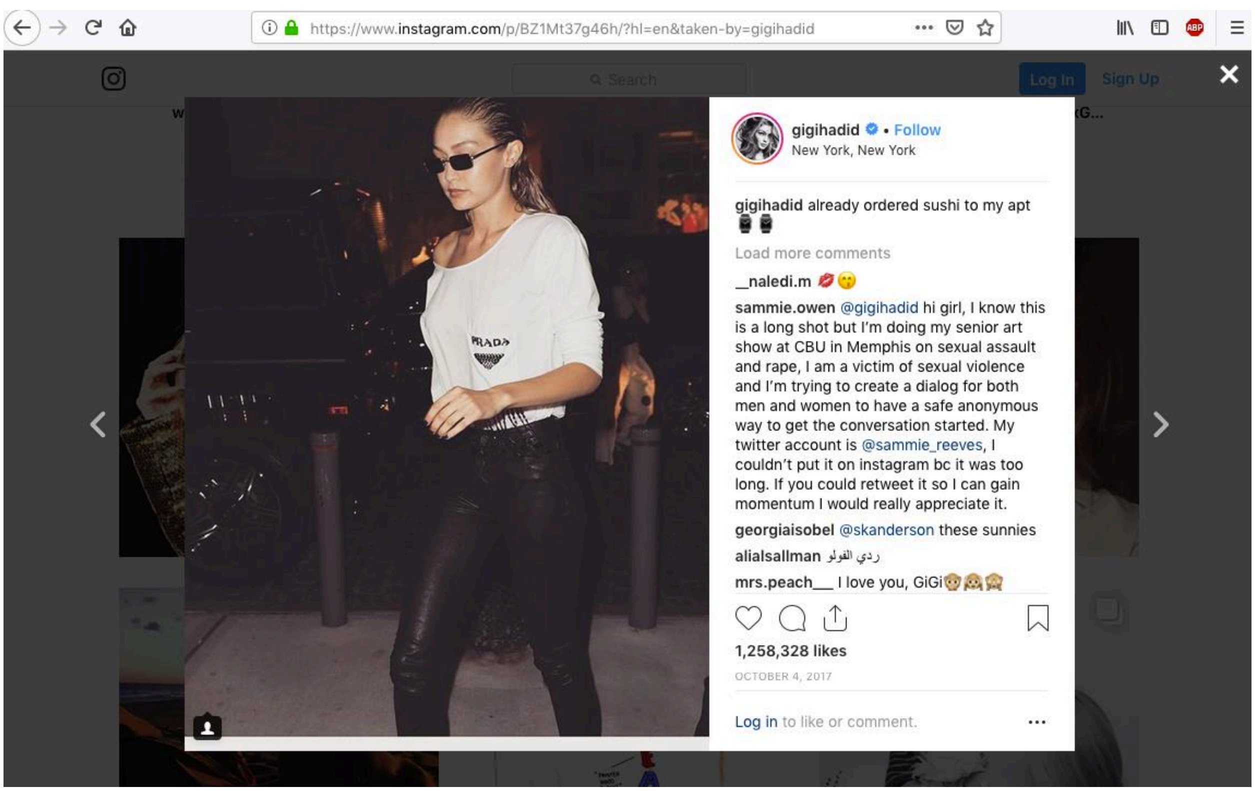

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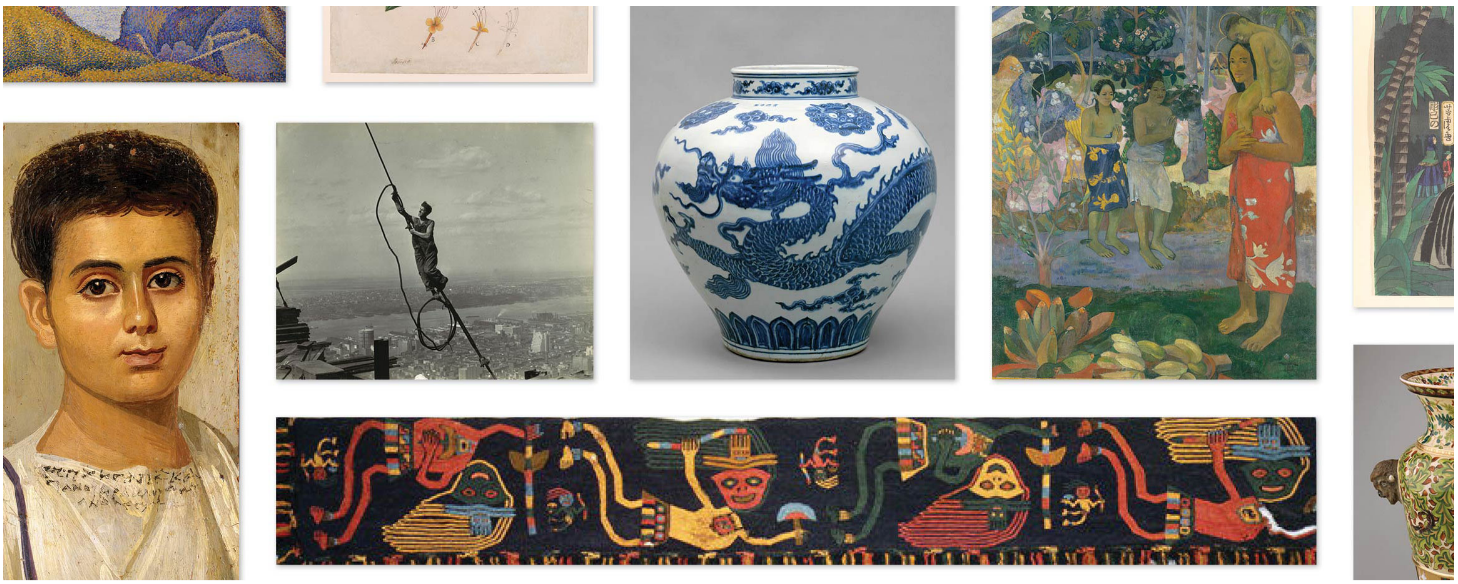

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OCTOBER 11, 2017

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MALIK PAYANO, JUAN C. SUAREZ, MAKESA KEKE FOFANA, MINDY LIU, JUAN GARCIA, JORGE E. FLORES JR., AMANDA DIMEGLIO, SABINA ADROVIC, ABIGAIL HAYNES, ANGELA DISPENZA, STEPHANIE CONSTANZO, ARONA COHEN, and MARTINA HALAGA on behalf of themselves and others similarly situated,

Plaintiffs,

v.

BURBERRY LIMITED a/k/a BURBERRYS LIMITED,

Defendant.

---x

CASE NO. 15-CV-10178 (SN)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Attorneys for Plaintiffs, FLSA Collective Plaintiffs, and the proposed class

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Plaintiffs, on behalf of themselves and others alleged to be similarly situated, respectfully submit this memorandum of law in support of their motion for preliminary approval of the Joint Stipulation of Settlement and Release dated July 12, 2017 ("Settlement Agreement" or "Agreement").[1] Defendant Burberry Limited ("Defendant" or "Burberry") has agreed to the terms of the Settlement Agreement and does not object to the relief requested herein.

I. INTRODUCTION

Subject to Court approval, the parties have settled this case for $2,540,000. The proposed settlement resolves the claims asserted in this action and satisfies all of the criteria for preliminary settlement approval under federal law. Plaintiffs respectfully request that the Court (1) grant preliminary approval of the Settlement Agreement; (2) permit Plaintiffs to file the Second Amended Complaint; (3) conditionally certify the settlement class under Fed. R. Civ. P. 23(b)(3) and 29 U.S.C. § 216(b); (4) appoint Joseph & Kirschenbaum LLP ("JK"), and Harrison, Harrison & Associates, Ltd. ("HHA") as class counsel; (5) approve the Notice of Proposed Class Action Lawsuit Settlement (the "Notice") attached as Exhibit 1 to the Agreement, the Claim Form attached as Exhibit 2 to the Agreement, and the parties' plan for their distribution; (5) set a deadline of 60 days from the mailing of Notice for Settlement Class Members to object to the settlement or opt out of the Class or to submit a Claim Form; and (5) schedule a hearing ("Fairness Hearing") at which the Court will consider Plaintiffs' motion for final approval of the settlement, attorneys' fees and costs, and enhancement awards.

Preliminary approval and conditional class certification will allow the parties to notify the Class Members of the settlement and of their right to object, opt out or submit a Claim Form.

[1] In support of this motion, Plaintiffs submit the declaration of Denise A. Schulman ("Schulman Decl."), attaching thereto as Exhibit 1 a true and correct copy of the Settlement Agreement ("Agreement" or "Schulman Ex. 1") and exhibits thereto.

Preliminary approval does not require the Court to rule on the ultimate fairness of the settlement, but to make only an "initial evaluation" of the fairness of the proposed settlement and whether there is "probable cause" to submit it to the class members. *See In re Traffic Executive Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980) (the court need only find "'probable cause' to submit the [settlement] to class members and hold a fullscale hearing as to its fairness"); *Clark v. Ecolab, Inc.*, No. 07 Civ. 8623, 2009 U.S. Dist. LEXIS 108736, at *14-15 (S.D.N.Y. Nov. 17, 2009) (same). The Court should permit notice of the settlement to be sent to class members because the settlement falls within the "range of possible approval." *Torres v. Gristede's Operating Corp.*, No. 04 Civ. 3316, 2010 U.S. Dist. LEXIS 75362, at *11 (S.D.N.Y. June 1, 2010).

II. BACKGROUND

A. Procedural History

The Plaintiffs worked in certain of Defendant's retail stores in New York in various positions. (Schulman Decl. ¶ 3.) On December 31, 2015, Plaintiffs Malik Payano, Juan C. Suarez, Makesa Keke Fofana, Mindy Liu, Juan Garcia, and Jorge E. Flores filed their complaint against Defendant on behalf of a putative collective and class of New York sales associates. The complaint asserted overtime claims under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") and claims for unpaid straight time and wage notice violations under the NYLL. (*Id*. at ¶ 4.) On March 16, 2016, Plaintiffs filed an amended complaint that, *inter alia*, added Amanda Dimeglio, Sabina Adrovic, Abigail Haynes, Angela Dispenza, Stephanie Constanzo, Arona Cohen, and Martina Halaga (Plaintiffs Payano, Suarez, Fofana, Liu, Garcia, Flores, Dimeglio, Adrovic, Haynes, Dispenza, Constanzo, Cohen, and Halaga are referred to collectively as the "Sales Plaintiffs") as named Plaintiffs. (*Id*. at ¶ 5.) In addition to the Sales

Plaintiffs, 11 individuals have filed consent to sue forms in this action, joining the case as party plaintiffs. (*Id*. at ¶ 6.) Defendant denied the allegations in the complaints. (*Id*. at ¶ 7.)

In May 2016, Plaintiffs' counsel advised Defendant that they intended to file another class and collective action lawsuit on behalf of shipper/receivers employed by Defendant at certain New York stores that would allege the same types of claims as are asserted in this action. (*Id*. at ¶ 8.) Plaintiffs' counsel provided Defendant with the draft complaint for the shipper/receiver lawsuit, which listed Brian Brown, Argenis Cerda, Thomas C. Rivera, and Sergio Torres[2] (collectively, the "Shipper Plaintiffs") as plaintiffs. (*Id*. at ¶ 9.) The parties agreed to toll the claims of the class of shipper/receivers identified in the draft shipper/receiver complaint for a certain period while the parties attempted to settle this action and the anticipated shipper/receiver lawsuit. (*Id*. at ¶ 10.)

B. Discovery And Settlement Discussions

At the beginning of this litigation, the parties agreed to engage in informal discovery in order to attempt to reach an early settlement. The parties in fact engaged in substantial discovery before reaching a settlement. (*Id*. at ¶ 12.) Defendant ultimately produced thousands of documents, including payroll records, time records, schedules, and Plaintiffs' and opt-in Plaintiffs' personnel files. Plaintiffs' counsel carefully reviewed all of these documents, many of them with Plaintiffs. (*Id*. at ¶ 13.) Defendant deposed two opt-in Plaintiffs, and Plaintiffs deposed two managers. (*Id*. at ¶ 14.) Plaintiffs' counsel also interviewed the named and opt-in Plaintiffs in order to learn detailed information about Defendant's New York stores. (*Id*. at ¶ 15.)

[2] Plaintiffs Cerda and Torres worked as shipper/receivers and in sales positions. As such, they previously filed consent to sue forms in this action. (Schulman Decl. n.1.)

