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UNITED STATES DISTRICT COURT

CENTRAL JUDICIAL DISTRICT OF CALIFORNIA

MARILYN PORTER, PATRICK BORGERT, CHARLOTTE BROWN, CARLA JEAN COOPER, BLAKE EVERGETTIS, JOAN MCKEOWN, EDITH MURRAY, YVETTE GODOY, SONDRA MOORE, AND DOLORES SEPULVEDA individually and on behalf of a California Class of other similarly situated individuals,

Plaintiffs,

v.

LOWE'S HIW INC., a Washington Corporation; and DOES 1 through 100, inclusive

Defendants.

CASE NO.: 10-cv-06903-MMM -JCG

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: July 18, 2011
Time: 10:00 a.m.
Room: Courtroom 780

PLEASE TAKE NOTICE THAT: that on July 18th, 2011, at 10:00 a.m., in Courtroom 780 of the above-referenced court, located at 255 East Temple Street, Los Angeles, CA 90012, Plaintiffs Marilyn Porter, Patrick Borgert, Charlotte Brown, Carla Jean Cooper, Blake Evergettis, Joan McKeown, Edith Murray, Yvette Godoy, Sondra Moore, and Dolores Sepulveda, ("Plaintiffs"), will respectfully move the Court to grant preliminary approval of the proposed class action settlement.

Specifically, the Plaintiffs will respectfully request that the Court: (a) grant preliminary approval for the proposed class action settlement; (b) authorize the mailing of the proposed class action notice; and (c) schedule a hearing for final approval of the settlement, the attorney fee award, and class representative enhancements.

Plaintiffs make this Motion on the grounds that the proposed settlement is fair, adequate and reasonable. Specifically, it is within the range of possible approval, and notice should therefore, be provided to the Class.

This Motion is based upon this Notice of Motion and Motion for Preliminary Approval of Class Action Settlement, the supporting memorandum of points and authorities below, the Class Action Settlement Agreement, the Declaration of Allen Felahy, any oral argument of counsel, the complete files and records of the above entitled matter, and such additional matters as the Court may consider.

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Respectfully submitted,

DATED: June 20, 2011

FELAHY LAW GROUP

By: /s/

Allen Felahy,
Oscar Ramirez, and
Boris Sorsher
Attorneys for Plaintiffs and Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Marilyn Porter, Patrick Borgert, Charlotte Brown, Carla Jean Cooper, Blake Evergettis, Joan McKeown, Edith Murray, Yvette Godoy, Sondra Moore, and Dolores Sepulveda, ("PLAINTIFFS"), have brought a class action against Defendant LOWE'S HIW INC., ("Defendant"), on behalf of themselves and of a class of past and current employees of Defendant.

The Plaintiffs contend that Defendant has violated California Labor Code Sections 510, 551-552, by requiring the Plaintiffs to work seven or more consecutive work days without providing them with one day of rest in seven and without paying overtime pay for all hours worked on the seventh consecutive date in violation of California Labor Code Section 510. Plaintiffs have further alleged that Defendant improperly computed the overtime rate by failing to account for all commissions paid to Plaintiffs, when computing their overtime rate. Finally, Plaintiffs contend that Defendant violated California Labor Code Sections 201-203, by failing to pay the Plaintiff all of the wages due to them at the time of their termination and therefore, owes the Plaintiffs waiting time penalties.

Plaintiffs, however, faced significant obstacles to recovery. As an initial matter, there is a paucity of guiding authority on Plaintiffs' claims, which significantly increased litigation risk. Moreover, Defendant had a motion for summary judgment pending and otherwise advanced complete defenses to each of Plaintiffs' claims, which, if successful, would have precluded any recovery for the class. In addition, Plaintiffs faced significant hurdles to certifying a class, including the possibility that each of the ten named plaintiffs lacked standing to represent the class.

