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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ERIC CHAVEZ, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

CONVERSE, INC., a Delaware
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 15-cv-03746-NC

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT**

Date: July 8, 2020

Time: 1:00 P.M.

Courtroom: 5, 4th Floor

Judge: Hon. Nathanael Cousins

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 8, 2020, at 1:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 5 of the United States District Court for the Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, CA 95113, before the Honorable Nathanael Cousins, Plaintiff Eric Chavez (“Plaintiff”) will and hereby does move the Court for preliminary approval of the proposed class action settlement. Specifically, Plaintiff respectfully requests that the Court: (1) grant preliminary approval for the proposed class action settlement; (2) grant certification of the proposed Settlement Class, for settlement purposes only, comprised of all non-exempt/hourly employees of Defendant in California who worked at any time during the period from July 10, 2011 through November 19, 2019; (3) authorize the mailing of the proposed notice to the class of the settlement; and (4) schedule a “fairness hearing,” i.e., a hearing on the final approval of the settlement.

Plaintiff makes this unopposed motion on the grounds that the proposed settlement is within the range of possible final 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 attached Memorandum of Points and Authorities in Support, the Declarations of Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, Max W. Gavron, Dennis S. Hyun, William L. Marder, and Eric Chavez filed herewith, the Joint Stipulation of Class Action Settlement and Release filed herewith, any oral argument of counsel, the complete files and records in the above-captioned matter, and such additional matters as the Court may consider.

DATED: June 3, 2020

DIVERSITY LAW GROUP

By: /s/ Larry W. Lee
 Larry W. Lee
 Kristen M. Agnew
 Nicholas Rosenthal
 Attorneys for Plaintiff and the Certified Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF AGREEMENT

Plaintiff Eric Chavez (“Plaintiff”) respectfully requests that the Court grant preliminary approval of the Class Action Settlement (hereinafter referred to as “Settlement Agreement”) that he has reached in the above-captioned matter with Defendant Converse, Inc. (“Defendant” or “Converse”) (Plaintiff and Defendant collectively referred to as the “Parties”).

A. Factual Allegations.

Plaintiff was hired by Defendant to work as a non-exempt employee at Defendant’s Gilroy, California retail store. (Declaration of Eric Chavez (“Chavez Decl.”) ¶ 2.) Plaintiff was employed by Defendant from on or about September 2010, until on or about October 7, 2015. (*Id.*)

Plaintiff alleges that, as with all other non-exempt retail store employees of Defendant in the State of California, he was required to undergo off-the-clock security checks and/or visual inspections before exiting the store at any time (whether at the end of a shift or during a break). Plaintiff claims that although said security checks and visual inspections were required after clocking out and before leaving the store, Defendant did not pay Plaintiff and other non-exempt employees any applicable minimum, regular, and/or overtime wages in connection with the time spent waiting and undergoing said security checks and visual inspections.

On the other hand, Defendant denies that it has engaged in any alleged unlawful conduct and maintains that it has complied with California law and properly paid its employees in all respects. Defendant maintains that its security checks and visual inspections do not require Converse for the *de minimis* time spent undergoing the checks, as they lasted mere seconds. Defendant further contends that it is not liable to an employee who did not spend any additional time engaged in or waiting for a bag check or visual inspection.

B. Procedural Background.

1. Summary of the Litigation.

On July 10, 2015, Plaintiff filed a class action complaint against Defendant in the Santa Clara Superior Court, on behalf of himself and a proposed class consisting of “all non-exempt retail store employees who were employed by Defendant[] in the State of California at any time from July 10, 2011,

through the present,” and alleging the following causes of action: (1) violation of California Labor Code sections 1194, 1197, and 1197.1 for failure to pay minimum wages; (2) violation of California Labor Code sections 510 and 1194 for failure to pay overtime wages; (3) violation of California Labor Code sections 226.7 and 512 for failure to provide proper meal breaks; (4) violation of California Labor Code section 226.7 for failure to provide proper rest breaks; (5) violation of California Labor Code section 226(a) for failure to provide accurate wage statements; (6) violation of the Private Attorneys General Act (“PAGA”), Labor Code § 2698, *et seq.*, based on the above-stated Labor Code violations; and (7) violation of the California Business and Professions Code section 17200, *et seq.* for unfair business practices. On August 17, 2015, Defendant filed a Notice of Removal of Civil Action to the United States District Court for the Northern District of California pursuant to the Class Action Fairness Act of 2005. (Dkt. No. 1.) Plaintiff subsequently filed a First Amended Complaint on November 23, 2015, adding claims for waiting time penalties under Labor Code section 203. (Dkt. No. 28.)