The parties attended a private mediation with mediator Michael Dickstein on June 27, 2016. (*Id*. at ¶ 16.) The parties were unable to reach a settlement at the mediation, but they agreed to exchange additional information that they believed would move settlement discussions forward. (*Id*. at ¶ 17.) The parties then participated in a settlement conference before this Court on January 31, 2017. (*Id*. at ¶ 18.) After further discussions with each other and with the Court's assistance, the parties ultimately agreed to settle this case for $2,540,000 at a March 21, 2017 conference with the Court. (*Id*. at ¶ 19.) Plaintiffs believe this settlement amount which is highly favorable to the Class, while also taking into account the substantial risks Plaintiffs faced in this litigation. (*Id*. at ¶ 20.)

III. THE PROPOSED SETTLEMENT

A. Plaintiffs Should Be Permitted To File Their Second Amended Complaint

This action and the proposed shipper/receiver action assert the same types of claims based on the same alleged practices, and the parties have engaged in coordinated discovery and settlement negotiations, culminating in the execution of a single Agreement. Because of this, Plaintiffs now seek to file a second amended complaint (attached to the Agreement as Exhiibt 7) adding the Shipper Plaintiffs as Named Plaintiffs and asserting claims on behalf of a class of shipper/receivers. (*Id*. at ¶ 11.) In the Agreement, and without making any admissions of any kind, Defendant consented to the filing of the second amended complaint. (Agreement ¶ 2.2.) Accordingly, Plaintiffs should be permitted to file the second amended complaint pursuant to Fed. R. Civ. P. 15(a)(2) ("[A] party may amend its pleading . . . with the opposing party's written consent[.]").

B. Settlement Fund

The Settlement Agreement provides that Defendant shall pay a maximum settlement amount of Two Million Five Hundred Forty Thousand Dollars ($2,540,000.00) (the "Settlement Payment"). (Agreement ¶¶ 1.33, 3.1(A).) The Settlement Payment includes payments to Claimants, attorneys' fees and costs, service awards, and settlement administration costs. (*Id.* at ¶¶ 3.1(A), 3.2, 3.3, 3.5.)

The Net Settlement Fund will be divided into separate funds for each store or groups of stores, as set forth in the Settlement Agreement. (*Id.* at ¶ 3.5(B).) The percentage of the Net Settlement Fund allocated to each store or group of stores corresponds to the percentage of damages attributable to each store or group of stores based on Plaintiffs' damages calculation. (Schulman Decl. ¶¶ 21-22.) Within each store's or group of stores' sub-fund, Class Members will receive varying numbers of points per week depending on whether they worked a full time week or a part time week and whether the time period in question was one where the store used handwritten time records or electronic time records. (Agreement ¶ 3.5(B); Schulman Decl. ¶ 23.) Each sub-fund will be allocated to Class Members who worked at the applicable store(s) on a *pro rata* basis according to Class Members' points. (Agreement ¶ 3.5(B).)

Class Members must submit a claim form in order to receive payment under the Settlement Agreement. (*Id.* at ¶ 1.2.) If Class Members do not claim the entire Net Settlement Fund, the unclaimed funds shall be used first to increase the awards of all Class Members who did submit claim forms by 5.11%. (*Id.* at ¶ 3.5(E).) If there are insufficient unclaimed funds to cover the 5.11% increase, Class Counsel will reduce their fee request, with the unrequested fees to be used to fund the 5.11% increase. (*Id.* at ¶ 3.2(A).) No Class Member's allocation of the Net Settlement Fund will be less than $150. (*Id.* at ¶ 3.5(D).)

No later than ten (10) days after the Effective Date, Defendant will deliver to the Claims Administrator all sums due under the Settlement Agreement. (*Id*. at ¶ 3.1(B).) The Claims Administrator will distribute the Settlement Payment within fourteen (14) days of the Effective Date. (*Id*. at ¶ 3.1(C).) Settlement checks will be valid for 180 days, and applicable tax withholdings will be made. (*Id*. at ¶¶ 3.5(G), 3.6(A)(B).)

C. The Release

In return for the above consideration, all Class Members who do not opt out of the Class will release all wage and hour claims against Defendant under state law. All Claimants will also release all FLSA claims against Defendant. (*Id*. at ¶ 3.7.) The Settlement Agreement does not release the FLSA claims of anyone who does not submit a claim form. The 19 individuals receiving service awards will release all claims against Defendant. (*Id*. at ¶ 3.7(C).)

D. Attorneys' Fees And Costs And Service Awards

Class Counsel will apply for up to one-third of the Settlement Amount as attorneys' fees and will seek reimbursement for costs. (*Id*. at ¶ 3.2(A).) The Court need not rule on fees and costs now. Plaintiffs will file a formal motion for approval of fees along with their motion for final approval of the settlement. *See* Fed. R. Civ. P. 23(h).

In addition to their individualized awards, 19 named Plaintiffs and opt-in Plaintiffs, all of whom actively participated in this lawsuit and spent many hours working with Class Counsel, will apply for additional payments totaling $62,500 in recognition of the services they rendered on behalf of the Class. (*Id*. at ¶ 3.3.) Plaintiffs will make this motion simultaneously with their motion for final approval of the Settlement Agreement. Such service awards "are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation." *Khait v. Whirlpool Corp.*, No. 06 Civ. 6381, 2010 U.S. Dist. LEXIS 4067, at *26 (E.D.N.Y. Jan. 20, 2010).

Both the application for attorneys' fees and the application for service awards are separate from approval of the Settlement Agreement, and will be fully briefed prior to final approval. Thus, the Court need not decide those issues now.

IV. ARGUMENT

Fed. R. Civ. P. 23(e) requires judicial approval for any compromise of claims brought on a class basis. Judicial proceedings under Fed. R. Civ. P. 23 ("Rule 23") have established a defined procedure and specific criteria for settlement approval in class action settlements. There are four necessary steps: (1) certifying the class for settlement purposes; (2) preliminary approval of the proposed settlement; (3) dissemination of notice of settlement to all class members; and (4) a final settlement approval hearing. *See In re Initial Pub. Offering,* 226 F.R.D 186, 191 (S.D.N.Y. 2005). These procedures safeguard class members' procedural due process rights and enable the court to fulfill its role as the guardian of class interests. *Torres*, 2010 U.S. Dist. LEXIS 75362 at *9-10.

With this motion, Plaintiffs request that the Court take the first three steps in the settlement approval process by certifying the class for settlement purposes only and granting preliminary approval of the Settlement Agreement, approving the Notice, and authorizing distribution of the Notice.

A. The Class Should Be Conditionally Certified For Settlement Purposes

Prior to granting preliminary approval of a settlement, district courts determine whether the proposed settlement class is a proper class for settlement purposes. *See e.g., Amchem Prods. v. Windsor,* 521 U.S. 591, 620 (1997) (explaining that courts should examine whether the proposed class would be adequately represented and fairly treated by a class action settlement).

Conditional settlement approval, class certification, and appointment of class counsel have practical purposes, including avoiding the costs of litigating class status while facilitating a global settlement, ensuring notification of all class members of the terms of the proposed settlement agreement, and setting the date and time of the final approval hearing. *Dorn v. Eddington Sec.*, No. 08 Civ. 10271, 2011 U.S. Dist. LEXIS 11931, at *3 (S.D.N.Y. Jan. 20, 2011).

The Court may certify a class where plaintiffs demonstrate that the proposed class and proposed class representatives meet the prerequisites of Rule 23(a) – numerosity, commonality, typicality and adequacy of representation – and one of the three requirements of Rule 23(b). Fed. R. Civ. P. 23; *In re Visa Check/Mastermoney Antitrust Litig.,* 280 F.3d 124, 132-33 (2d Cir 2001), *abrogated on other grounds by Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24 (2d Cir. 2006). Here, Plaintiffs seek certification under Rule 23(b)(3), which requires that "questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Court has great discretion in determining whether to certify a class. *Maywalt v. Parker & Parsley Petroleum Co*., 67 F.3d 1072, 1079 (2d Cir. 1998). *See Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143, 2010 U.S. Dist. LEXIS 139137 at *5-6 (E.D.N.Y. Nov. 12, 2010). However, in exercising this discretion, courts should give "proper deference to the private consensual decision of the parties." *Torres*, 2010 U.S. Dist. LEXIS 75362 at *10 (citation omitted).

i. The prerequisites of Rule 23(a) are satisfied

The Class is defined as certain hourly employees who worked at certain New York stores during the time periods set forth in the Settlement Agreement. (Agreement ¶ 1.7.) The relevant time periods vary depending on position and store based on the timing of the filing of complaints and/or tolling agreements and the addition of the Outlet Stores to the Class at the end of settlement negotiations. Plaintiffs submit that the Class meets the requirements of numerosity, commonality, typicality, and adequacy of representation under Rule 23(a) for settlement purposes.

a. Numerosity is satisfied

The parties estimate that the Class includes approximately 643 members. (*Id*. at ¶ 24.) Thus, Plaintiffs submit that the Class is so numerous that joinder of all Class Members is impracticable. *See Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir. 1995) (holding that numerosity can be presumed at a level of 40 members).

b. Commonality is satisfied

Plaintiffs submit that the proposed Class also satisfies the commonality requirement, the purpose of which is to test "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of SW v. Falcon*, 457 U.S. 147, 157 n.13 (1982). *See Daniels v. City of New York,* 198 F.R.D. 409, 417 (S.D.N.Y. 2001) ("The commonality requirement will be met if the named Plaintiffs share a common question of law or fact with the grievances of the prospective class.").

Here, Plaintiffs submit that there are several questions of law and fact alleged to be common to the Class, including the primary issues in this case, *i.e.,* whether Burberry had a policy and practice of requiring Class members to work "off the clock" and failed to pay them for all hours worked, including overtime hours. *See, e.g., Riidel v. Acqua Ancien Bath N.Y. LLC*, No. 14 Civ. 7238, 2016 U.S. Dist. LEXIS 68747, at *10-11 (S.D.N.Y. May 19, 2016).

c. Typicality is satisfied

Plaintiffs submit that typicality is also satisfied. "Like the commonality requirement, typicality does not require the representative party's claims to be identical to those of all class members." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 182 (W.D.N.Y. 2005). Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (quoting *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 291 (2d Cir. 1992)) (internal quotation marks omitted). *See, e.g., Campos v. Goode*, No. 10 Civ. 0224, 2011 U.S. Dist. LEXIS 22959, at *6-7 (S.D.N.Y. Mar. 4, 2011) (finding typicality met because "[t]he named plaintiffs suffered the same alleged injury as did the class members — Defendant's failure to pay overtime and "because Plaintiffs' claims arise from the same factual and legal circumstances that form the bases of the Class Members' claims"). "Minor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the named plaintiffs and the class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993); *Gortat v. Capala Bros*., No. 07 CV 3629, 2010 U.S. Dist. LEXIS 35451, at *13 (E.D.N.Y. Apr. 9, 2010).

Here, Plaintiffs submit that typicality is satisfied because "each class member's claim arises from the same course of events[,]" namely Defendant's alleged failure to pay Class Members for all hours worked. *Riedel*, 2016 U.S. Dist. LEXIS 68747, at *12.

d. Adequate representation is satisfied

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy requirement exists to ensure that the class representatives will have an interest in vigorously pursuing the claims of the class, and . . . have no interests antagonistic to the interests of other class members." *Toure v. Central*

Parking Sys., No. 05 Civ. 5237, 2007 U.S. Dist. LEXIS 74056, at *18-19 (S.D.N.Y. Sept. 28, 2007) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)) (internal quotation marks omitted). "'[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.'" *Dziennik v. Sealift, Inc.*, No. 05 Civ. 4659, 2007 U.S. Dist. LEXIS 38701, at *19 (E.D.N.Y. May 29, 2007) (quoting *Martens v. Smith Barney Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998)).

Here, the Named Plaintiffs (including the newly-added Named Plaintiffs in the proposed Second Amended Complaint) are adequate representatives of the proposed class, have fairly and adequately represented and protected the interests of all Class Members, and have no known conflicts with Class Members. (Schulman Decl. ¶ 25.) Accordingly, Plaintiffs submit that adequacy is satisfied.

ii. The Court should certify the settlement class under Rule 23(b)(3)

Rule 23(b)(3) requires that the common questions of law or fact "predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality." *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986). The Class is suitable for certification, and the Court should certify the Class pursuant to Rule 23(b)(3), for purposes of granting preliminary approval of the Agreement for settlement purposes only.

a. Common questions predominate

Predominance requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney*, 280 F.3d at 136. The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Id.* at 139. Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005).