Moreover, the value of Plaintiffs' case was reduced by Defendant's prior settlements as well as the United State Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S.Ct. 1740 (Apr. 27, 2011), which held that arbitration agreements containing class action waivers similar to the ones Plaintiffs signed are valid and enforceable. Those facts reduced both the scope of Defendant's exposure and the likelihood that Plaintiffs' claims were amenable to class treatment.

Notwithstanding the foregoing, Plaintiffs' counsel were able to obtain a significant settlement wherein Defendant agreed to pay up to $600,000.00, following a mediation with experienced class action mediator Hunter Hughes, Esq. In addition to the monetary component of the settlement, Plaintiff's counsel was able to obtain significant non-monetary benefits that will inure to the class. Specifically, as a result of this litigation, Defendant has, among other things: (1) educated its non-exempt employees that they are not required to work seven consecutive days; and (2) offered its non-exempt employees one free weekend off per month if they volunteered to work seven consecutive days. As a result of this litigation, Defendant also has obtained acknowledgments from its non-exempt employees to memorialize that they voluntarily work seven consecutive days on occasion in exchange for at least one free weekend off each month. As a result of both the monetary and non-monetary components of the settlement, it is beyond dispute that the proposed settlement is fair, reasonable, and in the best interests of the class.

Through the instant Motion, Plaintiffs' Counsel is seeking preliminary approval of that Settlement Agreement, a true and correct copy of which is attached hereto as Exhibit 1. This Court should lend its approval to the settlement because it was reached through arms-length bargaining with the assistance and considerable involvement of both experienced counsel and a respected mediator, after considerable discovery

efforts had been completed and the risk of continued litigation had been discussed at length. This Court should also approve the proposed settlement because it will result in significant financial benefit to claimants under a formula, which is equitable and subject to Court approval. Further, approval is appropriate since the agreement on attorneys' fees is not excessive, has been fully disclosed in the settlement and is subject to court approval. Finally, approval is warranted because the proposed form of notice to the Class is more than adequate under the pertinent standards.

Plaintiffs ask this Court to enter the Order, submitted herewith: (1) granting preliminary approval of the proposed settlement, 2) conditionally certifying the class, and (3) scheduling a hearing at which the Court will consider the motion for final approval of the settlement and entry of the proposed final judgment as well as Class Plaintiffs' counsel's application for an award of attorneys' fees and reimbursement of costs.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. PLAINTIFFS' CONTENTIONS

On August 4, 2010, Plaintiff MARILYN PORTER, filed the current action in Los Angeles Superior Court. Therein, Plaintiff Porter alleged that along with her fellow hourly employees she was required to work seven or more consecutive work days without receiving any overtime for the first eight hours worked on the seventh work day, or any subsequent consecutive work date. Plaintiff Porter pled that this pattern of conduct violated Labor Code Section 510, which obligates an employer to pay its employees overtime from the first hour worked on the seventh consecutive date worked in a work week. Plaintiff asserted that because the Defendant failed to provide such pay she and all similarly situated California employees were owed additional overtime pay. Plaintiff further alleged that through this practice the Defendant violated Labor Code Sections 201-203, by failing to pay terminated employees the overtime

they were owed at the time of their termination. As a result, Plaintiff Porter also asked to recover the waiting time penalties owed to herself and all other terminated employees, under Labor Code Section 203.

Defendant removed the current action to this federal court and shortly thereafter the parties proceeded to engage in discovery. During the discovery process, Defendant produced the entirety of the Plaintiff Porter's payroll file. A review of this file, along with numerous hours spent interviewing witnesses caused Plaintiffs' Counsel to conclude that: the Defendant did not always accurately compute the overtime rate for its employees due to its failure to account for all commissions and bonuses paid to its employees. (See, Declaration of Felahy at ¶ 3.) Likewise, Plaintiffs' counsel determined that Defendant's policy of having its employees work seven or more consecutive work days was a violation of California Labor Code Sections 551 and 552, a violation which could be compensated through the provisions of the Private Attorney General Act of 2004 (hereinafter "PAGA"). (See, Declaration of Felahy at ¶ 4.) Furthermore, Plaintiffs' counsel was retained by nine additional individuals (Patrick Borgert, Charlotte Brown, Carla Jean Cooper, Blake Evergettis, Joan McKeown, Edith Murray, Yvette Godoy, Sondra Moore, and Dolores Sepulveda) who desired to be named as class representatives in order to help facilitate the litigation.