On August 18, 2016, the Court granted Defendant’s Motion for Partial Summary Judgment as to Plaintiff’s second cause of action for violation of Labor Code sections 510 and 1194 (failure to pay overtime wages) and Plaintiff’s fifth, sixth and seventh causes of action to the extent these claims were premised upon Defendant’s failure to pay overtime wages as a result of the miscalculation of Plaintiff’s regular rate of pay. (Dkt. No. 80.)

The Parties thereafter fully briefed class certification. On September 22, 2016, the Court granted Plaintiff’s Motion for Class Certification, finding that common questions of law and fact predominated:

Because the time clock is always at the back of a Converse store, while the point of exit is at the front, all class members are necessarily off-the-clock when they have their bags checked. ... [T]he Court finds that Chavez has demonstrated that most, if not all, Converse stores are set up such that an employee would necessarily be off-the-clock when a bag check occurs.

(Dkt. No. 89 at 3). The Court certified the following class: “[a]ll current and former non-exempt retail store employees of Converse who worked in California during the period from July 10, 2011, to the present.” (Dkt. No. 89 at 6). The Court certified all remaining claims, with the exception of Plaintiff’s third cause of action for violation of Labor Code sections 226.7 and 512 (failure to provide meal breaks). (Dkt. No. 89.)

Subsequent to the granting of class certification, the Court heard Plaintiff and Defendant’s

1 previously filed cross-motions for summary judgment. Defendant’s Motion for Summary Judgment
 2 sought dismissal of all of Plaintiff’s claims based on the federal *de minimis* doctrine. (Dkt. No. 118.) On
 3 October 11, 2017, the Court granted Defendant’s Motion for Summary Judgment based on the *de*
 4 *minimis* doctrine and denied Plaintiff’s Motion for Partial Summary Judgment as moot. (Dkt. No. 144.)
 5 Plaintiff appealed the ruling to the Ninth Circuit. On June 28, 2019, the Ninth Circuit issued its opinions
 6 in *Rodriguez v. Nike Retail Servs., Inc.*, 928 F.3d 810, 818 (9th Cir. 2019), and *Chavez v. Converse, Inc.*,
 7 772 F. App’x 571, 572 (9th Cir. 2019), reversing the lower court’s (including this Court’s) granting of
 8 the defendants’ motions for summary judgment based on the *de minimis* doctrine.

9 Following remand from the Ninth Circuit, the Parties thus continued to extensively litigate the
 10 certified class claims. The Parties filed motions for summary adjudication on liability over the security
 11 check policy. On January 15, 2020, the Court granted Plaintiff’s Motion for Partial Summary Judgment,
 12 finding that employees were subject to Defendant’s control as a result of being forced to undergo the
 13 security inspections: “[u]nder the exit search policy as written, Converse exercises control over its
 14 employees during exit searches. Employees are required to make sure a manager inspects their
 15 belongings.” Chavez, 2020 WL 247942, at *3. On March 13, 2020, the Court granted in part
 16 Defendant’s Motion for Partial Summary Judgment as to Plaintiff’s Labor Code sections 203 and 226
 17 penalties, resulting in the adjudication of these claims against Plaintiff. (Dkt. No. 202.) The Court,
 18 however, denied Defendant’s Motion for Partial Summary Judgment based on the *de minimis* doctrine,
 19 and as to Plaintiff’s meal and rest break claims. (Dkt. No. 202.)

20 On March 20, 2020, Defendant filed a Motion to Decertify the Class and Strike Plaintiff’s PAGA
 21 Claim as Unmanageable, which was pending at the time the Parties mediated and reached the agreement
 22 resulting in this settlement. (Dkt. No. 203.)

23 **2. Summary of Investigation and Discovery.**

24 With respect to investigation and discovery, Plaintiff conducted extensive investigation of the
 25 facts surrounding the claims in this action before filing suit, as well as conducted extensive discovery
 26 during the course of litigating and prosecuting this case. (Declaration of Larry W. Lee (“Lee Decl.”) at
 27 ¶¶ 3-9.) The Parties propounded and responded to multiple rounds of written discovery, including
 28 interrogatories and requests for production of documents. (*Id.* at ¶ 3.) In connection with written

discovery, Plaintiff also obtained and reviewed Defendant's document production, including policy documents, class contact information, and class time and payroll data. (*Id.* at ¶ 3, 5.)