Here, Plaintiffs submit that all Class Members are unified by common factual and legal allegations – that Defendant maintained a policy and practice of failing to pay Class Members for all hours worked. Therefore, Plaintiffs submit that predominance is satisfied. *Riedel*, 2016 U.S. Dist. LEXIS 6874, at *14.

b. A class action is a superior mechanism

Rule 23(b)(3)'s second part analyzes whether "'the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy.'" Fed. R. Civ. P. 23(b)(3); *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104 (2d Cir. 2007). Rule 23(b)(3) sets forth a non-exclusive list of relevant factors, including whether individual class members wish to bring, or have already brought, individual actions, and the desirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).

Here, Plaintiffs and the Class have limited financial resources with which to prosecute individual actions, and Plaintiffs are unaware of any individual lawsuits that have been filed by Class Members arising from the same allegations. Concentrating the litigation in this Court is desirable because much of the allegedly wrongful conduct occurred within its jurisdiction.

Employing the class device here will achieve economies of scale for putative Class Members, conserve judicial resources, and preserve public confidence in the system by avoiding repetitive proceedings and preventing inconsistent adjudications. *Beckman v. Keybank, N.A.*, 293 F.R.D. 467, 473-74 (S.D.N.Y. 2013); *Campos*, 2011 U.S. Dist. LEXIS 22959, at *8.

iii. The Court should appoint Plaintiffs' counsel as class counsel

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(A), (B). In making this determination, the Court must consider counsel's (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(C).

Plaintiffs' counsel Joseph & Kirschenbaum LLP ("JK") and Harrison, Harrison & Associates, LTD ("HHA") meet all relevant criteria. They did substantial work identifying, investigating, prosecuting, and settling the claims; have substantial experience prosecuting and settling wage and hour class actions; are well-versed in wage and hour and class action law; and are well-qualified to represent the interests of the class. (Schulman Decl. ¶¶ 26-41.) Courts have repeatedly found JK and HHA to be adequate class counsel in wage and hour class actions. *E.g., Roberts. v. Sterling Mets, L.P.,* No. 11 CV 3778 (E.D.N.Y. June 14, 2013) (HHA); *Sand v. Greenberg*, No. 08 CV 7840, 2011 U.S. Dist. LEXIS 36266 at *6 (S.D.N.Y. Mar. 22, 2011) (JK); *Spicer v. Pier Sixty LLC*, 269 F.R.D. 321 (S.D.N.Y. 2010) (JK). (*See also* Schulman Decl. ¶¶ 35-36, 40.)

Therefore, the Court should appoint JK and HHA to serve as class counsel Class pursuant to Rule 23(g).

B. Preliminary Approval Of The Agreement Is Appropriate

There is a strong preference in the law for the resolution of class action litigation through settlement. *See McReynolds v. Richards-Cantave,* 588 F.3d 790, 803 (2d Cir. 2009); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc*., 396 F.3d 96, 116-17 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context"); *Cohen v. J.P. Morgan Chase & Co*., 262 F.R.D. 153, 157 (E.D.N.Y. 2009) ("'The compromise of complex litigation is encouraged by the courts and favored by public policy.'") (citations omitted).

Preliminary approval is the first step in the settlement process. It allows notice to issue to the class and for class members to object or opt out of the settlement. After the notice period, the Court will be able to evaluate the settlement with the benefit of the class members' input at a fairness hearing. The fairness hearing affords class members "an opportunity to present their views of the proposed settlement." *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, M 21-95, 2006 U.S. Dist. LEXIS 81440, at *14 (S.D.N.Y. Nov. 8, 2006) (internal quotation marks omitted). Accordingly, a district court reserves its ultimate determination of whether a proposed settlement is fair, reasonable, and adequate for the final approval stage, after notice of the settlement has been given to the class members and they have had an opportunity to voice their views of the settlement or to exclude themselves from the settlement. *Torres*, 2010 U.S. Dist. LEXIS 75362, at *9-10.

Preliminary approval requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and informal presentation by the settling parties. *Torres*, 2010 U.S. Dist. LEXIS 75362 at *10-11; Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*"), § 11.25 (4th ed. 2002). The court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n*, 627 F.2d at 634; *Newberg* § 11.25 ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members). *See also Danieli v. IBM*, No. 08 Civ. 3688, 2009 U.S. Dist. LEXIS 106938, at *12 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where the settlement "ha[d] no obvious defects" and the proposed allocation plan was "rationally related to the relative strengths and weaknesses of the respective claims asserted").

"Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank*, 228 F.R.D. at 184. "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (internal quotation marks omitted); *Khait*, 2010 U.S. Dist. LEXIS 4067 at *13 (same); *Wright v. Stern*, 553 F. Supp. 2d 337, 343 (S.D.N.Y. 2008) (same). *See also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("When a settlement is negotiated prior to class certification, . . . it is subject to a higher degree of scrutiny in assessing its fairness."). "Consequently, when evaluating a settlement agreement, the court is not to substitute its judgment for that of the parties, nor is it to turn consideration of the adequacy of the settlement 'into a trial or a rehearsal of the trial.'" *Wright*, 553 F. Supp. 2d at 343-44 (quoting *Detroit v. Grinnell Corp*., 495 F.2d 448, 462 (2d Cir. 1974)). *See also Saylor v. Lindsley,* 456 F.2d 896, 904 (2d Cir. 1972) ("[S]ince the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the court must not turn the settlement hearing into a trial or a rehearsal of the trial; and that the court is concerned with the likelihood of success or failure and ought, therefore, to avoid any actual determination on the merits.") (internal citations omitted).

i. There are no grounds to doubt the fairness of the agreement, which is the product of extensive, arm's length negotiations

The first consideration in the preliminary-approval analysis is whether "the settlement is the result of serious, informed and non-collusive negotiations." *In re Med. X-Ray Film Antitrust Litig.,* No. CV 93-5904, 1997 U.S. Dist. LEXIS 21936, at *19 (E.D.N.Y. Dec. 10, 1997).

The proposed settlement here is the product of extensive negotiations, including a full-day mediation and two settlement conferences with the Court, that lasted nine months. The negotiations were at all times hard-fought and at arm's length and have produced a result that experienced counsel believe to be in the best interests of the Class. *See Clark*, 2010 U.S. Dist. LEXIS 47036 at *17-18 (where the settlement was achieved through experienced counsels' arm's-length negotiations, then, "[a]bsent fraud or collusion," "'[c]ourt[s] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.'") (citation omitted); *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 461 (S.D.N.Y. 2004) ("In addition to this presumption of fairness, great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.") (internal citations omitted).

ii. The settlement contains no obvious deficiencies

The proposed settlement has no obvious deficiencies. The settlement provides for reasonable service awards for 19 Named and Opt-In Plaintiffs who Plaintiffs believe were instrumental in facilitating a resolution of this matter, in a *total* amount of $62,500, or 2.46% of the total settlement fund. These individuals expended significant time participating in discovery and communicating with counsel. "[S]ervice awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff." *Capsolas v. Pasta Res., Inc.*, No. 10 CV 5595, 2012 U.S. Dist. LEXIS 144651, at *26 (S.D.N.Y. Oct. 5, 2012) (awarding 10 service awards totaling $110,000 out of $5,250,000 settlement fund); *Khait,* 2010 U.S. Dist. LEXIS 4067 at *26 (approving awards totaling $175,000 out of a $9,250,000 settlement fund).

Finally, the settlement does not mandate excessive compensation for Class Counsel, which will apply for an award of attorneys' fees not to exceed one-third of the settlement fund and reimbursement of expenses. This is well "within the range of reasonable attorney fees awarded in the Second Circuit." *deMunecas v. Bold Food, LLC*, No. 09 Civ. 00440, 2010 U.S. Dist. LEXIS 87644, at *22-23 (S.D.N.Y. Aug. 23, 2010) ("Class Counsel's request for 33% of the Fund is reasonable under the circumstances of this case and is consistent with the norms of class litigation in this circuit.") (citing cases).

> In wage and hour class action lawsuits, public policy favors a common fund attorneys' fee award. Where relatively small claims can only be prosecuted through aggregate litigation, "private attorneys general" play an important role. Attorneys who fill the private attorney general role must be adequately compensated for their efforts. If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk. Adequate compensation for attorneys who protect wage and hour rights furthers the remedial purposes of the FLSA and the NYLL.

Khait, 2010 U.S. Dist. LEXIS 4067 at *22-23 (internal citations omitted).

iii. The settlement falls within the range of possible approval

As explained above, the Settlement Agreement was reached only after protracted arms' length negotiations, including a mediation with an experienced mediator and settlement conferences with the Court. The parties and their counsel fully considered the advantages and disadvantages of continued litigation. Class Counsel believe that this settlement achieves all of the objectives of the litigation, namely a substantial monetary settlement to Class Members.

Class Counsel, who have a great deal of experience in the prosecution and resolution of wage and hour class actions, have carefully evaluated the merits of this case and the proposed settlement. Even if the matter were to proceed to trial, Class Counsel acknowledge that the apparent strength of the claims in this case is no guarantee against a complete or partial defense verdict. "Litigation inherently involves risks." *deMunecas*, 2010 U.S. Dist. LEXIS 87644 at *14 (citation omitted). Indeed, "if settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.,* 304 F. Supp. 917, 934 (S.D.N.Y. 1969); *Campos*, 2011 U.S. Dist. LEXIS 22959 at *13 (same).

Weighing the benefits of the settlement against the risks associated with proceeding in the litigation, the settlement amount in the Agreement is more than reasonable. *See Velez v. Novartis Pharms. Corp.*, 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945, at *40-41 (S.D.N.Y. Nov. 30, 2010) ("[C]ourts often approve class settlements even where the benefits represent 'only a fraction of the potential recovery.'"); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982) ("It is well settled that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair.") (collecting cases); *cf. Grinnell Corp.*, 495 F.2d at 455 n.2 ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."); *Cagan v. Anchor Sav. Bank FSB*, No. 88 Civ. 3024, 1990 U.S. Dist. LEXIS 11450, at *34-35 (E.D.N.Y. May 17, 1990) (approving $2.3 million class settlement over objections that the "best possible recovery would be approximately $121 million").

The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Khait*, 2010 U.S. Dist. LEXIS

4067, at *18 (quoting *Frank*, 228 F.R.D. at 186). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Khait*, 2010 U.S. Dist. LEXIS 4067, at *18-19. "[A] 'settlement agreement achieved through good-faith, non-collusive negotiation does not have to be perfect, just reasonable, adequate and fair.'" *Dupler v. Costco Wholesale Corp*., 705 F. Supp. 2d 231, 246-47 (E.D.N.Y. 2010) (quoting *Joel A. v. Guiliani,* 218 F.3d 132, 144 (2d Cir. 2000)). Furthermore, even if a judgment were obtained against Defendant at trial, the relief might be no greater, and indeed might be less, than that provided by the proposed Settlement.

Thus, the Court should grant preliminary approval of the Settlement Agreement and direct that notice of it be given to the Class.

C. The Proposed Plan Of Class Notice Should Be Approved

"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P.23(c)(2)(B). *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974) ("[E]ach class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action.").

Rule 23(e)(B) similarly states, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(B). "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart Stores,* 396 F.3d at 113 (internal citations omitted). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Id.* at 114 (internal citations omitted). Notice is "adequate if it may be understood by the average class member." *Newberg* § 11:53.

Here, the Claims Administrator will disseminate the Notice and Claim Form (Exhibits 1 and 2 to the Agreement) to all Class Members via first class mail at their last known addresses as maintained by Defendant. For any Notice returned as undeliverable, the Claims Administrator will (1) e-mail the Notice to the Class Member if an e-mail address is available and (2) attempt a skip trace using the computer databases available and the information provided by Defendant. Those individuals who are located using the skip trace will be sent an additional copy of the Notice. 30 days before the deadline to submit claim forms, the Claims Administrator will mail a reminder postcard (Exhibit 3 to the Agreement) to Class Members who have not yet opted out or submitted claim forms. 14 days before the deadline to submit claim forms, the Claims Administrator will e-mail a reminder (Exhibit 4 to the Agreement) to Class Members who have not yet opted out or submitted claim forms and for whom Defendant provided e-mail addresses. (Agreement ¶ 2.5.) Thus, the proposed methods of notice comport with Rule 23 and the requirements of due process.