As a result, in February of 2011, Plaintiffs' counsel prepared and submitted PAGA claim letters to the LWDA on behalf of these additional putative class representatives. Likewise, at or around that time Plaintiff Porter's intentions to amend the complaint to add these nine additional Plaintiffs, as well as both the PAGA claim and the claim arising from the alleged failure to properly compute overtime, were communicated to Defense counsel by Plaintiffs' counsel in February of 2011.[1]

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[1] These additional claims and parties were subsequently added to the complaint by stipulation and are enumerated in the first amended complaint.

B. DEFENDANT'S CONTENTIONS

Defendant vigorously denied all liability. On March 25, 2011, Defendant moved for summary judgment on the claim for seventh day overtime premiums. In its motion, and throughout this litigation, Defendant argued that its policies and practices comply with California law because Defendant automatically pays its employees overtime when they work all seven days in the employer's workweek. While Defendant admitted that it does not pay overtime when its employees work seven consecutive days over two workweeks, Defendant contended the law does not require it to pay overtime in those circumstances.

In support of its position, Defendant relied on the plain language of the California Labor Code, the governing Industrial Wage Commission Order, and certain persuasive authorities. See, e.g., Cal. Labor Code § 510(a) ("the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the [overtime] rate.") (emphasis added); I.W.C. Wage Order 7-2001 at § 3(A)(1); *Blasdell v. State of N. Y.*, No. 91-CV-1014, 1992 WL 469733, *2 (N.D. N.Y. Sept. 8, 1992) (holding that where employees worked seven consecutive days, but "first five days of this work stretch fell within one 'workweek' and the sixth and seventh days fell within another, no overtime compensation was required by the FLSA."). Moreover, as a factual matter, Defendant argued that none of the named Plaintiffs ever worked all seven days in a "workweek" and that they therefore suffered no damages.[2]

[2] If the Court accepted Defendant's view of the law, and Defendants were able to establish that none of the named Plaintiffs ever worked all seven days in a workweek, Plaintiffs also risked a finding that they lacked standing to represent a class, a finding which would have precluded class certification and may have resulted in no recovery for the class.

Plaintiffs disputed Defendant's view of the law, particularly in light of a recent California Court of Appeal decision called Andrew Seymore v. Metson Marine Inc. Cal.Rptr.3d ----, 2011 WL 1438510 (Cal.App. 1 Dist.). In Plaintiffs' view, Metson Marine stands for the propositions that an employer must demonstrate: 1) that a bona fide business reason exists for the designated start and end dates of the work week, and 2) that this reason is unrelated to the computation of overtime. Defendant countered that, among other things, Metson Marine involved unusual facts and that the opinion itself recognizes that it is acceptable for employers to designate a workweek where different employees will work different days and have different days off for the purpose of ensuring an appropriate amount of coverage. Defendant argued that rationale applied to its business operations because Defendant's stores are open virtually every day of the year and it needs to ensure that its stores have sufficient coverage to provide excellent customer service. While the parties disputed the law and the facts applicable to Plaintiffs' claim for seventh day overtime premiums, the risk of an adverse determination on summary judgment, which would have resulted in no recovery for the class, weighed in favor of settlement.

On Plaintiffs' "one's days rest in seven" claim for alleged violations of California Labor Code §§ 551-552, Defendant argued that liability could only attach where the seven consecutive days occurred in the employer's workweek because: (1) the governing wage order for Defendant's retail employees refers to the day of rest law in terms of a workweek, not seven consecutive days, I.W.C. Wage Order 7-2001(3)(F); and (2) California's Department of Labor Standards Enforcement Manual supported its interpretation, see DLSE Manual at § 48.1.3.2, p. 48-2 (containing an example of employees working as many as 10 consecutive days without any mention of violations under §§ 551 or 552). Accordingly, Defendant argued it faced no exposure because no Plaintiff ever worked all seven days in one "workweek." As with the claim for

seventh day overtime premiums, if Defendant's view of the law prevailed, and it was able to make the requisite factual showing regarding when Plaintiffs worked, any recovery for the class would have been precluded on this claim.