Plaintiff's counsel also defended Plaintiff's deposition and took multiple depositions of Defendant's FRCP 30(b)(6) Corporate Representatives on various topics that impacted class certification and liability. (Lee Decl. at ¶ 4.) Additionally, over the course of litigation, Plaintiff took the depositions of over 25 current and former employees of Defendant located throughout the State of California. (*Id.*) In addition, Plaintiff retained an expert, Brian Kriegler, Ph.D. for purposes of liability and damages. (*Id.* at ¶ 5.) Similarly, Defendant also retained its own expert, Dr. Robert Crandall. (*Id.*) The Parties have conducted expert discovery, including deposing Dr. Kriegler and the observers to Defendant's time and motion study and submitting and reviewing expert and rebuttal expert reports. (*Id.* at ¶ 6.)

In sum, as evidenced from the docket, from the time of removal to the instant settlement, this case has been substantively and vigorously litigated by both Parties. The Parties have also conducted extensive investigation and discovery, including formal written discovery; taking and defending depositions of Plaintiff, Defendant's corporate representatives, class members, and Plaintiff's expert; exchanging class data and documents; and conducting expert discovery. (Lee Decl. at ¶¶ 3-9.)

C. Summary of the Current Settlement.

On April 15, 2020, the Parties attended a virtual, face-to-face mediation with experienced professional mediator Michael Loeb. (Lee Decl. at ¶ 10.) After a full day of negotiations, the Parties were able to reach an agreement for settlement and the key terms. As a result of the mediation and discussions thereafter, Plaintiff the Parties have reached the current settlement, as detailed fully in the Settlement Agreement. (*Id.*, Ex. A (Settlement Agreement).)

The Settlement Agreement provides for a total settlement sum of One Million Eight Hundred Seventy-Five Thousand Dollars (\$1,875,000.00), inclusive of payments to Settlement Class Members, payment of the Service Award to Plaintiff, payment to the Labor & Workforce Development Agency ("LWDA") pursuant to the PAGA, attorneys' fees and costs, and settlement administration costs. (Settlement Agreement at § 4.1.)

Pursuant to the terms of the Settlement Agreement, the Net Settlement Amount (after deduction

of attorneys' fees in the amount of up to Six Hundred Twenty-Five Thousand Dollars (\$625,000.00), costs up to Two Hundred Thousand Dollars (\$200,000.00), the Service Award in the amount of up to Ten Thousand Dollars (\$10,000.00), PAGA payment in the amount of Seventy-Five Thousand Dollars (\$75,000.00) to the LWDA, or 75% of \$100,000.00, and costs of settlement administration in the amount of approximately Twenty-Five Thousand (\$25,000.00) is approximately \$940,000 (Settlement Agreement at §§ 4.1, 5.2; Lee Decl. at ¶ 13.) As provided in the Settlement Agreement, 40 percent of the Net Settlement Amount will be allocated as penalties and will not be subject to withholdings, 30 percent of the Net Settlement Amount will be considered wages and will be subject to all applicable withholdings, and 30 percent of the New Settlement Amount will be allocated to interest and will not be subject to withholdings. (Settlement Agreement § 4.2.) Defendant has also agreed to be separately responsible for its employer-side share of payroll taxes. (*Id.* at § 4.1.)

Significantly, this settlement is non-reversionary and does not involved the use of claim forms. (Settlement Agreement §§ 5.5, 7.1.) In other words, none of the unclaimed settlement funds will revert back to Defendant and a Settlement Class Member need not do anything to receive his or her share. Instead, the Settlement Class Member will automatically receive his or her share of the settlement funds so long as he or she does not opt-out from the settlement.¹ Moreover, the Net Settlement Amount available to Settlement Class Members will proportionately increase as the result of any opt-outs. (Settlement Agreement §§ 5.4-5.5.) Thus, each Class Member's settlement amount could be further increased depending on the number of exclusions submitted. (Lee Decl. ¶ 14.)