Rule 23(c)(2)(B) requires a class notice to state the nature of the case, the class definition, the class claims, that a class member may enter an appearance through counsel, how a class member may opt out, and the binding effect of a class judgment. The Notice comports with the rule in all respects. It describes the terms of the settlement, including the proposed allocation of attorneys' fees and service awards to the named Plaintiffs, provides specific information regarding the date, time, and place of the final approval hearing, clearly provides that Class Members may enter an appearance through their own counsel, discloses Class Members' right to exclude themselves from the settlement or object to any of its terms, and specifies the deadline and procedure for doing so, and warns of the binding effects of the settlement on those persons who remain in the Class. *See Willix,* 2010 U.S. Dist. LEXIS 139137, at *9 (approving notice where it "adequately puts Rule 23 Class Members on notice of the proposed settlement"); *In re Michael Milken & Assocs. Sec. Litig.,* 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (class notice "need only describe the terms of the settlement generally"). (*See also* Agreement Ex. 1.)

Therefore, in granting preliminary settlement approval, the Court should also approve the parties' proposed form and method of notice.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that the Court grant Plaintiffs' motion to amend the complaint and for preliminary approval of the proposed settlement, conditional certification of the Class for settlement purposes only, and approval of the Notice and Claim Form and plan for dissemination of same.

Dated: New York, New York
July 17, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ISAAC RODRIGUEZ,
Plaintiff,

v.

NIKE RETAIL SERVICES, INC.,
Defendant.

Case No. 14-cv-01508-BLF

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Re: ECF 84]

The all too familiar bag check we experience in airports, ballparks, and federal courthouses is also firmly ensconced in the workplace. Employers, seeking to reduce employee theft, require exiting staff to open their bags and pockets for inspection. The question in this case is whether that time in compensable. Defendant Nike Retail Services, Inc. ("Nike") seeks summary judgment under the *de minimis* doctrine, arguing that its time and motion study shows an average inspection takes no more than 18.5 seconds which it claims is *de minimis* as a matter of law and thus not compensable. Plaintiffs refute this evidence, claiming wait times can take up to a few minutes, which is compensable. Plaintiffs further argue that capturing the time is feasible and Nike has failed to meet its burden of demonstrating entitlement to judgment.

On August 10, 2017, the Court held a hearing on Nike's motion for summary judgment and the matter was taken under submission. For the reasons that follow, Nike's motion for summary judgment against the certified class is GRANTED.

I. BACKGROUND

In order to resolve the instant motion, the Court must consider evidence of how Nike conducts its mandatory exit inspections, and how long those inspections take. Although the general nature of the exit inspections is not in dispute, the parties present conflicting evidence as to the length of time employees spend waiting for an exit inspection and undergoing an exit inspection.

A. Undisputed Facts and Procedural Posture

As set forth in detail in the Court's August 19, 2016 Order Granting Plaintiff's Motion for Class Certification, Nike's non-exempt retail store employees in California are required to punch in and out of work on a time clock to track their hours, and they are paid accordingly. ECF 69. Out of concern for theft of merchandise and a desire to keep managers apprised of who is in the store, Nike further requires its employees to undergo mandatory exit inspections whenever they leave the store. Because employees must clock out of work before they exit the store, whether during a rest break or when they depart for the day, the exit inspections at issue occur "off the clock." All Nike employees are subject to exit inspections regardless of whether they are carrying a bag. However, Nike's exit inspections take a variety of forms, and the time it takes depends on whether the employee is carrying a bag or if authorized personnel are immediately available to conduct the inspection.

If the employee is not carrying a bag, box, or something similar, the employee is subject only to a "visual inspection." If the employee is wearing a jacket, a visual inspection may involve a request to unzip the jacket. An employee carrying a bag, box, or something similar is subject to a "bag check" whereby the employee must open the bag to show its contents before exiting. Because exit inspections can only be conducted by managers, supervisors, or contract security, an employee trying to leave the store after clocking out may have to wait at the exit until someone with the requisite authority is available to conduct the inspection.[1]

Plaintiff Isaac Rodriguez ("Rodriguez") was a non-exempt employee at Nike's Gilroy, California retail store for two months from November 11, 2011 to January 11, 2012. ECF 69, 6:17-18. On behalf of himself and a certified class of similarly situated Nike retail store employees in California, Rodriguez alleges that Nike failed to compensate class members for time spent in connection with the above-described exit inspections that occurred after employees clocked out. First Amended Complaint ("FAC") ¶ 23, ECF 27. Rodriguez brings claims on behalf of himself and the certified class against Nike for (1) failure to pay minimum wages in violation of

[1] The time it takes for an employee to walk from the time clock to the exit of the store is not at issue in this lawsuit. *See* Class Certification Hearing Transcript 6:7-20, ECF 67.

Cal. Labor Code §§ 1194, 1197; (2) failure to pay overtime wages in violation of Cal. Labor Code §§510, 1194; and (3) unfair and unlawful business practices in violation of Cal. Bus. Prof. Code §§ 17200, et seq. *See generally*, FAC.

On August 19, 2016, the Court certified a class pursuant to Federal Rule of Civil Procedure 23 consisting of "[a]ll current and former non-exempt retail store employees of Defendant who worked in California during the period from February 25, 2010 to the present."[2] In its order certifying the class, the Court held that whether time spent undergoing exit inspections is *de minimis* is a common issue. "That is, if the time is compensable at all, an across-the-board rule, such as sixty seconds, might wind up being the *de minimis* threshold. This issue as well will be litigated on a class-wide basis." ECF 69, 13:11-14 (citing *Frlekin v. Apple Inc*., 309 F.R.D. 518, 525 (N.D. Cal. 2015)).

On January 31, 2017, Nike moved for summary judgment against the certified class on the ground that any time spent in connection with exit inspections is *de minimis* and therefore not compensable as a matter of law. ECF 84 ("Mot."). In order to measure the time spent by employees in connection with exit inspections, Nike retained expert Robert W. Crandall, M.B.A. ("Crandall"), and Resolution Economics LLC to conduct a scientific sampling in the form of a "time and motion study" (hereafter, the "Crandall Study"). Mot. 6. "For purposes of measuring the amount of time it takes workers or groups of workers to perform certain tasks, a properly-conducted time and motion study is the methodology that provides the most accurate and reliable analysis." Crandall Decl. ¶ 9, ECF 84-3. Data collected in the course of a time and motion study is recorded by video observations and in-person observations, which can be directly validated by an opposing party. Mot. 7. Nike provided the certified class, their counsel, and their designated expert with full access to all of the data collected. *Id*.

Rodriguez opposes Nike's motion, but does not offer evidence from his own study or a survey of the members of the certified class. *See* Plaintiff's Opposition ("Opp'n"), ECF 92. Rather, Rodriguez retained expert Brian Kriegler, Ph.D. ("Dr. Kriegler") of Econ One Research,

[2] In so doing, the Court granted Rodriguez's motion to certify the class and denied Nike's motion to deny class certification as moot.

Inc. to evaluate and critique the Crandall Study. *Id*. 2. Rodriguez argues that the Crandall Study is "flawed and unreliable" for a number of reasons detailed in Rodriguez's opposition and the Kriegler Declaration, ECF 92-2. Opp'n 1. Specifically, Rodriguez relies on Dr. Kriegler's testimony to challenge the reliability of the Crandall Study on six grounds: (1) the study was too narrow in terms of scope and time to be applied to the entire class period; (2) the study required observers to make constant "judgment calls" about what they were watching; (3) the study artificially decreased reported times by assuming that when an employee was talking or interacting with another person, the employee was not also waiting for a security check; (4) the study's data collection is flawed because the in-person observations yield significantly different results from the video observations; (5) the video observations are flawed because they are based on the assumption that managers only conducted the exit inspection on camera; and (6) the in-person observations performed inconsistently when compared with each other. Opp'n 2-12.

Rodriguez also points to the deposition testimony of Nike retail store managers to contradict the results of the Crandall Study. Opp'n 2. He argues this testimony further demonstrates that the Crandall Study is unreliable. *Id*. Although the Court had invited the parties to retain a joint expert to conduct a time and motion study to which the Court could consider the *de minimis* standard, clearly that suggestion was not seen by the parties as the best way to proceed. Thus, Nike contends that its statistical evidence provides "undisputed conclusions regarding the average and median lengths of time spent in connection with exit inspections." Mot. 6 n.4. Nike argues that to the extent Rodriguez disputes the evidence in the Crandall Study to create a genuine issue of material fact, such a dispute necessarily requires decertification of the class due to individualized inquiries and trial manageability concerns. *Id*.

Resolution of the instant motion for summary judgment turns on whether there are material disputed facts in the record on the *de minimis* doctrine and whether the *de minimis* rule is recognized under California law. Therefore, the Court must consider whether the respective evidence presented by Nike and Rodriguez regarding the time spent by employees undergoing exit inspections presents any triable issue of fact. Below, the Court summarizes the results of Nike's Crandall Study as well as the deposition testimony of the Nike store managers, and will address additional facts as required in the discussion.

B. Results of the Crandall Study

The results of the Crandall Study are based on a random sampling of 15 out of the 34 Nike retail stores in California. Crandall Decl. ¶¶ 26-34. This sample represents 44% of the Nike stores in California. *Id.* ¶ 32. The 15 stores selected for the study were then further randomly assigned to an "observation approach" of either a video or in-person observation. *Id.* ¶ 35. 10 Nike retail stores were randomly selected for video observation and 5 were randomly selected for in-person observation. *Id.* ¶¶ 35-36. In total, the Crandall Study analyzed 1,662 exits over a period of two full days at 15 store locations in late 2016. *Id.* ¶ 55. 862 Nike retail store employees were scheduled to work across the stores on those days. *Id.* ¶¶ 55, 59.[3] Using statistical analysis, Crandall extrapolated the data to the entire class of approximately 10,000 current and former Nike retail store employees. *Id.* ¶¶ 14-20.

1. Waiting Time

The Crandall Study defined waiting time as the time between when the employee reaches the door area of the store and the time a visual inspection or bag check is initiated. *Id.* ¶ 62. Waiting time occurs when employees have to wait for an authorized person to conduct an exit inspection or for other employees to be checked. *Id.*

The study reveals that 60.5% of all exits recorded had zero waiting time. *Id.* ¶ 63. Thus, the remaining 39.5% of exit inspections had some amount of waiting time. *Id.* ¶ 64. Of the exit inspections that had any waiting time, 83.38% of waiting times were one minute or less. *Id.* ¶ 67. The average waiting time of all exit inspections observed was 14.2 seconds. *Id.* ¶ 69. The average waiting time that can be extrapolated to the entire class is 12.6 second to 15.8 seconds at a 95% confidence level. *Id.* ¶ 72.[4]

[3] Although 862 employees were scheduled to work at the 15 stores during the two-day period observed by the Crandall Study, there were 1,662 recorded exits. An employee can have multiple store exits including during rest periods, meal periods, at the end of a shift, and at the time the store closed. Mot. 8 n.7.

[4] For the exits where waiting time occurred at all, the average was 36 seconds. Extrapolated to the entire class, the average wait time was between 32.6 seconds and 30.5 seconds. *Id.* ¶ 74-76.

2. Visual Inspections

51% of the 1,662 exit inspections observed had a visual inspection rather than a bag check. *Id*. ¶ 78. Of those exits where a visual inspection occurred, 99% lasted less than 23 seconds. *Id*. ¶ 87. The average visual inspection lasted 3.1 seconds. *Id*. ¶ 88. Extrapolated to the entire class, the average visual inspection time was 2.7 seconds to 3.5 seconds at a 95% confidence level. *Id*. ¶ 90.

3. Bag Checks

The Crandall Study recorded 756 bag checks out of the 1,662 exit inspections (45.5%). *Id*. ¶ 92. Of the exits where a bag check occurred, 99.6% had a duration of less than one minute. *Id*. ¶ 98. The average length of a bag check was 7.5 seconds. *Id*. ¶ 99. Extrapolated to the class, the average bag check duration was between 6.8 seconds and 8.2 seconds at a 95% confidence level. *Id*. ¶ 101.

4. Combined Exit Inspection Time

The Crandall Study calculated the combined total time of the exit inspection process, assuming an employee experienced waiting time following by either a visual inspection or a bag check. *Id*. ¶¶ 103-111. 21.5% of combined exit inspections involved no time at all. *Id*. ¶ 103. This is explained by the fact that the majority of exits did not involve any waiting time or a bag check, and only involved a visual inspection as the employee departed the store "without breaking his or her stride." Mot. 12. 97.5% of the exits had a combined exit inspection time of less than two minutes. Crandall Decl. ¶ 107. Collectively, the average combined time of an exit inspection was 18.5 seconds. *Id*. ¶ 108. Extrapolated to the entire class, the average combined time was between 16.9 seconds and 20.2 seconds per exit. *Id*. ¶ 110.