Plaintiffs disputed Defendant's view of the law, arguing that an employee who worked any seven consecutive days, regardless of the "workweek" could trigger PAGA liability. In response, Defendant argued that it does not require -- "cause" -- its employees to work seven consecutive days. See Cal. Lab. Code § 552 ("No employer of labor shall cause his employees to work more than six days in seven."). Rather, Defendant argued that to the extent employees worked seven days in a row, they did so at their own request (i.e., so that they could have one full weekend off per month). Defendant further argued that the law expressly permits an employer to cause employees to work seven consecutive days where it is "reasonably required" by the nature of the business, and that exception applied to its business operations. See Cal. Lab. Code § 554(a). While Plaintiffs disputed Defendant's arguments, Plaintiff's counsel recognized the risk of an adverse determination, especially given the paucity of authority interpreting the requirements imposed by California Labor Code §§ 551-552.

While Plaintiffs contend that Defendant improperly calculated the employees' "regular rate" for overtime purposes, Defendant disagreed vigorously.[3] Using sample data from Plaintiff Porter, Defendant argued that it properly calculated the employees' regular rate and properly accounted for all forms of includable compensation. While Plaintiffs disputed Defendant's arguments, Plaintiffs faced a real risk of no recovery on this claim as well.

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[3] The "regular rate" must account for compensation beyond the employee's base wage, including commissions, SPIFFs, and performance bonuses. DLSE Manual §§ 49.1.2.1-49.1.2.3 (2002 ed.).

With respect to waiting time penalties under California Labor Code § 203, which would have been available only if Plaintiff were to prevail on one of its overtime theories, Defendant argued that recovery was precluded because Plaintiffs could not establish that any failure to pay was "wilful." In particular, Defendant pointed out that to the extent it faced any exposure on the claim for seventh day overtime premiums it was only because of the California Court's of Appeal's April 2011 decision in Metson Marine, which Defendant had no way to foresee.

More generally, Defendants also argued that other settlements impacted Plaintiffs' ability to recover. Those settlements include *Mardirossian v. Lowe's HIW, Inc.*, Los Angeles County Superior Court Case No. BC410541, which released claims for, among other things, PAGA penalties and waiting time penalties through March 8, 2010, and *Bennie v. Lowe's HIW, Inc.*, C.D. Cal. Case No. SACV08-00576 DOC (SHx), which released, among other things, PAGA penalties and claims under California Labor Code §§ 551-552 through June 10, 2009. Those settlements significantly affected the value of Plaintiffs' case.

Finally, Defendant argued that regardless of merit of the Plaintiffs' claims, the current matter will not be certified in a contested proceeding because of the United States Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S.Ct. 1740 (Apr. 27, 2011), wherein the Supreme Court held that arbitration agreements containing class action waivers are valid and enforceable. Presently, Plaintiffs and members of the Plaintiff Class have executed arbitration agreements with class action waivers and therefore, the possibility exists that under the holding in *Concepcion* this case is not subject to class treatment. In sum, Defendant denied all liability and asserted complete defenses to all of Plaintiffs' claims.

C. THE MEDIATION AND THE SETTLEMENT

The parties agreed to mediate the claims in front of Hunter Hughes. In advance of the mediation, the parties conducted extensive written and deposition discovery, which included the production and review of the Plaintiffs' employment/payroll records and all of the Defendant's applicable policies and procedures. Moreover, in advance of the mediation, the Plaintiffs obtained a sampling of approximately 10% of the payroll records of the class. Indeed, Plaintiffs received nearly 100 megabytes of employment data. (See, Declaration of Felahy at ¶ 5.) Ultimately, through their discovery efforts and the informal exchange of information, Plaintiffs received information regarding the characteristics of the Class members and the size of the class as well as a sampling of all pertinent payroll data for 10 % of the class. Using this information, Plaintiffs' Counsel was able to determine the size of the class and the frequency with which employees worked seven or more consecutive work days. (See, Declaration of Felahy at ¶ 6.)