Moreover, the remaining monies from uncashed checks will be redistributed to those Settlement Class Members who cashed their checks from the first distribution, and any remaining funds thereafter shall be paid to the *cy pres* beneficiary of the Settlement, Legal Aid at Work. (Settlement Agreement § 10.5.) Legal Aid at Work is a non-profit legal services organization that provides legal assistance to low-income individuals for issues related to employment, including any wage and hour issues, like those presented in this case. (Lee Decl. at ¶ 16.) The Parties and their respective counsel do not have any

¹ However, request for exclusions do not apply to the PAGA Claims. (Settlement Agreement § 7.8.) Notwithstanding the submission of a timely request for exclusion, Class Members will still be bound by the settlement and release of PAGA Claims or remedies under the Final Judgment pursuant to *Arias v. Superior Court*, 46 Cal. 4th 969 (2009). As a result, those requesting exclusion will still receive a check for the flat amount of \$10.00.

relationship with Legal Aid at Work. (*Id.*; Declaration of Dennis Hyun (“Hyun Decl.”) at ¶ 11; Declaration of Kristen M. Agnew (“Agnew Decl.”) at ¶ 10; Declaration of Nicholas Rosenthal (“Rosenthal Decl.”) at ¶ 5; Declaration of Max Gavron (“Gavron Decl.”) at ¶ 11; Declaration of William L. Marder (“Marder Decl.”) at ¶ 13.)

The Settlement Class consists of all individuals employed by Defendant as non-exempt/hourly employees in California who worked at any time during the period of July 10, 2011 through and including November 19, 2019 (“Settlement Class Period”). (Settlement Agreement §§ 2.30, 2.31, 2.33.) The identities of class members can be ascertained from Defendant’s payroll records. Based upon Defendant’s records, the estimated number of unique Settlement Class Members is approximately 2,700. (*Id.* at § 2.30.) As discussed above, Settlement Class Members have the right to opt-out and exclude themselves from the settlement.

Class membership for settlement purposes is different than the litigation class that the Court previously certified due to Defendant’s change in policy. *See* Northern District Procedural Guidelines for Class Settlements. Effective November 19, 2019, Defendant changed its policies to no longer mandate exit inspections. (Dkt. No. 201.) As it is undisputed that the litigation class does not have claims after that date, the Court granted summary judgment as to all claims after November 19, 2019. (*Id.*) Given that the definition of the Settlement Class is similar to the litigation class certified by the Court (with the exception of the settlement time period as addressed above), the Parties believe that the Settlement Class is appropriate. (Lee Decl. at ¶ 12.)

D. The Settlement is Fair, Reasonable, and Adequate.

Based on their own respective independent investigations and evaluations, the Parties and their respective counsel are of the opinion that settlement for the consideration and on the terms set forth in their Settlement Agreement is fair, reasonable, and adequate and is in the best interests of the class and the Defendant in light of all known facts and circumstances and the expenses and risks inherent in litigation. (Lee Decl. at ¶ 17; Hyun Decl. at ¶¶ 7-9; Marder Decl. at ¶ 11; Agnew Decl. at ¶ 8; Rosenthal Decl. at ¶ 4; Gavron Decl. at ¶ 9.)

Defendant denies any liability or wrongdoing of any kind associated with the claims alleged by Plaintiff. (Settlement Agreement §1.2.) Defendant denies certification of the Settlement Class,

comprised of all individuals employed by Defendant as non-exempt/hourly employees in California who worked at any time during the Settlement Class Period, for any purpose other than that of settling this lawsuit. (Settlement Agreement §§ 1.2, 2.31.) Indeed, Defendant's Motion to Decertify the Class was pending at the time of settlement. (Dkt. No. 203.) If Defendant's motion were granted in full, Plaintiff would be left with only his individual claims. Further, if the motion failed and this case proceeded to trial, Defendant also would assert that Plaintiff would not be able to prevail on his claims. (Settlement Agreement §1.2.) Significantly, this Court granted Defendant's Motion for Partial Summary Judgment as to the Labor Code §§ 203 and 226 penalties, which drastically reduces Defendant's total exposure and the potential recovery of the Class. Therefore, in light of the significant risks, Plaintiff submits that this settlement is fair, adequate and reasonable.

