

1 Allen B. Felahy, Esq., SBN 190177
2 Oscar Ramirez, Esq., SBN 236768
3 Boris Sorsher, Esq., SBN 251718
4 FELAHY LAW GROUP
5 4000 Cover St., Suite 100
6 Long Beach, CA 90808
7 (562) 499-2121 tel.
8 (562) 499-2124 fax

9 Attorneys for Marilyn Porter, Patrick Borgert, Charlotte Brown, Carla Jean Cooper,
10 Blake Evergettis, Joan McKeown, Edith Murray, Yvette Godoy, Sondra Moore, and
11 Dolores Sepulveda on behalf of themselves, and all other similarly situated California
12 Citizens

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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, SONDRAL 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

1 PLEASE TAKE NOTICE THAT: that on July 18th, 2011, at 10:00 a.m., in
2 Courtroom 780 of the above-referenced court, located at 255 East Temple Street, Los
3 Angeles, CA 90012, Plaintiffs Marilyn Porter, Patrick Borgert, Charlotte Brown, Carla
4 Jean Cooper, Blake Evergettis, Joan McKeown, Edith Murray, Yvette Godoy, Sondra
5 Moore, and Dolores Sepulveda, ("Plaintiffs"), will respectfully move the Court to
6 grant preliminary approval of the proposed class action settlement.
7

8
9 Specifically, the Plaintiffs will respectfully request that the Court: (a) grant
10 preliminary approval for the proposed class action settlement; (b) authorize the mailing
11 of the proposed class action notice; and (c) schedule a hearing for final approval of the
12 settlement, the attorney fee award, and class representative enhancements.
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14 Plaintiffs make this Motion on the grounds that the proposed settlement is fair,
15 adequate and reasonable. Specifically, it is within the range of possible approval, and
16 notice should therefore, be provided to the Class.
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18 This Motion is based upon this Notice of Motion and Motion for Preliminary
19 Approval of Class Action Settlement, the supporting memorandum of points and
20 authorities below, the Class Action Settlement Agreement, the Declaration of Allen
21 Felahy, any oral argument of counsel, the complete files and records of the above
22 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.

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

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

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

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

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

14 **II. FACTUAL AND PROCEDURAL BACKGROUND**

15 **A. PLAINTIFFS' CONTENTIONS**

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

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

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

19 As a result, in February of 2011, Plaintiffs' counsel prepared and submitted
20 PAGA claim letters to the LWDA on behalf of these additional putative class
21 representatives. Likewise, at or around that time Plaintiff Porter's intentions to amend
22 the complaint to add these nine additional Plaintiffs, as well as both the PAGA claim
23 and the claim arising from the alleged failure to properly compute overtime, were
24 communicated to Defense counsel by Plaintiffs' counsel in February of 2011.¹

25
26 ¹ These additional claims and parties were subsequently added to the complaint by stipulation and are
enumerated in the first amended complaint.

1
2 **B. DEFENDANT’S CONTENTIONS**

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

11 In support of its position, Defendant relied on the plain language of the
12 California Labor Code, the governing Industrial Wage Commission Order, and certain
13 persuasive authorities. See, e.g., Cal. Labor Code § 510(a) (“the first eight hours
14 worked on the seventh day of work in any one workweek shall be compensated at the
15 [overtime] rate.”) (emphasis added); I.W.C. Wage Order 7-2001 at § 3(A)(1); *Blasdell*
16 *v. State of N. Y.*, No. 91-CV-1014, 1992 WL 469733, *2 (N.D. N.Y. Sept. 8, 1992)
17 (holding that where employees worked seven consecutive days, but “first five days of
18 this work stretch fell within one ‘workweek’ and the sixth and seventh days fell within
19 another, no overtime compensation was required by the FLSA.”). Moreover, as a
20 factual matter, Defendant argued that none of the named Plaintiffs ever worked all
21 seven days in a “workweek” and that they therefore suffered no damages.²
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25 ² If the Court accepted Defendant’s view of the law, and Defendants were able to establish that
26 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.

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

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

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

4 Plaintiffs disputed Defendant's view of the law, arguing that an employee who
5 worked any seven consecutive days, regardless of the "workweek" could trigger
6 PAGA liability. In response, Defendant argued that it does not require -- "cause" -- its
7 employees to work seven consecutive days. See Cal. Lab. Code § 552 ("No employer
8 of labor shall cause his employees to work more than six days in seven."). Rather,
9 Defendant argued that to the extent employees worked seven days in a row, they did so
10 at their own request (i.e., so that they could have one full weekend off per month).
11 Defendant further argued that the law expressly permits an employer to cause
12 employees to work seven consecutive days where it is "reasonably required" by the
13 nature of the business, and that exception applied to its business operations. See Cal.
14 Lab. Code § 554(a). While Plaintiffs disputed Defendant's arguments, Plaintiff's
15 counsel recognized the risk of an adverse determination, especially given the paucity
16 of authority interpreting the requirements imposed by California Labor Code §§ 551-
17 552.

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

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26 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.).

1 With respect to waiting time penalties under California Labor Code § 203,
2 which would have been available only if Plaintiff were to prevail on one of its
3 overtime theories, Defendant argued that recovery was precluded because Plaintiffs
4 could not establish that any failure to pay was “wilful.” In particular, Defendant
5 pointed out that to the extent it faced any exposure on the claim for seventh day
6 overtime premiums it was only because of the California Court’s of Appeal’s April
7 2011 decision in Metson Marine, which Defendant had no way to foresee.