Specifically, to determine the amount of the overtime, Plaintiff's Counsel and their experts from ILS Legal Services Inc., reviewed thousands of work schedules and payroll records to confirm Plaintiffs' contention that Defendant asked is employees to work seven consecutive days. Plaintiffs' counsel also relied on the testimony of Defendant's PMK and the admissions made by Defendant's Vice President in the declarations filed by him with the court, wherein he provided the size of the class, the average hours worked per day and the average hourly wage. These facts were then used to create a damages calculation, which indicated that the damages for the failure to pay overtime would exceed several million dollars (this model was predicated on Plaintiff s obtaining the maximum possible result and presumed that all of the Defendants' defences would fail.)

However, this anticipated recovery had to be weighed against Defendant's various defenses and the risk of continuing litigation in light of the recently issued decision of *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S.Ct. 1740 (Apr. 27, 2011), which if read broadly prevents the Plaintiffs from obtaining any recovery on a class basis and instead obligates them to proceed individually.

Accordingly, after a full day of mediation and in accordance with the recommendation of the esteemed mediator -- who is a class action specialist, and who personally attended the oral arguments presented before the Supreme Court in *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S.Ct. 1740 (Apr. 27, 2011), the parties agreed to the current settlement.

D. THE SETTLEMENT TERMS

Through the Settlement, Defendant has not admitted any wrongdoing, and it has reserved its right to contest Plaintiffs' claims on all procedural and substantive grounds should the Settlement not be approved or the proposed Final Judgment not become final.

The Maximum Settlement that Defendant shall pay under the terms of this Settlement is $600,000.00, which includes a PAGA allocation of $25,000.00. Significantly, the Settlement contains a 40% "floor," which guarantees a certain minimum payout to the class. In addition, the settlement contains substantial non-monetary benefits. Specifically, Defendant has: (1) educated its non-exempt employees that they are not required to work seven consecutive days; and (2) offered its non-exempt employees one free weekend off per month if they volunteered to work seven consecutive days. Defendant also has obtained acknowledgments from its non-exempt employees to memorialize that they voluntarily work seven consecutive days on occasion in exchange for at least one free weekend off each month. The Settlement further provides for: (1) Class Counsel's attorneys' fees, which shall be in the

maximum amount of $200,000, subject to Court approval, and litigation costs not to exceed $30,000; (2) the payment of settlement administration costs; and (3) an enhancement payment of $10,000 to lead Class Representative Marilyn Porter, and $4,000 each of the other named plaintiffs.

The distribution of the settlement proceeds is unquestionably fair and reasonable. Each Settling Class Member's "Individual Settlement Award" shall equal the number of times the Settlement Class Member worked seven or more consecutive days during the Class Period, as determined by Defendant's records (provided that such number shall be no less than one), divided by the total number of times that all Settlement Class Members worked seven or more consecutive days during the Class Period as determined by Defendant's records, multiplied by the available funds (called the "Potential Gross Individual Settlement Proceeds" in the Settlement Agreement). For example, if a Settlement Class Member worked seven or more consecutive days on 2 occasions during the Class Period, and all Settlement Class Members worked seven or more consecutive days on a total of 200 occasions, then the Settlement Class Member would receive would receive 1.0% (2 divided by 200) of the Potential Gross Individual Settlement Proceeds. Given the substantial risks that the class would recover nothing at all, the Settlement is fair, reasonable, and in the class's best interests.

III. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL

A. Standards for Preliminary Approval

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the parties must obtain court approval for any settlement of a class action. When the parties request approval of a class action settlement, a court generally cannot require the parties to modify or otherwise alter the terms of the proposed settlement. (See *Hanlon v.*

Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) ("[t]he settlement must stand or fall in its entirety.").