Based on the approximately 2,700 Settlement Class Members, each Settlement Class Member will receive a raw average of approximately \$348.15, after deduction for attorneys' fees, class representative enhancement payment, payment to the LWDA, settlement administration costs, and litigation costs. (Lee Decl. at ¶ 15.) Each individual Settlement Class Member's settlement amount may be more or less than this raw average, depending on each respective Settlement Class Member's number of Hours Worked (the total number of hours a Settlement Class Member worked during the Settlement Class Period) during the Settlement Class Period, and the number of opt-outs received. (*Id.*; Settlement Agreement § 2.11.) In order to calculate each Settlement Class Member's pro-rata share, the Claims Administrator will first total the Hours Worked provided by Defendant ("Total Hours Worked"). (Settlement Agreement § 5.4.) The Claims Administrator will then divide each Settlement Class Member's Hours Worked by the Total Hours Worked. (*Id.*) This amount will then be multiplied against the Net Settlement Amount to reach the Settlement Class Member's Individual Settlement Payment. (*Id.*)

II. LEGAL ANALYSIS

A. The Class at Issue and the Settlement Fund.

Defendant has agreed to collect information regarding the identity of the members of the Settlement Class and the number of Hours Worked. (Settlement Agreement §§ 2.3, 2.11.) The Parties have further agreed and stipulated that the Settlement Class be certified on a provisional, non-mandatory

basis for the purposes of this settlement only. (Settlement Agreement §1.12.) As set forth in the Settlement Agreement, the Settlement Class includes all individuals employed by Defendant as non-exempt/hourly employees in California who worked at any time July 10, 2011 through and including November 19, 2019. (Settlement Agreement § 2.31.) Again, the Parties have agreed that the settlement is non-reversionary and will proceed without the use of claim forms. (*Id.* at §§ 5.5, 7.1.)

B. Two-Step Approval Process.

Any settlement of class litigation must be reviewed and approved by the Court. This is done in two steps: (1) an early (preliminary) review by the court, and (2) a final review and approval by the court after notice has been distributed to the class members for their comment or objections. The Manual for Complex Litigation, Fourth states:

Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties. If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b). If there is a need for subclasses, the judge must define them and appoint counsel to represent them. The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Manual for Complex Litigation (“MCL”) (4th ed. 2004), § 21.632.

Thus, the preliminary approval by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. As Professor Newberg comments:

The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal may vary. The court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid subject only to any objections that may be raised at a final hearing.

4 Conte & Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2010). Accordingly, a court should grant preliminary approval of a class action settlement where it is within the “range of reasonableness.” Here, the Parties have reached such an agreement that is fair, reasonable, and adequate, and have

submitted it to the Court in connection with this filing.

C. The Standard for Preliminary Approval.

As a matter of public policy, settlement is a strongly-favored method for resolving disputes. *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989). This is especially true in complex class actions such as this case. *Officers for Justice v. Civil Serv. Comm’n of City & County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

Preliminary approval does not require the Court to make a final determination that the settlement is fair, reasonable, and adequate. Rather, that decision is made only at 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. 5 James Wm. Moore et al., *Moore’s Federal Practice* § 23.165 (3d ed. 2010). In considering the settlement, the Court need not reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute and need not engage in a trial on the merits. *Officers for Justice*, 688 F.2d at 625. Preliminary approval is merely the prerequisite to giving notice so that “the proposed settlement...may be submitted to members of the prospective class for their acceptance or rejection.” *Philadelphia Hous. Auth. v. Am. Radiator & Standard. Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970).

“The judge should raise questions at the preliminary hearing and perhaps seek an independent review if there are reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys.” MCL § 21.633. Here, the proposed settlement does not pose such issues. This was a highly-contentious litigation with the Parties each being represented by highly-competent counsel. As discussed above and in the declarations submitted herewith, the Parties engaged in substantial motion practice, including appellate briefing and argument before the Ninth Circuit, and conducted thorough investigations related to the claims and defenses alleged in this case. Further, the proposed settlement was reached after Plaintiff obtained class certification, after the Parties utilized the assistance of an experienced mediator and after substantial arm’s-length negotiations between the Parties.

As detailed herein, the proposed settlement satisfies the standard for preliminary approval as it is

well within the range of possible approval and there are no grounds to doubt its fairness. The Parties' attorneys have extensive experience in employment law, particularly wage and hour litigation, and reached settlement only after mediation and extensive arm's-length negotiations subsequent to the mediation.

D. The Court Has Already Certified the Class and Therefore Should Certify the Settlement Class for the Same Reasons.

The Parties also may, at the preliminary approval stage, request that the court provisionally approve certification of the class—conditional upon final approval of the settlement. Settlements are highly favored, particularly in class actions. *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989); *Officers for Justice*, 688 F.2d at 625; *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D. Colo. 1997). Plaintiff requests such provisional approval at the preliminary approval hearing:

The strength of the findings made by a judge at a preliminary hearing or conference concerning a tentative settlement proposal...may be set out in conditional orders granting tentative approval to the various items submitted to the court. Three basic rulings are often conditionally entered at this preliminary hearing. These conditional rulings may approve a temporary settlement class, the proposed settlement, and the class counsel's application for fees and expenses.