C. Deposition Testimony of Nike Store Managers

In its opposition and at the hearing on the instant motion, Rodriguez points to evidence from the deposition testimony of Nike retail store managers in California regarding the amount of time that the exit inspections took. In particular, Brian Aquino, Megan Roos, and Michael Ruybal testified as to the length of time of each component of the exit inspections.

1. Waiting Time

Brian Aquino, Nike Assistant Head Coach in the Petaluma store, testified that at the Petaluma location, 90% of the time an employee was required to wait for some period of time for a manager to be available to perform the exit inspection. *See* Decl. of Larry W. Lee, ECF 92-1 ("Lee Decl.") Ex. E ("Aquino Depo.") 53:18-22. He further testified that 60-65% of the time that period of waiting time was "at least a minute." Aquino Depo. 52:9-24. Mr. Aquino further testified that when he worked at the Nike retail store in Gilroy, California, employees were required to wait even longer periods of time. Aquino Depo. 68:9-13.

Megan Roos, Nike Assistant Head Coach at the Vacaville store since April 2012, testified that 40-50% of the time that she performed checks at the Vacaville location, the employee had to wait at least one full minute before the check was performed. Lee Decl. Ex. F ("Roos Depo.") 89:2-4, 91:21-92:20. Michael Ruybal, Assistant Head Coach at the Nike store in San Francisco since 2011, testified that at the San Francisco retail store, if an employee had to wait for a manager to conduct the inspection, most of the time that waiting period was between two and five minutes. Lee Decl. Ex. G ("Ruybal Depo.") 39:13-17.

2. Visual Inspections

According to Mr. Aquino, a visual inspection of an employee wearing a jacket would take 30 seconds to a minute. Aquino Depo. 46:17-22. Rodriguez offers no evidence from the testimony of store managers regarding the length of a visual inspection when the employee is not wearing a jacket. Nike offers evidence that Rodriguez, who was an employee not a manager, testified in his own deposition that a visual inspection of the employee would take "roughly" less than two seconds. Rodriguez Depo. 27:7-11.

3. Bag Checks

Mr. Aquino testified that a bag check would take "about a minute." Aquino Depo. 46:17-22. Rodriguez cites no other evidence from the store managers regarding the length of bag checks.

4. Combined Exit Inspection Time

Rodriguez does not identify or rely on any testimony by the Nike's store managers regarding the combined time of the exit inspection process.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56 governs motions for summary judgment. "A party is entitled to summary judgment if the 'movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id*. at 248–49.

The moving party "bears the burden of showing there is no material factual dispute," *Hill v. R+L Carriers, Inc.*, 690 F. Supp. 2d 1001, 1004 (N.D. Cal. 2010), by "identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). To meet its burden, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). In judging evidence at the summary judgment stage, the Court "does not assess credibility or weigh the evidence, but simply determines whether there is a genuine factual issue for trial." *House v. Bell*, 547 U.S. 518, 559-60 (2006). A fact is "material" if it "might affect the outcome of the suit under the governing law," and a dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable trier of fact to decide in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

If the moving party meets its initial burden, the burden shifts to the nonmoving party to produce evidence supporting its claims or defenses. *Nissan Fire*, 210 F.3d at 1103. If the nonmoving party does not produce evidence to show a genuine issue of material fact, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. 317, 323 (1986). "The court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor." *City of Pomona*, 750 F.3d at 1049. However, "the 'mere existence of a scintilla of evidence in support of the plaintiff's position'" is insufficient to defeat a motion for summary judgment. *Id.* (quoting *Anderson*, 477 U.S. 242, 252 (1986)). If the nonmoving party's "evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S.at 249-50 (internal citations omitted). "'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" *City of Pomona*, 750 F.3d at 1049-50 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

III. DISCUSSION

Nike seeks summary judgment against the certified class on the basis that the amount of unpaid time spent by its employees undergoing exit inspections is *de minimis* and therefore not compensable as a matter of law. *See generally* Mot. Nike bears the burden of proving the applicability of the *de minimis* doctrine at trial. *See Gillings v. Time Warner Cable LLC*, 583 Fed. App'x 712, 714 (9th Cir. 2014) (unpublished) (citing *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1057 n.10 (9th Cir. 2010)). As the moving party on summary judgment, Nike must come forward with evidence that demonstrates an absence of any genuine issue of material fact on the *de minimis* doctrine. If Nike meets its initial burden, Rodriguez must produce evidence demonstrating a triable issue of material fact on the *de minimis* doctrine such that a reasonable trier of fact could find for Rodriguez and the certified class.

For the reasons that follow, the Court finds that it is appropriate to apply the *de minimis* doctrine to California Labor Code claims given the current state of the law. In determining whether the parties have met their respective burdens on summary judgment, the Court considers the findings in the Crandall Study as well as the deposition testimony of Nike employees as evidence. However, the Court does not consider the report of Rodriguez's rebuttal expert Dr. Kriegler to the extent the Kriegler Report attacks the credibility of Nike's expert but does not offer evidence on the *de minimis* doctrine for the Court to consider. Ultimately, the Court determines that the *de minimis* doctrine applies to the claims at issue in this case such that Nike is entitled to summary judgment against the certified class.

A. The Applicability of the *De Minimis* Doctrine to Rodriguez's Claims

At the outset, the parties dispute whether the *de minimis* doctrine applies to claims for violations of the California Labor Code. Mot. 13; Opp'n 14. The outcome of Nike's motion for summary judgment hinges on this question. Therefore, the Court must first determine whether the doctrine applies to the claims in this case in light of existing precedent. The *de minimis* doctrine arose in the context of the Federal Fair Labor Standards Act ("FLSA") to shield employers from having to pay for trivial amounts of time worked off-the-clock by employees that would otherwise be compensable. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). The Supreme Court of the United States held that "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *Id.*

In order to determine if the amount at issue is *de minimis*, the Ninth Circuit has instructed courts to consider three factors: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *See Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984). The Ninth Circuit has held that *de minimis* is appropriately characterized as a "doctrine" or "rule" rather than an affirmative defense that must be pled by a defendant. *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1080 (9th Cir. 2016).

As of the writing of this Order, the California Supreme Court has not addressed whether the *de minimis* doctrine applies to claims for unpaid wages under the California Labor Code. However, the Ninth Circuit and California's intermediate courts of appeal have done so, and have held that the *de minimis* doctrine applies to claims arising under California law. *See, e.g.*, *Gillings v. Time Warner Cable LLC*, 583 Fed. Appx. 712, 714 (9th Cir. 2014) (unpublished); *Corbin*, 821 F.3d at 1081 n.11; *Gomez v. Lincare, Inc.*, 173 Cal.App.4th 508, 527 (2009); *Chavez v. Angelica Corp.*, No. D063199, 2014 WL 6973497, at *1 (Cal. Ct. App. Dec. 10, 2014); *Mosley v. St. Supery Vineyards & Winery*, No. A137373, 2014 WL 793130, at *8 n.5 (Cal. Ct. App. Feb. 27, 2014) (unpublished); *LoJack Corp. v. Superior Court*, No. B219647, 2010 WL 1137044, at *8 (Cal. Ct. App. Mar. 26, 2010) (unpublished). One California court of appeal has declined to determine whether the *de minimis* rule applies to California wage and hour cases. *See Bustamante v. Teamone Employment Specialists, LLC*, No. B222136, 2011 WL 1844628, at *10 (Cal. Ct. App. May 17, 2011), *as modified on denial of reh'g* (June 6, 2011) (unpublished) (declining to consider whether *de minimis* applies under California law because "even if it does apply, disputed issues of fact preclude summary judgment in this case.") However, the Court is not aware of any decision at the appellate level, and Rodriguez does not point to any, holding that the *de minimis* doctrine *does not* apply to claims brought under the California Labor Code. *Accord Gillings*, 583 Fed. App'x at 714 ("We have found no Court of Appeal case refusing to apply the *de minimis* standard to a wage claim under California law.")

The silence from California's highest court on the applicability of the *de minimis* doctrine to California Labor Code claims may soon be broken. The California Supreme Court has agreed to review the issue at the Ninth Circuit's request. *See Troester v. Starbucks Corp.*, Case No. S234969; *Troester v. Starbucks Corp.*, 680 Fed. App'x. 511, 512 (9th Cir. 2016). The Ninth Circuit certified the following question to the California Supreme Court:

> Does the federal Fair Labor Standards Act's *de minimis* doctrine, as stated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) and *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984), apply to claims for unpaid wages under the California Labor Code sections 510, 1194, and 1197?

Id. Although briefing in *Troester* is complete, the matter remains pending before the California Supreme Court. Therefore, this Court does not have the benefit of a ruling from California's high court that either alters or solidifies the viability of the *de minimis* doctrine outside of the FLSA context from which it originated. In deciding the instant motion for summary judgment, this Court must operate in the present legal landscape and apply the law as it currently exists. Under current law, the *de minimis* doctrine is a valid defense to wage claims brought under the California Labor Code. *See Hubbs v. Big Lots Stores, Inc.*, 2017 WL 2304751 at *8 (C.D. Cal. May 12, 2017) ("Notwithstanding that there may be further development of the law in this area, there are substantial similarities between the FLSA and the requirements of the California Labor Code. In light of these similarities, the existing Ninth Circuit decisions are sufficient to permit the [*de minimis*] analysis in this case.")

Here, Rodriguez argues that the *de minimis* doctrine is "archaic" and "should have no place in modern times where time can be captured to the second." Opp'n 14. Rodriguez further argues that *de minimis* is solely a federal doctrine that has no applicability to the California Labor Code which "was enacted to afford additional protections to employees beyond the FLSA." *Id.* Rodriguez is not the first plaintiff to advance such arguments. In fact, courts applying the *de minimis* doctrine to wage claims under California law routinely consider and reject these arguments. *See, e.g.*, *Gillings*, 583 Fed. App'x. at 713 ("The employees argue that the *de minimis* doctrine does not apply to claims of unpaid wages under California's Labor Code. Not so."); *Cervantez v. Celestica Corp.*, 618 F. Supp. 2d 1208, 1217 (C.D. Cal. 2009) (applying the *Lindow* test to California Labor Code claims and rejecting plaintiffs' argument that "the *de minimis* defense is an outdated principle and relates only to the FLSA, not California law.") Although these policy arguments are currently before the California Supreme Court in *Troester*, this Court declines Rodriguez's invitation to predict how the California Supreme Court will rule. Rodriguez's argument that California labor law is more "employee friendly" than its federal counterpart thus does not alter the Court's obligation to apply existing law and consider the applicability of the *de minimis* doctrine to the claims in this case.[5]

When it certified the question in *Troester*, the Ninth Circuit made clear that two of its panels had previously applied the *de minimis* doctrine to California wage claims in the absence of a determination on the issue by the California Supreme Court. 680 Fed. App'x at 513. In *Gillings*,

[5] None of the cases relied on by Rodriguez holds that employers must compensate employees for trivial amounts of time. Opp'n 14-16 (citing *Augustus v. ABM Sec. Servs. Inc.*, 2 Cal. 5th 257, 262 (2016); *Bernstein v. Virgin Am., Inc.*, No. 15-CV-02277, 2017 WL 57307, at *11 (N.D. Cal. Jan. 5, 2017); *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012)). Rather, these cases only serve to demonstrate the protective nature of the California Labor Code that ultimately led the Ninth Circuit to seek input from the California Supreme Court in *Troester* as to whether the *de minimis* test applies to California wage claims. Until a decision comes down from the California Supreme Court, this Court is bound by Ninth Circuit precedent on the *de minimis* doctrine and will not speculate as to the ultimate outcome.

an unpublished disposition, the Ninth Circuit determined that because the California Supreme Court has never ruled on the applicability of the *de minimis* doctrine to California wage claims, the Ninth Circuit must follow the decisions of California's intermediate appellate courts absent "convincing evidence that the state supreme court would decide the issue differently." 583 Fed. App'x at 714 (quoting *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001)). The *Gillings* court then summarized the state of the law among California courts of appeal and considered the endorsement of the *de minimis* standard by the California Division of Labor Standards Enforcement ("DLSE") which has persuasive value among California courts. 583 Fed. App'x at 714. The Ninth Circuit ultimately concluded that it must follow the existing law and apply the *de minimis* doctrine to the employees' claims given the absence of "convincing evidence" that the California Supreme Court would come out differently. *Id.* As recently as 2016, another panel of the Ninth Circuit followed the reasoning in *Gillings* and applied the *de minimis* doctrine to California Labor Code claims. *Corbin*, 821 F.3d at 1081 n.11. Again, the Ninth Circuit found the adoption of the *de minimis* doctrine by California appellate courts and the DLSE to be persuasive in the absence of direct guidance from the California Supreme Court. *Id.* Despite these decisions, the Ninth Circuit recognized the need for a clear determination on the issue by the California Supreme Court. *Troester*, 680 Fed. App'x at 515.