Indeed, at a preliminary approval hearing, the Court should determine only whether the proposed settlement is "within the range of possible approval." *In re Tableware Antitrust Litigation*, 484 F.Supp.2d 1078, 1080 (N.D. Cal. 2007). If the Court finds that the settlement proposal is "within the range of possible approval," it then proceeds to the second step in the review process, the fairness hearing. *Id.* A court need not conduct a detailed review of the settlement at the preliminary approval stage because Class Members will subsequently be notified of the proposed settlement and of the fairness hearing at which they and all interested parties have an opportunity to be heard. See, *Dunk Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 624 (9th Cir. 1982).

As explained in detail infra, this Court can make such a determination in light of the potential procedural and factual hurdles to recovery by the Class, the uncertainties inherent in such complex litigation, and the fact that the proposed settlement eliminates the risk that Class Members will not otherwise recover any damages.

B. <u>The Proposed Settlement Merits Preliminary Approval</u>.

1. The Parties Can Identify the Strengths/Weaknesses of The Case.

An evaluation of the benefits of an immediate monetary settlement must be tempered by recognition that any compromise involves concessions on the part of all of the settling parties. Indeed, "the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." *Officers for Justice v. Civil Service Commission of City and County of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982). *See also In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610 (N.D. Cal. 1979).

Presently, Plaintiffs have conducted formal discovery, which consisted of deposition testimony, requests for production of documents, requests for admission and interrogatories. The parties have also exchanged hundreds of pages of paper documents and nearly 100 megabytes of electronic documents, which if printed would number in the thousands of pages. Further, Defendant has provided Plaintiffs with evidence describing its policies and practices.

Plaintiffs' Counsel, is experienced in similar wage and hour litigation and is very familiar with the facts and law and as such, is highly qualified to bring the matter to trial has also supplemented the foregoing efforts with its own investigation into the underlying events and facts related to the subject matter of the lawsuits, and has engaged in lengthy discussions with Defense counsel regarding these and other issues relevant to this litigation. Plaintiffs' Counsel also has undertaken an extensive analysis of: the legal principles applicable to the Class' claims against Defendant, potential defenses against these claims, and potential damages that could be recovered in the event that Plaintiffs and the Class succeed in prevailing on their claims. (Felahy Dec., ¶ 6-8, 12.) Specifically, Plaintiffs' Counsel has considered the attendant risks inherent in continuing this complex litigation, including the strength of Defendants' defenses and the risks posed by the recent decision in *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S.Ct. 1740 (Apr. 27, 2011), which could prevent the certification of the claims. (Felahy Dec., ¶ 8, 12.) In addition, Plaintiffs' Counsel considered Defendant's likely appeal of any order granting Class certification, Defendant's motions to exclude or limit expert testimony at the time of trial, and post-trial appeals. (Felahy Dec., ¶12.)

Based on all of the aforementioned efforts, Plaintiffs' counsel clearly understood the strengths and weaknesses of their case and had more than sufficient information to support a decision regarding the fairness of the Settlement Agreement. Indeed, based on all of the documentary and deposition discovery it took and the other

information it gathered, and the analysis that Plaintiffs' expert and Plaintiffs' Counsel performed, Plaintiffs' Counsel concluded that the settlement set forth in the Settlement Agreement is fair, reasonable, adequate, and in the best interests of Plaintiffs and the Class, and therefore Class Counsel has "unreservedly recommended" the settlement. (Felahy Dec., ¶15.)

Ultimately, Plaintiffs and their counsel recognize that the outcome of this litigation is uncertain, and that seeking resolution through the litigation process would create substantial risk and would require additional discovery, time, and expense. Moreover, based on Defendant's defenses, Plaintiff's counsel understands that, absent a settlement, the class may not recover anything at all. Hence, through this unopposed motion the parties submit that the prompt resolution of the issues in this action through the Settlement Agreement is in the best interests of the class.