4 Newberg on Class Actions at § 11.26.

As stated above, on September 22, 2016, the Court certified Plaintiff's class claims that were predicated on Defendant's security inspection policy (Dkt. No. 80.) Pursuant to the Settlement Agreement, the Settlement Class is defined as all non-exempt/hourly employees in California who worked at any time during the period of July 10, 2011 through and including November 19, 2019. (Settlement Agreement § 2.31.) This definition is virtually identical to the definition of the class previously certified by the Court, with the sole difference being that the certified class period runs from July 10, 2011 through the date of class certification, while the Settlement Class period runs from July 10, 2011 to November 19, 2019 for the reasons explained above.

The Parties agree that certification of the proposed Settlement Class is appropriate for settlement purposes. While Defendant maintains that the Class should have been decertified prior to trial, the Parties believe that certification is appropriate for purposes of classwide resolution, and recognize that at

the time of settlement, the class was certified as proposed in the settlement, with the sole exception of the Settlement Period. Thus, for purposes of this Motion, the Court need not re-engage in an analysis of whether the Settlement Class can be certified for settlement purposes, given that the Court has already found that the elements of Rule 23 have been established.

Accordingly, the Parties respectfully request that the Court certify the Settlement Class, for settlement purposes only, as defined in the Settlement Agreement.

E. The Settlement is Fair and Reasonable and Not the Result of Fraud or Collusion.

1. The Settlement May be Presumed Fair and Reasonable.

There is a presumption that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983) ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs"); *In re Excess Value Ins. Coverage Litig.*, No. M-21-84 (RMB), 2004 WL 1724980, at *10 (S.D.N.Y. July 30, 2004) ("Where 'the Court finds that the Settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness'") (Citations omitted); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 380 (N.D. Ohio 2001) ("When a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair").

Additionally, 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); *Mars Steel Corp. v. Continental Illinois Nat'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). 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'l 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. 1990); *Steinberg v. Carey*, 470 F. Supp. 471, 478 (S.D.N.Y. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n*, 79 F.R.D. 571, 576 (E.D. Pa. 1978).

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account, particularly where, as here, they have already obtained class

certification, been involved in extensive litigation, extensive informal investigation and formal written discovery, depositions, and expert discovery, appear to be competent, and have experience with this type of litigation. *Newberg on Class Actions* at § 11.47; *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528 (“So long as the integrity of the arm’s length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement...and ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation”) (citations omitted); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (“Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement”; pre-certification class action settlements should be scrutinized for “clear sailing” provisions “providing for the payment of attorneys’ fees separate and apart from class funds, which carries ‘the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class’”) (emphasis added). Here, this settlement was reached only after extensive litigation and class certification, as well as several rulings on summary judgment. Thus, Plaintiff’s counsel zealously litigated this case on behalf of the class.

a. Experience of Class Counsel.

Here, counsel for Parties have a great deal of experience in wage and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a number of other wage/hour class actions. (Lee Decl. at ¶¶ 23-25; Hyun Decl. at ¶¶ 3-6; Agnew Decl. at ¶ 6; Rosenthal Decl. at ¶ 3; Gavron Decl. at ¶6; Marder Decl. at ¶ 10.) Moreover, Plaintiff’s counsel conducted an extensive investigation and discovery of the factual allegations involved in this case prior to filing suit and throughout the course of litigation up until trial. Thus, based upon such experience and knowledge of the current case, Plaintiff’s counsel believe that the current Settlement is fair, reasonable and adequate. (Lee Decl. at ¶ 17; Hyun Decl. at ¶¶ 7-9; Agnew Decl. at ¶ 8; Rosenthal Decl. at ¶ 4; Gavron Decl. at ¶ 9; Marder Decl. at ¶11.) Pursuant to the Northern District Procedural Guidelines for Class Settlements , information regarding Plaintiff’s counsel’s past comparable class settlement is detailed in their declarations. (See Lee Decl. at ¶ 25.)

b. Investigation and Discovery Prior to Settlement.