Finally, it is worth noting that nearly one year ago this Court had the opportunity to stay Nike's summary judgment motion on the *de minimis* doctrine pending a decision in *Troester* and declined to do so. *See* ECF 78, 5:20-7:5. The parties then proceeded to conduct discovery on the defense and brief the instant motion. Nike also points out that this Court has already held in its order granting class certification in this case that the *de minimis* doctrine applies to Rodriguez's California Labor Code claims. Mot. 15; ECF 69, 13:8-9 ("The same [*de minimis*] test applies to California wage claims.") For these reasons, the Court finds that the *de minimis* doctrine applies to Rodriguez's wage claims brought pursuant to the California Labor Code.[6]

B. Evidence on Summary Judgment

1. The Kriegler Report

Before turning to the required analysis under the *Lindow* factors, the Court addresses the nature of the evidence before it. In support of its motion for summary judgment, Nike offers findings from its time and motion study detailed in the Crandall Declaration. ECF 84-3. Rodriguez does not present the Court with evidence from a competing study. Rather, Rodriguez retained an expert to attack the credibility of the Crandall Study. Rodriguez dedicates most of his opposition to picking apart the findings and methodology of the Crandall Study through Dr. Kriegler. Ultimately, Rodriguez argues that the Crandall Study is so fatally flawed that Nike cannot satisfy its burden on summary judgment. *See* Opp'n 17.

The Court does not consider the portions of Dr. Kriegler's expert report attacking the credibility of the Crandall Study at summary judgment because those portions of the Kriegler Report do not supply evidence addressing any of the *de minimis* factors. Rodriguez cited to no authority in his opposition or at the hearing on the motion for summary judgment to support his position that summary judgment must be denied when an expert attacks the credibility of the other side's expert report. Such a situation may be appropriate on a motion to strike expert testimony, but it is not evidence that creates a factual dispute for purposes of summary judgment. In judging evidence at the summary judgment stage, the Court "does not assess credibility or weigh the evidence, but simply determines whether there is a genuine factual issue for trial." *House v. Bell,* 547 U.S. 518, 559-60 (2006).

To the extent Rodriguez offers the Kriegler Report as support for a motion to strike the Crandall Study, the motion is denied pursuant to Federal Rule of Civil Procedure 702 and *Daubert*

[6] Rodriguez argues that even if the *de minimis* doctrine applies at all, "[t]he *de minimis* rulings in FLSA cases provide no guidance as to how the *de minimis* theory operates under California law." Opp'n 18-20. Although cloaked differently, this is the same point that Rodriguez makes in his argument that *de minimis* should not apply to this case at all. Courts that have applied the *de minimis* doctrine to the California Labor Code explicitly apply the standard articulated in *Anderson*, *Lindow*, and other precedent from the FLSA context. Rodriguez himself relies on precedent from FLSA cases in his opposition. Thus, the Court rejects his argument that if it finds the *de minimis* doctrine applies, it cannot consider case law from the FLSA context.

v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). In *Daubert*, the Supreme Court held that Rule 702 requires the district court to act as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. These standards apply not only at trial, but also when a challenge to expert opinion is brought in the context of class certification or summary judgment. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (district court correctly applied *Daubert* standard to a motion to strike an expert opinion submitted in support of class certification); *In re Ford Tailgate Litig.*, No. 11-CV-02953-RS, 2015 WL 7571772, at *5 n.3 (N.D. Cal. Nov. 25, 2015) ("*Daubert* dictates the analysis necessary for a motion to exclude expert testimony in the context of a motion for summary judgment."); *Tietsworth v. Sears, Roebuck & Co.*, No. 5:09-CV-00288-JF, 2012 WL 1595112, at *7 (N.D. Cal. May 4, 2012) (applying *Daubert* standard to expert testimony at class certification stage). Here, Dr. Kriegler's opinions, while thorough, go to the credibility of Crandall's findings and not to admissibility. Crandall is well-qualified in the field of statistical analysis and has substantial experience in conducting time and motion studies to generate data from which he can base his conclusions. Although Dr. Kriegler's testimony could be persuasive to a jury at trial, Rodriguez has not shown that the Crandall Study is so "unreliable" as to necessitate exclusion under Rule 702.

Despite how Rodriguez characterizes the Kriegler Report, there is no "battle of experts" in this case. In support of this argument, Rodriguez compares the Crandall and Kriegler reports to the evidence before this Court in *Estate of Naharro v. Cty. of Santa Clara*, No. 14-CV-04570-BLF, 2016 WL 6248957 (N.D. Cal. Oct. 26, 2016). There, this Court considered the expert evidence presented by both sides in connection with the defendants' motion for summary judgment in a civil rights action brought pursuant to 42 U.S.C. § 1983. *Id.* The defendants submitted the declaration of an expert on police practices who testified that the officer's use of deadly force was consistent with police standards and state law. *Id.* at *12. This Court found that such evidence was sufficient to satisfy the defendants' initial burden on summary judgment. *Id.* The burden then shifted to the plaintiffs to produce evidence supporting their claims or defenses. *Nissan Fire*, 210 F.3d at 1103. The plaintiffs rebutted the defendants' evidence with their own police procedures expert who *presented evidence* that was directly in conflict with the opinion of the defendants' expert and created disputed facts as to essential elements of the 1983 claim. *Estate of Naharro*, 2016 WL 6248957, at *12. The plaintiffs' expert did not simply point out "flaws" in the methodology of the defendants' expert.

The situation in this case is not analogous to the "classic battle of experts" in *Estate of Naharro* where both experts presented conflicting evidence on essential elements of the claim at issue. Dr. Kriegler does not present any evidence on the *de minimis* doctrine that could create a genuine issue of material fact as to the length of the exit inspections. Rather, he uses his expertise to "expos[e] the flaws" of the evidence offered by Nike. Opp'n 17. Rodriguez's attempt to equate this situation to a battle of experts sufficient to deny summary judgment is misguided. If this strategy is to be accepted, then all a party needs to do to defeat summary judgment is to hire an expert to point out flaws in the other side's evidence, without offering any conflicting evidence for the jury to consider at trial on the relevant claim or defense. Once the moving party has met its initial burden, if the nonmoving party does not produce evidence to show a genuine issue of material fact, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. 317, 323 (1986).[7]

Rodriguez relies on two other cases to urge the Court to deny summary judgment on the basis of the Kriegler Report alone. These cases are similarly distinguishable. In *Goldman v. Standard Ins. Co.*, each side presented conflicting evidence on the essential elements of a defense. 341 F.3d 1023, 1035 (9th Cir. 2003). The Ninth Circuit held that the plaintiff presented sufficient evidence to create triable issues of fact on both prongs of the "reasonableness" standard of section 10144 of the California Insurance Code. *Id*. The plaintiff's expert presented evidence on the defendant's insurance policies that created a triable issue on the first prong of the defense. The plaintiff also presented evidence from two experts to refute the second prong of the defense on the basis of medical data, actuarial principles and actual experience. *Id.* These expert opinions

[7] The Court recognizes that Rodriguez offers the Kriegler Report to argue that Nike cannot meet its initial burden on the *de minimis* doctrine, not just that it creates a triable issue of fact once the burden shifts to Rodriguez. Still, Rodriguez does not cite to any case law establishing that an expert's critique can prevent a moving party from meeting its burden of production.

presented evidence that contradicted the defendant's claims and raised questions of fact that precluded summary judgment on the defense. *Id*. In *Goldman*, a reasonable fact-finder could believe one expert over the other to determine if the defendant's denial of insurance coverage was reasonable as a matter of law. *Id*. Here, the Kriegler Report does not raise a triable issue as to whether time spent on exit inspections is *de minimis*.

Finally, in *Faron v. St. Joseph Hosp.*, the defendant presented an expert declaration in support of his motion for summary judgment in a medical malpractice action. No. C 07-05602 SBA, 2008 WL 4820796 (N.D. Cal. Nov. 4, 2008). The defendant's expert presented evidence to negate the elements of breach and causation. *Id*. at *5-6. The court held that the burden then shifted to the plaintiff to present evidence affirming the elements in order to survive the motion. *Id*. The plaintiff attached an expert declaration to his opposition with evidence that the defendant had not met the requisite standard of care and had caused the plaintiff's injuries. *Id*. The court concluded that this "battle of experts" on the issues of breach and causation created a genuine issue of material fact that barred summary judgment. *Id*. Again, the Kriegler Report does not present evidence that conflicts with or rebuts Nike's evidence as to the length of the exit inspections, it merely attacks it as unreliable.

For these reasons, the Court does not consider the Kriegler Report's attack on the credibility of the Crandall Report in its summary judgment analysis.[8]

2. Deposition Testimony

In contrast to the Kriegler Report, the deposition testimony of Nike's retail store managers that Rodriguez relies on in his opposition constitutes evidence that the exit inspections took longer than the Crandall Study suggests. The deposition testimony is therefore in conflict with the findings of the Crandall Study on the *de minimis* issue. The Court considers below if the evidence from these depositions is sufficient to create a triable issue of fact such that a reasonable jury

[8] The Court notes that Rodriguez has offered a supplemental declaration of Dr. Kriegler in response to what Rodriguez characterizes as "new evidence" in Nike's reply brief and supporting declarations regarding the reliability and bases for the Crandall Study in response to the Kriegler Report. *See* ECF 95, 95-1. To the extent that the Court considers the supplemental declarations of Jon Meer and Robert Crandall (ECF 93-2, 94-1), the Court also considers Dr. Kriegler's supplemental declaration.

could find for Rodriguez and the certified class on the issue of whether the time spent undergoing exit inspections is *de minimis*.

C. Whether Time Spent On Exit Inspections Is *De Minimis*

The Court now turns to the *Lindow* factors to determine whether the time spent by Nike retail store employees undergoing exit inspections is *de minimis* and therefore not compensable. To determine whether time that would otherwise be compensable is *de minimis*, the Ninth Circuit established a three-prong test instructing courts to consider "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow*, 738 F.2d at 1063. The *Lindow* test "reflects a balance between requiring an employer to pay for activities that it requires of its employees and the need to avoid 'split-second absurdities' that 'are not justified by the actuality of the working conditions.'" *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046, 1057 (9th Cir. 2010) (quoting *Lindow*, 738 F.2d at 1062).

Although it is not a stand-alone prong of the *Lindow* test, the Ninth Circuit also noted that "[a]n important factor in determining whether a claim is *de minimis* is the amount of daily time spent on the additional work." 738 F.2d at 1062. No bright line or "rigid rule can be applied with mathematical certainty" to determine whether periods of time are *de minimis* such that they need not be compensated. *Lindow*, 738 F.2d at 1062. "Rather, common sense must be applied to the facts of each case." *Id.* However, courts have regularly held that daily periods of up to 10 minutes are *de minimis*. *Id.* at 1062 (collecting cases); *Alvarado v. Costco Wholesale Corp.*, Case No. 06-04015, 2008 WL 2477393, at *3-5 (N.D. Cal. June 18, 2008); *Hubbs*, 2017 WL 2304751, at *8.

Courts have varied in their treatment of the daily amount of time under the *Lindow* test. The Ninth Circuit in *Corbin* addressed the daily amount of time in conjunction with the aggregate amount of compensable time. 821 F.3d at 1082. The *Gillings* court similarly appeared to consider the daily amount of time as one of the three factors. 583 Fed. App'x at 715 ("Although the plaintiffs complain of non-payment for periods of time each very short, that circumstance does not justify application of the *de minimis* doctrine without consideration of the other *two factors* articulated in *Lindow*.") (emphasis added). District courts have considered daily time in lieu of aggregate time. *See, e.g.*, *Troester v. Starbucks Corp.*, 2014 WL 1004098, at *4 (C.D. Cal. March 7, 2014). Other district courts have distinguished "amount of time" from "aggregate time" and analyzed them as separate factors under the *Lindow* test. *See, e.g.*, *Alvarado*, 2008 WL 2477393, at *3-5; *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2009 WL 2612307, at *25 (N.D. Cal. Aug. 24, 2009). Moreover, at least one district court has interpreted *Lindow* as holding that "[w]hile the daily time involved in an activity is the chief concern in determining whether it is *de minimis*, courts also consider" the three *Lindow* factors. *Farris v. Cty. of Riverside*, 667 F. Supp. 2d 1151, 1165 (C.D. Cal. 2009).