2. Continued Litigation Poses Substantial Risks in Establishing Liability.

Defendant has vigorously disputed the ability of Plaintiffs and the Class to attain certification, prove liability, and to prove damages. As set forth in more detail above, Defendant asserted complete defenses to each of Plaintiffs' claims and had a motion for summary judgment pending at the time of mediation. Defendants also asserted procedural defenses, including its intention to oppose class certification on predominance and standing grounds.

In addition, Defendants' prior settlements in *Mardirossian v. Lowe's HIW, Inc.*, Los Angeles County Superior Court Case No. BC410541 and *Bennie v. Lowe's HIW, Inc.*, C.D. Cal. Case No. SACV08-00576 DOC (SHx) significantly impacted the value of Plaintiffs' claims.

Moreover, there is a substantial risk that the court may agree with Defendant and hold that pursuant to *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S.Ct.

1740 (Apr. 27, 2011) this case cannot be certified. Likewise, even if certification is granted and Plaintiffs' view of the law prevailed, a substantial risk exists that the Defendant's policies did not violate the law under *Metson Marine* if the Defendant is able to establish that its current policy was motivated by a desire to provide its employees with one interrupted weekend off per month instead of a desire to curb overtime pay. Finally, since *Andrew Seymore v. Metson Marine Inc.* Cal.Rptr.3d ----, 2011 WL 1438510 (Cal.App. 1 Dist.) is the first California case to discuss whether employers can alter the start dates of their work week in a manner which circumvents Labor Code Section 510, and because that case was decided after this action was filed, Plaintiffs' ability to prove that Defendants conduct was wilful is and subject to 203 waiting time penalties, is also a highly disputed matter.

If Plaintiffs cannot overcome the foregoing hurdles, their claims will fail and they will walk away from the litigation empty-handed. The proposed settlement eliminates these risks.

3. Balancing the Certainty of an Immediate Recovery and Prospective Relief Against the Expense and Likely Duration of Protracted Litigation and Trial Favors Settlement.

The immediacy and certainty of a recovery is a factor for the Court to balance in determining whether the proposed settlement is fair, adequate and reasonable. *See, e.g., In re Mego Financial Corp. Securities Litigation, supra*, 213 F.3d at 458. Therefore, the present settlement proposal must be balanced against the expense and likelihood of achieving a more favorable result at a later point in the litigation or at trial. Here, the approval of the settlement will mean a present recovery for members of the Class and therefore, this factor tilts in favor of approval.

4. The Proposed Settlement Provides Substantial Benefits to the Class.

Under the terms of the Settlement, the Class will receive $600,000.00. This result is well within the range of what courts have found to be fair and reasonable. *See, e.g., In re LDK Solar Sec. Litig.*, 2010 WL 3001384 (N.D. Cal. July 29, 2010) (approving settlement at less than 5% of estimated damages); *See also Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982) ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair.") Hence, this factor also supports approval. Moreover, as described above, the class stands to receive substantial non-monetary benefits under the Settlement, which also weighs heavily in favor of preliminary approval.

5. The Recommendations of Experienced Counsel Heavily Favor Approval of the Settlement.

It is well settled that Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Nat 'I Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry, 752 F. Supp.* 1087, 1093-1094 (D.D.C. 990); *Steinberg v. Carey,* 470 F. Supp. 471,478 (S.D.N.Y. 1979).

As noted above, substantial weight should be attributed to the belief of experienced counsel that settlement is in the best interests of the class. Presently, both Plaintiffs' counsel and Defendant's counsel fully support the settlement; and it is the informed opinion of Plaintiffs' counsel that, given the uncertainty and expense of pursuing this case through trial, that the settlement is fair, reasonable and adequate and in the best interests of the Settlement Classes.

6. The Settlement is the Product of Arms-Length Negotiations.

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. (See, *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); M*ars Steel Corp. v. Coni 'I Illinois Nal'l Bank & Trust* Co., 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980).