As mentioned, Class Counsel conducted significant investigation and discovery in furtherance of the prosecution of this action. (Lee Decl. at ¶¶ 3-9.) This investigation and discovery included, among other things: (a) interviewing current and former employees of Defendant and reviewing various documents obtained from those employees regarding the facts surrounding the claims; (b) subpoenaing and taking depositions of over 25 current and former employees of Defendant; (c) inspection and analysis of thousands of pages of documents, and class time and payroll records, produced by Defendant throughout the course of litigation and in connection with mediation; (d) conducting multiple depositions of Defendant's FRCP 30(b)(6) Corporate Representatives, on a myriad of topics relating to the underlying claims; (e) retaining an expert, Dr. Kriegler, to assess damages and penalties, along with reviewing rebuttal expert reports produced in connection with expert discovery; and (f) extensively researching and litigating the substantive issues in this case from class certification up to summary judgment stage and readied the case for trial. (*Id.*)

Plaintiff was provided with the time and payroll data and class list for the entire class. (Lee Decl. at ¶ 5.) Thereafter, Plaintiff deposed a random sample of class members. (*Id.* at ¶ 4.) Plaintiff then hired an expert to process and analyze deposition data, and calculate maximum exposure of damages and penalties that is extrapolated and applicable to the entire class for the entire class period. (*Id.* at ¶¶ 4-8.) Based thereon, the following represents Plaintiff's analysis of Defendant's potential liability:

For unpaid wages, Plaintiff's expert calculated the maximum exposure of class-wide damages that Defendant could face as approximately \$91,523, assuming a conservative one minute per shift of unpaid work time, plus interest. (Lee Decl. at ¶7.) In addition, Defendant also faces liability for rest period penalties arising from the off-the-clock security check process. (*Id.*) Plaintiff's expert estimated that the maximum exposure of class-wide rest period penalties totaled approximately \$3,745,500. (*Id.*)

For PAGA penalties, Defendant faces penalties as high as approximately \$20,597,950. (Lee Decl. at ¶ 8.) However, that amount is subject to any good faith defenses that Defendant may raise, including those similar to the defenses on which Defendant sought and won summary judgement. (Dkt. No. 202.) Moreover, PAGA penalties are discretionary and subject to reduction by this Court. Pursuant to Labor Code § 2699(f)(2), the Court can decline to award the full amount of PAGA penalties where "...if, based on the facts and circumstances of the particular case, to do otherwise, would result in an

award that is unjust, arbitrary and oppressive, or confiscatory.” Indeed, courts have affirmed the reduction of PAGA penalties in the past. As recently shown in *Carrington v. Starbucks Corp.*, the Court of Appeal affirmed the trial court’s reduction of PAGA penalties by 90 percent, citing the employer’s good faith attempt at complying with the law. 30 Cal. App. 5th 504, 517 (2018). Here, if the Court reduced the potential PAGA penalties by 90 percent as in *Carrington*, total exposure would be only \$2,059,795. (Lee Decl. at ¶ 8.)

Thus, \$1,875,000 would account for approximately **7.67 percent** of the total exposure that includes the maximum class-wide damages of \$24,434,973. (Lee Decl. at ¶ 15.)

2. The Settlement is Fair, Reasonable, and Adequate.

The settlement for each participating Class Member is fair, reasonable, and adequate, given the inherent risk of going forward with trial, the risk of appeals, the risks in an area where it is argued that the law is unsettled, and the costs of pursuing such litigation.

a. Risks of Proceeding with the Decertification Motion, Trial and Any Appeals.

To assess the fairness, adequacy and reasonableness of a class action settlement, the Court must weigh the immediacy and certainty of substantial settlement proceeds against the risks inherent in continued litigation. *In re General Motors Corp.*, 55 F.3d 768, 806 (3d Cir. 1995) (“present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement”); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979); MCL § 21.62 at 316.

Here, the Settlement affords fair relief to the Class, while avoiding significant legal and factual battles. Most immediately, Defendant’s Motion to Decertify the Class and Strike Plaintiff’s PAGA Claims was pending at the time of settlement, which if successful would eliminate the class’s entire recovery. Additionally, at trial, the Class may have been prevented from obtaining any recovery at all. Although Plaintiff’s attorneys believe the certified claims are meritorious, they are experienced and realistic, and understand that the outcome of a trial, and the outcome of any appeals that would inevitably follow if the class prevailed at trial, are inherently uncertain in terms of both outcome and

1 duration.

2 Indeed, this Court granted Defendant's Motion for Partial Summary Judgment against Plaintiff's
3 claims for penalties in violation of Labor Code §§ 203 and 226. These claims for penalties represent a
4 significant portion of the monetary recovery available to the Class, which are no longer available in light
5 of this Court's ruling.