The Court begins its analysis by considering the duration of each individual exit inspection because the parties direct the majority of their evidence at this factor and it has implications for the remaining *Lindow* analysis. The Court then addresses the evidence in the record on administrative difficulty, aggregate amount, and regularity to determine whether Rodriguez's claims are *de minimis* as a matter of law. As stated above, Nike bears the burden of proving the applicability of the *de minimis* doctrine at trial. *See Gillings*, 583 Fed. App'x at 714 (citing *Rutti*, 596 F.3d at 1057 n.10). As the moving party on summary judgment, Nike "must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." *Id.* at 715 (quoting *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). Where Nike has met its initial burden, the burden shifts to Rodriguez to produce evidence to raise a genuine issue of material fact on the *de minimis* issue. *Celotex*, 477 U.S. 317, 323 (1986). Even viewing the evidence in the light most favorable to Rodriguez and the certified class, the Court finds that the *Lindow* factors support Nike's position and no triable issue of fact exists such that a reasonable jury could find for Rodriguez and the certified class on the *de minimis* doctrine. Thus, the Court GRANTS Nike's motion for summary judgment.

1. Amount of Time

In the record before the Court, there is evidence from the Crandall Study and testimony from the depositions of Nike store managers regarding the amount of time each exit inspection took. Nike argues that it is undisputed that an employee's off-the-clock time spent undergoing an exit inspection "lasted mere seconds" in each instance. Mot. 16. As summarized above, Nike has offered evidence through the Crandall Study to demonstrate that the combined average exit time extrapolated to the entire class is between 16.9 seconds and 20.2 seconds per exit. Crandall Decl. ¶¶ 108-110. Broken down, Nike submits that the average waiting time per exit was between 12.6 seconds and 15.8 seconds, the average visual inspection per exit was between 2.7 seconds and 3.5 seconds, and the average bag check was between 6.8 seconds and 8.2 seconds. *Id.* ¶¶ 69-72, 88-90, 99-101. Nike concludes that "the statistics from the time and motion study show that the exit inspections took only a matter of seconds at each stage, and certainly less than one minute for virtually every exit." Mot. 13.[9]

There is also evidence in the record that the exit inspections took longer than a few seconds. The Nike store managers testified that each component of the exit inspection lasted up to a few minutes rather than seconds. Nike store manager Brian Aquino testified that a visual inspection of an employee wearing a "full zipped jacket" would take "30 seconds to a minute." Aquino Depo. 46:5-16. He further testified that a bag check takes "about a minute." *Id.* 46:17-22. In terms of waiting time, Aquino testified that "about 45 percent of the time" an employee would be required to wait a minute or two for a manager to become available and perform a security check, but a wait of five minutes is rare. *Id.* 52:12-16. According to Aquino, another 15 to 20 percent of the time an employee would have to wait between two and five minutes for the manager to conduct the check. *Id.* 52:17-24. Aquino testified that 30 to 35 percent of the time an employee's wait time would be under one minute. *Id.* 53:1-9. As detailed above, Nike store managers Megan Roos and Michael Ruybal also testified that waiting time, when it occurred, was

[9] Even considering Nike's recalculation of the Crandall wait and inspection times based on the Kriegler critique, Nike still posits that the combined exit inspection time would be an average of 22 seconds. ECF 93-2 ¶ 11 (recalculating times to include "other" time that Kriegler argued was improperly excluded due to "judgment calls" in the Crandall Study). Moreover, putting aside the in-person observations which Dr. Kriegler found unreliable, it is undisputed that the Crandall Study's average combined exit inspection time based solely on video observations was 23.1 seconds. *Id.* ¶ 20. Dr. Kriegler does not dispute this recalculation of time but takes issue with Nike's use of "average" and "median" times which he argues do not address "*how often* the security check process would result in a measurable impact on wages." ECF 95-1 ¶ 13 (emphasis in original). This critique corresponds with *Lindow*'s regularity prong, discussed below.

often at least one minute and could be as long as five minutes. Roos Depo 89:2-4, 91:21-92:20.; Ruybal Depo. 39:13-17. However, neither Roos nor Ruybal testified regarding how long the exit inspection takes when there is no waiting time, meaning when a manager is already at the exit and available to conduct the inspection. Rodriguez argues that the testimony of Aquino, Roos and Ruybal demonstrates that the exit inspections "routinely took several minutes," mostly due to the time spent waiting for a manager to arrive at the front of the store to perform the inspection. Opp'n 13.[10]

In sum, although Nike contends that the inspections took an average of 18.5 seconds per exit, as supported by the Crandall Study, there is evidence from the deposition testimony that many of the exit inspections took significantly longer. Moreover, Dr. Kriegler's Report concludes that over 10 workdays, class members "almost surely have one or more workdays with a minute or more of uncredited time." Kriegler Decl. ¶ 42. Therefore, viewing the evidence in the light most favorable to the nonmoving party, the Court can only conclude that it is undisputed that an exit inspection takes between zero seconds and several minutes. The Court notes that even several minutes of daily time may properly be considered *de minimis* and not compensable. *See Lindow*, 728 F.2d at 1062 ("Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable."); *Farris v. Cty. of Riverside*, 667 F. Supp. 2d 1151, 1165 (C.D. Cal. 2009) ("10 minutes is the standard threshold for determining whether something is de minimis"); *Alvarado*, 2008 WL 2477393, at *3 (finding plaintiff's claim to be *de minimis* despite her testimony that bag checks took "a couple of minutes" and wait times could last "several minutes.")

However, the *de minimis* inquiry does not end merely because the amount of time at issue is short in each instance. The Ninth Circuit has explicitly stated that "non-payment for periods of time each very short…does not justify application of the *de minimis* doctrine without consideration of the two other factors articulated in *Lindow* as pertinent to application of the *de*

[10] Nike argues that the deposition testimony shows that none of the managers believed the combined exit inspection process took longer than one minute "the majority of the time." Reply 3. This argument addresses the regularity prong of the *Lindow* test, discussed below.

minimis doctrine in wage cases." *Gillings*, 583 F.App'x at 715 (citing *Rutti*, 596 F.3d at 1058); *accord Hubbs*, 2017 WL 2304751, at *8 ("Periods of approximately ten minutes per day may be properly treated as *de minimis*, when there is a practical administrative difficulty recording the time, and/or the amount of time varies from day to day.") The administrative difficulty and regularity prongs of the *Lindow* test are particularly important, where, as here, the parties presented evidence on the amount of time on a "per exit" basis. Thus, there is an absence of evidence on the "daily" or "aggregate" amount of time that a Nike employee spends undergoing exit inspections. The Crandall Study and deposition testimony are only evidence that *each exit* involves a short amount of time. Therefore, the Court turns to the remaining *Lindow* factors to determine if Nike is entitled to summary judgment on the *de minimis* doctrine.

2. Practical Administrative Difficulty

In order to satisfy the next prong of the *Lindow* test, Nike must offer evidence of the practical administrative difficulty of recording the time spent by employees in connection with exit inspections. *See Lindow*, 738 F.2d at 1062-63 ("The *de minimis* rule is concerned with the practical administrative difficulty of recording small amounts of time for payroll purposes. Employers, therefore, must compensate employees for even small amounts of daily time unless that time is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes.") The district court in *Troester* held that the administrative difficulty prong favors the defense "when the employer's timekeeping system cannot be practically configured to capture the alleged off-the-clock work." 2014 WL 1004098, at *4.

Here, Nike points to evidence that its timekeeping system does not allow time to be recorded in increments less than one minute. Meer Decl., ECF 84-2 Ex. A, Class Certification Hearing Transcript 14:16-18. Nike further argues that it is impractical to move its time clocks, which are currently located in the back of its retail stores, to the area of the store exits in the front where exit inspections are conducted. *Id*. 6:23-7:2. Nike's designated corporate witness, Michael Steele, testified that Nike made the decision to keep time clocks in the back of the store for business reasons. Lee Decl. Ex. P ("Steele Depo." 56:6-10. Steele testified that "[t]ime clocks are best placed off the sales floor" due to privacy concerns related to the employees' information. *Id*.

Steele further testified that there are benefits to placing the time clocks in the break room, which allows employees to clock in and out after their break periods. Steele Depo. 56:12-18. In sum, there is evidence in the record that Nike's timekeeping system cannot manage employees by the second, and Nike perceives a business benefit to keeping the time clocks solely in the break rooms rather than in the front of the store.

Rodriguez responds that Nike's entire administrative difficulty argument is premised on the Crandall Study's finding that exit inspections take "mere seconds." Opp'n 21. As explained above, Rodriguez has presented evidence that the amount of time spent in connection with exit inspections took up to a few minutes rather than seconds. Rodriguez also argues that Nike has not shown that it is technically impossible to place an additional time clock at the front of the store or at cash registers that are close to the front of the store. *Id*. Rodriguez points to examples where other major retailers such as Dick's Sporting Goods and Under Armour decided to either place an additional time clock at the front of the store or to allow employees to clock out from the cash register in order to compensate employees for security checks. *Id*. 22. Rodriguez also provides photographs of Nike retail stores where cash registers are out on the floor of the store to refute Nike's argument that the time clocks cannot also be located on the sales floor for privacy reasons. Opp'n 23. Rodriguez further points to Steele's testimony stating that the time clock only contains the name and ID number of the employee, which Rodriguez argues is less "confidential" than the information contained in the cash registers. *Id*. To ensure that the time spent undergoing exit inspections is recorded, Rodriguez promotes the use of an additional clock by the store exit. *Id*. As additional alternatives, Rodriguez suggests that Nike perform the security checks at the back of the stores before its employees clock out, and then have managers escort or monitor the employees as they exit. Rodriguez also suggests that Nike could add a set amount of time to the paycheck of each employee to ensure that everyone is compensated for time spent undergoing exit inspections. *Id*. 24.

Nike relies heavily on *Corbin* to argue that the *de minimis* doctrine does not require an employer to implement changes to capture time increments in seconds. Reply 14. In *Corbin*, the Ninth Circuit held that all three *Lindow* factors supported the district court's conclusion that plaintiff's "one minute" of off-the-clock time was *de minimis*. 821 F.3d at 1081. The Ninth Circuit found that the administrative burden on the employer to record the additional time was high, and rejected the plaintiff's "baseless" contention that the employer could conceivably ascertain the additional time by "scouring its computer records." *Id*. at 1082. Rather, the Ninth Circuit held that "the *de minimis* doctrine is designed to allow employers to forego just such an arduous task." *Id*. Here, there is evidence in the record that some of the exit inspections took minutes rather than seconds. Therefore, Nike's evidence that its systems cannot administratively capture time in seconds is not determinative on this factor. However, the Court credits Nike's evidence that repositioning the time clocks would be administratively impracticable. Mot. 14. In light of evidence in the record regarding Nike's timekeeping system and its business considerations for having employees clock in and out in the break room, the Court finds that Nike has met its initial burden of production that it would be administratively difficult to record the time spent on exit inspections.

Rodriguez's evidence does not create a triable issue of fact on the administrative difficulty prong. Rodriguez focuses on the testimony of Nike's designated corporate witness where he admitted there is no "technical reason" why an additional timeclock could not be placed at the front of the store. Opp'n 21; Steele Depo. 55:23-56:5. In light of *Corbin*, which explicitly rejected plaintiff's technical feasibility argument as "baseless" on this prong, Rodriguez's evidence that Nike has the technical ability to change its timekeeping system is misplaced. 821 F.3d at 1082 ("Corbin's contention that the *de minimis* doctrine does not apply because TWEAN *could* ascertain the exact log-in/out times by scouring its computer records is baseless; the *de minimis* doctrine is designed to allow employers to forego just such an arduous task.") In order to prevail on this prong, Nike need not prove it is "technically infeasible" to record the additional time; only that it would be administratively difficult to do so given its timekeeping system. Rodriguez's evidence that Nike already utilizes two time clocks in break rooms in its busier stores, or that other retailers have decided to place an additional time clock by the store exit, does not refute Nike's evidence that such a change would be administratively difficult. *See Alvarado*, 2008 WL 2477393, at *3-4 (holding that the administrative difficulty prong favored Costco, and rejecting plaintiff's argument that "merely by repositioning the time clock close by the exit door, Costco could more accurately measure the amount of time its employees were on the job.")