8 More generally, Defendants also argued that other settlements impacted
9 Plaintiffs’ ability to recover. Those settlements include *Mardirossian v. Lowe’s HIW,*
10 *Inc.*, Los Angeles County Superior Court Case No. BC410541, which released claims
11 for, among other things, PAGA penalties and waiting time penalties through March 8,
12 2010, and *Bennie v. Lowe’s HIW, Inc.*, C.D. Cal. Case No. SACV08-00576 DOC
13 (SHx), which released, among other things, PAGA penalties and claims under
14 California Labor Code §§ 551-552 through June 10, 2009. Those settlements
15 significantly affected the value of Plaintiffs’ case.

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

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

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

5 The distribution of the settlement proceeds is unquestionably fair and
6 reasonable. Each Settling Class Member's "Individual Settlement Award" shall equal
7 the number of times the Settlement Class Member worked seven or more consecutive
8 days during the Class Period, as determined by Defendant's records (provided that
9 such number shall be no less than one), divided by the total number of times that all
10 Settlement Class Members worked seven or more consecutive days during the Class
11 Period as determined by Defendant's records, multiplied by the available funds (called
12 the "Potential Gross Individual Settlement Proceeds" in the Settlement Agreement).
13 For example, if a Settlement Class Member worked seven or more consecutive days on
14 2 occasions during the Class Period, and all Settlement Class Members worked seven
15 or more consecutive days on a total of 200 occasions, then the Settlement Class
16 Member would receive would receive 1.0% (2 divided by 200) of the Potential Gross
17 Individual Settlement Proceeds. Given the substantial risks that the class would
18 recover nothing at all, the Settlement is fair, reasonable, and in the class's best
19 interests.

20 **III. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

21 **A. Standards for Preliminary Approval**

22 Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the parties must
23 obtain court approval for any settlement of a class action. When the parties request
24 approval of a class action settlement, a court generally cannot require the parties to
25 modify or otherwise alter the terms of the proposed settlement. (See *Hanlon v.*
26

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

3 Indeed, at a preliminary approval hearing, the Court should determine only
4 whether the proposed settlement is "within the range of possible approval." *In re*
5 *Tableware Antitrust Litigation*, 484 F.Supp.2d 1078, 1080 (N.D. Cal. 2007). If the
6 Court finds that the settlement proposal is "within the range of possible approval," it
7 then proceeds to the second step in the review process, the fairness hearing. *Id.* A
8 court need not conduct a detailed review of the settlement at the preliminary approval
9 stage because Class Members will subsequently be notified of the proposed settlement
10 and of the fairness hearing at which they and all interested parties have an opportunity
11 to be heard. See, *Dunk Officers for Justice v. Civil Service Commission*, 688 F.2d 615,
12 624 (9th Cir. 1982).

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

17 **B. The Proposed Settlement Merits Preliminary Approval.**

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

19 An evaluation of the benefits of an immediate monetary settlement must be
20 tempered by recognition that any compromise involves concessions on the part of all
21 of the settling parties. Indeed, "the very essence of a settlement is compromise, a
22 yielding of absolutes and an abandoning of highest hopes." *Officers for Justice v.*
23 *Civil Service Commission of City and County of San Francisco*, 688 F.2d 615, 624
24 (9th Cir. 1982). See also *In re Mego Financial Corp. Securities Litigation*, 213 F.3d
25 454, 458 (9th Cir. 2000); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610 (N.D. Cal. 1979).

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

7 Plaintiffs' Counsel, is experienced in similar wage and hour litigation and is
8 very familiar with the facts and law and as such, is highly qualified to bring the matter
9 to trial has also supplemented the foregoing efforts with its own investigation into the
10 underlying events and facts related to the subject matter of the lawsuits, and has
11 engaged in lengthy discussions with Defense counsel regarding these and other issues
12 relevant to this litigation. Plaintiffs' Counsel also has undertaken an extensive analysis
13 of: the legal principles applicable to the Class' claims against Defendant, potential
14 defenses against these claims, and potential damages that could be recovered in the
15 event that Plaintiffs and the Class succeed in prevailing on their claims. (Felahy Dec.,
16 ¶ 6-8, 12.) Specifically, Plaintiffs' Counsel has considered the attendant risks inherent
17 in continuing this complex litigation, including the strength of Defendants' defenses
18 and the risks posed by the recent decision in *AT&T Mobility LLC v. Concepcion*, __
19 U.S. __, 131 S.Ct. 1740 (Apr. 27, 2011), which could prevent the certification of the
20 claims. (Felahy Dec., ¶ 8, 12.) In addition, Plaintiffs' Counsel considered Defendant's
21 likely appeal of any order granting Class certification, Defendant's motions to exclude
22 or limit expert testimony at the time of trial, and post-trial appeals. (Felahy Dec., ¶12.)

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

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

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

13 **2. Continued Litigation Poses Substantial Risks in Establishing** 14 **Liability.**

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

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

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

1 1740 (Apr. 27, 2011) this case cannot be certified. Likewise, even if certification is
2 granted and Plaintiffs' view of the law prevailed, a substantial risk exists that the
3 Defendant's policies did not violate the law under *Metson Marine* if the Defendant is
4 able to establish that its current policy was motivated by a desire to provide its
5 employees with one interrupted weekend off per month instead of a desire to curb
6 overtime pay. Finally, since *Andrew Seymore v. Metson Marine Inc.* Cal.Rptr.3d ----,
7 2011 WL 1438510 (Cal.App. 1 Dist.) is the first California case to discuss whether
8 employers can alter the start dates of their work week in a manner which circumvents
9 Labor Code Section 510, and because that case was decided after this action was filed,
10 Plaintiffs' ability to prove that Defendants conduct was wilful is and subject to 203
11 waiting time penalties, is also a highly disputed matter.

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

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

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

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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.

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

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

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

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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