The proposed Settlement was the product of arms length bargaining. Indeed, Plaintiff and the putative Class were represented by experienced counsel who negotiated the current settlement at mediation, under the auspices of and with the approval of a well known and experienced class action mediator. Hence, there is no evidence of collusion between counsels and as such the settlement is presumed valid.

7. No Segments of the Class are Receiving Preferential Treatment.

All Class Members are subject to clearly defined notice and claim procedures and release terms. Further, each will be paid through a neutral mathematical formula.

8. The Proposed Notice of Pendency and Proposed Form of Distribution Are More than Adequate.

Rule 23 requires that the absent Class Members receive the "best notice practicable under the circumstances." See Fed. R. Civ. P.23(c)(2)(B). The method and the content of the notice to class members should be designed to fairly apprise them of the terms of the proposed settlements and the options available to them. See, e.g., *Philadelphia Housing Auth. v. Am. Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364, 378 (B.D. Pa. 1970). Federal courts have made clear that individual mailings to each class member's last known address are a sufficient form of notice. See, W*hite v. Nat'l Football League*, 41 F.3d 402,408 (8th Cir. 1994), abrogated on other grounds, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591,618-620 (1997).

The settlement agreement provides for the following notice procedures. Each of the Class Members will be mailed, within fifteen (30) days of the Court's approval of the Notice of Pendency, which is attached in its proposed form as Exhibit A to the Settlement Agreement. Class Counsel will retain the professional claims administration firm of Rust Consulting, Inc. (the "Claims Administrator") to perform the notice and claims administration procedures in this matter. (See, Settlement Agreement at ¶2.) The Notice of Pendency (Ex. A), the Claim Form (Ex. B) and the Exclusion Form (Ex. C) will be sent, postage pre-paid, via first class mail to the last known addresses of each Class Member. Id. at ¶8 (a). In addition, to the extent a Notice of Pendency is returned to the Claims Administrator, the Claims Administrator will forward the Notice of Pendency to any forwarding address provided for returned and undeliverable notices, or if none is provided, then the Claims Administrator will perform a skip trace and forward the Notice of Pendency to the resulting address, if any. Id. at ¶8 (c). As set forth in the Notice of Pendency, Class Members will have sixty (60) days from the mailing of the Notice of Pendency to complete in full, sign under penalty of perjury, and return their Consent to Join Settlement Form and Claim Form to the Claims Administrator or sixty (60) days from the mailing of the Notice of Pendency to complete in full, sign under penalty of perjury, and return their Exclusion Form to the Claims Administrator. Id. at 8 (b).

Thereafter, Administrator will certify jointly to Plaintiffs' Counsel and Defendant's counsel which Consent to Join Settlement Forms, Claim Forms and Exclusion Forms were timely or untimely filed. Id. at 8(d).

As explained in the Notice of Pendency, a Class Member will participate in the Settlement and share in the proceeds to be paid only if he or she submits both a valid and timely Claim Form. A Class Member may elect to not participate in the Settlement by timely filing an Exclusion Form and therefore repaints the right to file a separate

lawsuit. If he or she does neither of the above, then he or she cannot participate in the monies paid out under the Settlement but he or she will still be bound by the terms of the Settlement as to his/her state law claims if it is granted final approval by this Court. Id., ¶ 5 (d).

Those Class Members that submit Exclusion Forms will not be subject to the Final Judgment. (Id.) Upon the Settlement Effective Date, all Class Members will be deemed to have, and by operation of the Final Judgment will have, released all claims, rights, demands, liabilities and cause of action related to consecutive day violations, whether known or unknown, arising during the Class Members' Released Period. Id. at ¶18.

The aforementioned notice procedures comply with all of the relevant requirements and accordingly the proposed notice is proper and sufficient to satisfy all existing norms.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court conditionally certify the class, preliminarily approve the proposed settlement, set a hearing for the Final Settlement Hearing, and allow Class Counsel to utilize the notice procedures set forth herein to notify members of the Class of the terms of the settlement, the date of the Settlement Hearing and their ability to object or opt out if they desire to do so.

Respectfully submitted,

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FELAHY LAW GROUP

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