In fact, because the time it takes for an employee to walk from the break room in the back of the store to the store exit is not at issue in this case, the administrative difficulty prong favors Nike even more. Rodriguez's suggestion would require an employee to clock out in the break room, and then clock back in at the store exit in order to record the exit inspection time, only to clock out for a second time after the exit inspection concludes. Where an employee does not carry a bag and only undergoes a visual inspection, it could take longer for an employee to clock back in and out to record the time than it would take for the visual inspection itself. Rodriguez provides no evidence to show how this configuration would pose less administrative difficulties for Nike. Given the evidence in the record, it is undisputed that it would be administratively difficult for Nike to reconfigure its existing timekeeping system to conduct exit inspections "on-the-clock." Therefore, no reasonable juror could find for Rodriguez on this prong. *Accord Hubbs*, 2017 WL 2304751, at *9 (crediting defendant's evidence that "calculating the time employees waited for a bag check would be administratively difficult because those employees had already clocked out for the day, and the time between clocking out and leaving the building varied from day to day and was often of very short duration.")

3. Aggregate Amount

As *Lindow* is a multi-factor test, and no single factor is determinative, the Court next considers the size of the aggregate claim. "Courts have granted relief for claims that might have been minimal on a daily basis but, when aggregated, amounted to a substantial claim." *Lindow*, 738 F.2d at 1063. The aggregate size of the claim is important because it "would promote capricious and unfair results" to consider only the daily amount of unpaid time at issue. *Id*. (reasoning that it is unjust to compensate "one worker $50 for one week's work while denying the same relief to another worker who has earned $1 a week for 50 weeks."). However, even if an aggregate claim is substantial, the time may still be *de minimis* because of the administrative difficulty of recording the time and the irregularity of the additional work. *Id*. at 1064. When there is evidence that the aggregate claim is insubstantial, "we may dismiss it as groundless and unreasonable." *Id*. at 1063.

As discussed above, the Crandall Study provides evidence of the amount of time that an exit inspection took *in each instance*. The Court must also consider the "daily" and "aggregate" amount of compensable time at issue, which Nike argues is still *de minimis*. The Crandall Study notes that "[s]ome of the 862 employees included in the study had multiple store exits –e.g., exits for rest periods, exits for meal periods, exits at the end of a shift, and exits at the time the store closed." Crandall Decl. ¶ 58. Other employees may have only had a single exit from the store because they "did not work enough hours to qualify for a rest period or meal period" or they "chose to remain in the store" during those periods and only exited at the end of their shift. *Id*. Therefore, even if the Court credits Crandall's finding that each exit takes only a few seconds on average, the Court must consider whether employees leave the store multiple times each day or if the aggregate claim is large over a longer period of time.

There is "no precise amount of time" that is considered *de minimis* per se. *Lindow*, 738 F.2d at 1062. Still, Nike argues that "every other court to address the [*de minimis*] issue has held that off-the-clock periods of less than one minute are not compensable." Mot 18. Again, the Court views the evidence in favor of Rodriguez and the class, who have presented evidence that the exits could take up to several minutes in some instances. The Court then considers the size of this claim on a "daily" basis. *See Lindow*, 738 F.2d at 1062 ("[m]ost courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable."); *Farris*, 667 F. Supp. 2d at 1165 (noting that the "daily time involved in an activity is the chief concern in determining whether it is de minimis"). Although the parties agree that some employees qualified for mandatory meal/rest breaks, it is not clear how often employees leave the store in a single day.

Dr. Kriegler finds that Nike's timekeeping data shows the number of workdays with "multiple punch-outs" during the class period. Kriegler Decl. ¶ 36, Ex. 5. However, "multiple punch-outs" is defined as "two or more" punch-outs in a day, "*i.e.*, one punch-out for a meal break and one punch-out at the end of the workday." *Id*. Dr. Kriegler's analysis of Nike's timekeeping data shows that over the course of the period from July 2011 through March 2017, "83.0 percent of employees worked 10 or more days with multiple punchouts" and "61.7 percent of employees worked 30 or more days with multiple punch-outs." *Id*. This analysis was conducted to calculate the probability that an employee would experience a workday with at least 60 seconds of uncredited time. However, these percentages do not indicate how many times an employee leaves the store each day, or if an employee ever leaves more than twice in a single day.

Drawing all reasonable inferences in favor of Rodriguez, the daily amount of time is still well within the 10-minute *de minimis* threshold. Even if an exit inspection occasionally lasts a few minutes, and an employee exits twice a day (once for a meal/rest break, and once at the end of the workday, as Dr. Kriegler suggests), an employee would still spend less than 10 minutes a day in connection with exit inspections. If the Court assumes that an employee leaves *more than* twice a day, which there is no evidence to support, it would still take multiple exits to reach 10 minutes per day. For example, an employee would have to undergo a two-minute exit inspection five times a day, or a three-minute inspection four times a day, in order to surpass 10 minutes of "daily" time spent undergoing exit inspections. And such a hypothetical experience is neither found in the evidence nor plausible. Moreover, the record indicates that exit inspections lasting over 60 seconds were not regular, which further supports a finding that the "daily" amount of time involved is *de minimis*. Dr. Kriegler himself opines that there is only a 67% probability that out of 10 exits, at least one involved a combined time of at least 60 seconds. Kriegler Decl. ¶ 35. Thus reducing the plausible daily time to well below five minutes.

As for the aggregate amount of time over periods longer than a day, the Crandall Study shows that the average exit inspection time is between 16.9 seconds and 20.2 seconds, with a median time of 4.7 seconds. Crandall Decl. ¶¶ 108-111. Nike extrapolates this evidence to establish that the aggregate amount of uncompensated time at issue is miniscule. Moreover, Dr. Kriegler can at most show that he is only confident that one in 30 exits results in a bag check that exceeds 60 seconds. Kriegler Decl. ¶ 34, Table 2. Dr. Kriegler concedes that those 30 exits might occur over a six-month period of time. Kriegler Dep. 107:17-22. Thus, the undisputed evidence indicates that it could take more than a pay period for an employee to experience an exit inspection that reaches 60 seconds. *Id*. 118:18-23. Below is Dr. Kriegler's analysis of the probability that an employee has at least one combined exit time of at least 60 seconds:

Table 2: Probability of at Least One Store Exit With a Combined Time of at Least 60 Seconds	
Number of Store Exits	**Probability**
1	10.5%
5	42.6%
10	67.0%
15	81.1%
20	89.1%
25	93.8%
30	96.4%

Kriegler Decl. ¶ 34, Table 2.

Based on the evidence in the record, it is undisputed that the "daily" amount of compensable time at issue is small and within the amount of time that courts have found to be *de minimis*. The only reasonable inference from the Crandall Study and Kriegler Report is that the "aggregate" amount of compensable time is also small. However, regardless of whether the aggregate is small, which would favor Nike, or large, which would favor Rodriguez and the class, the *Lindow* court made clear that even when an aggregate claim is substantial, a claim may still be considered *de minimis* "because of the administrative difficulty of recording the time and the irregularity of the additional [] work." 738 F.2d at 1063.

4. Regularity

Finally, the Court considers whether the employees performed the uncompensated work on a regular basis. *Lindow*, 738 F.2d at 1063. Nike offers evidence that exit inspections often involved no time at all. Mot. 19. The Crandall Study found that 60.5% of exit inspections involved zero seconds of waiting time. Crandall Decl. ¶¶ 60-63. As for visual inspections, 52% of the visual inspections were one second or less. *Id.* ¶ 82. This is because visual inspections can be "split second events" where the employee "may not need to break stride upon exit." *Id.* ¶ 79. All "split-second" visual inspections that could consist of a "glance" of an authorized supervisor were recorded as one second in the Crandall Study. *Id.* ¶¶ 79-81. Moreover, Nike presented evidence that bag checks did not occur regularly because out of all of the exits recorded in the Crandall Study, 51% of the exits did not involve a bag check. *Id.* ¶ 78. Bag checks of any duration only occurred 45.5% of the time. *Id.* ¶ 92. As for combined time, the Crandall Study demonstrated that

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21.5% of the exits involved no time at all and were considered "walk-outs" with no measurable time for waiting, visual inspections, or bag checks. *Id.* ¶ 103. This evidence supports a finding that exit inspections of no measurable amount of time were frequently conducted.

Even if the Court were to consider the criticisms in the Kriegler Report, the Crandall Study still demonstrates that compensable exit times lasting at least 60 seconds did not occur regularly. Dr. Kriegler concedes that "60 seconds is relevant because Nike's timekeeping and payroll systems measure time to the whole minute. It follows that an additional 60 seconds of time on the clock would have a measurable impact on wages." Kriegler Decl. ¶ 34. The Kriegler Report accepts that if the Crandall Study is taken at face value, there is only a 10.5% probability that a given exit inspection would have a combined time of at least 60 seconds. *Id.* ("Based on Mr. Crandall's video footage, there is a 10.5 percent chance that Combined Time will be at least 60 seconds.") Thus, the evidence in the record demonstrates that there is at least an 89.5% probability that a given exit inspection takes less than 60 seconds. *Id.* Kriegler further opines that it takes 30 exits to obtain a 96.4% probability that at least one of those exits took 60 seconds or more. Kriegler Decl. ¶ 35, Table 2. The Crandall Study itself concluded that 92.2% of exit inspections recorded had a combined time of less than 60 seconds. Crandall Decl. ¶ 106.

Rodriguez does not present any evidence to create a triable issue of fact on the regularity of the additional time. Rodriguez relies solely on his argument that the "unpaid work" is regular because employees are required to undergo a security check every time they leave the store. Opp'n 25. The Court declines to interpret the regularity prong of the *Lindow* test in such a manner. Rather, the proper consideration is the regularity of exit inspections that were compensable. *See Lindow*, 738 F.2d at 1064 ("[A]lthough plaintiffs reported early on a regular basis, they did not regularly engage in compensable activities."); *see also Corbin*, 821 F.3d at 1082. The Ninth Circuit further noted in *Lindow* that "the uncertainty of how often employees performed the tasks and of how long a period was required for their performance are also relevant" on the regularity prong. 738 F.2d at 1063.

Viewing the evidence in the light most favorable to Rodriguez and the certified class, the deponents testified that wait times and bag checks could take several minutes in some instances.

However, Rodriguez offers no evidence that such lengthy inspections occurred with regularity. As Nike points out, the store managers' testimony confirms the Crandall Study's finding that the vast majority of exits take less than one minute. Reply 2-3. Even crediting the Kriegler Report, there is no evidence to rebut the Crandall Study's conclusion that (1) many exit inspections took zero seconds; and (2) exit inspections lasting more than 60 seconds were not regular. Notably, the Kriegler Report did not even consider the length of exits in any increment beyond 60 seconds. Meer Decl., ECF 94-1 Ex. D ("Kriegler Depo.") 85:21-23, 122:21-25 (explaining that the "highest cutoff" used "was 60 seconds because of Nike's timekeeping system.") And in his own analysis of Nike's timekeeping data, Dr. Kriegler calculates that it would take 10 workdays for a class member to experience a workday with one minute or more of uncredited time, which is not evidence of regularity. *See* Kriegler Decl. ¶ 42.

In light of the above, Nike has put forth evidence that its employees did not work "off-the-clock" every time they exited the store. Moreover, the Crandall Report demonstrates that exit inspections lasting "several minutes" as the store managers suggest were also not regular. The burden then shifts to Rodriguez, who fails to offer evidence to create a genuine issue of material fact that compensable exit inspections occurred regularly. Therefore, it is undisputed that exit inspections often took zero seconds, and any inspection lasting over 60 seconds (which Nike's timekeeping system could conceivably record) was not regular. As such, the regularity prong heavily favors Nike on summary judgment.

Under the *Lindow* analysis, the factors "uniformly lean in favor" of Nike. *Corbin*, 821 F.3d at 1082. It is undisputed that an exit inspection generally takes a few seconds, but can take up to a few minutes. It is also undisputed that compensable exit inspections lasting 60 seconds or more were irregular, and the only reasonable inference from the evidence is that the daily and aggregate amount of compensable time is small. There is also evidence that it would be administratively difficult for Nike to record the exit inspections given its timekeeping policies. Based on the record before the Court, the *de minimis* doctrine applies and no reasonable jury could find that the claims at issue are compensable.

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IV. ORDER

For the foregoing reasons, Nike's motion for summary judgment against the certified class is hereby GRANTED.[11]

Dated: September 12, 2017

BETH LABSON FREEMAN
United States District Judge

[11] The *de minimis* doctrine bars all of Rodriguez's claims including failure to pay minimum wages pursuant to Cal. Lab. Code §§ 1194, 1197; failure to pay overtime wages pursuant to Cal. Lab. Code §§ 510, 1194; restitution of unpaid wages pursuant to Cal. Bus. & Prof. Code § 17200; and waiting time penalties pursuant to Cal. Lab. Code § 203.

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We look forward to seeing you again at our
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