6 An additional issue which will continue to pose risks at trial is the *de minimis* doctrine.
7 Significantly, in *Troester v. Starbucks Corp.*, the California Supreme Court held that *de minimis* doctrine
8 does not apply to regularly occurring work under the California Labor Code. 5 Cal. 5th 829 (2018).
9 However, the *Troester* Court left open the question and did not address whether there are other activities
10 that are so irregular or brief that it is unreasonable to require compensation. *Id.* In this Court's Order
11 Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, the Court opined that
12 "[e]ven after *Troester*, the precise contours of the *de minimis* doctrine remain uncertain." (Dkt. No. 202.)
13 As this issue remains undecided, this Settlement provides concrete relief to the Settlement Class without
14 having to proceed with trial on this issue.

15 In light of these risks and uncertainties in connection with proceeding with trial, Plaintiff asserts
16 that this settlement is fair, adequate and reasonable.

17 **b. The Settlement is Within the Range of Reasonableness.**

18 The standard of review for class settlements is whether the settlement is within a range of
19 reasonableness. As Professor Newberg comments:

20 Recognizing that there may always be a difference of opinion as to the
21 appropriate value of settlement, the courts have refused to substitute their
22 judgment for that of the proponents. Instead the courts have reviewed
23 settlements with the intent of determining whether they are within a range
24 of reasonableness....

25 4 Newberg on Class Actions, at § 11.45.

26 Here, the settlement fund is non-reversionary, such that 100 percent of the Net Settlement
27 Amount will be available for distribution to Settlement Class Members who do not opt-out. Moreover,
28 the settlement does not require claim forms. Rather, Settlement Class Members who do not opt-out will
automatically receive a check. Assuming that every Settlement Class Member elects to participate in the
settlement, each Settlement Class Member will receive his or her pro rata share, with each person

1 receiving on average an approximate amount of \$348.15. (Lee Decl. ¶ 14.) Further, the settlement fund
2 will be paid out entirely in cash (as opposed to a voucher, coupon, etc.).

3 In addition, as set forth in the Settlement Agreement, the release for Settlement Class Members
4 is narrowly tailored to the claims alleged in the operative complaint:

5 “Settlement Class Members’ Released Claims” means any and all present
6 and past claims under the wage and hour laws and regulations of the state
7 of California that were or could have been asserted based on the facts
8 pleaded in the Lawsuit or any amendments thereto, including but not
9 limited to, all statutes mentioned in the Lawsuit and corresponding
10 provisions of the relevant California Wage Order, including but not
11 limited to California Labor Code sections 201-203, 226, 226.7, 510, 512,
12 558, 1194, 1197, 1197.1, the Private Attorneys General Act (“PAGA”)
13 (Labor Code Sections 2698-2699.5) and California Business and
Professions Code sections 17200, et seq., as related to claims for:
overtime; minimum wage; meal period premiums; rest break premiums;
wage statements; waiting time penalties; restitution; civil and statutory
penalties; interest; injunctive relief; and attorneys’ fees, costs and
expenses. based on facts pleaded in the Lawsuit. The “Settlement Class
Members’ Released Claims” are released from July 10 2011 through and
including November 19, 2019.

14 (Settlement Agreement § 2.32.)

15 For these reasons, and for the reasons set forth above relating to the total liability and the risks of
16 prevailing on the theories of liability alleged, Plaintiff believes that the current Settlement is fair,
17 reasonable, and adequate.

18 **c. The Complexity, Expense, and Likely Duration of Continued**
19 **Litigation Against the Settling Defendant Favors Approval.**

20 Another factor considered by courts in approving a settlement is the complexity, expense, and
21 likely duration of the litigation. *Officers of Justice*, 688 F.2d at 625; *Girsh*, 521 F.2d at 157. In applying
22 this factor, the Court must weigh the benefits of the settlement against the expense and delay involved in
23 achieving an equivalent or more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433-34 (5th Cir.
24 1971).

25 The Settlement Agreement provides to all Settlement Class Members fair relief in a prompt and
26 efficient manner. Were the Parties to engage in continued litigation of this matter, including the motion
27 for decertification and trial proceedings, Plaintiff may risk losing based on the reasons explained above.
28 Moreover, following a decision at trial, there is also the possibility of appeal. Given the realities of

litigation, this process places ultimate relief several years away. The idea of balancing a fair recovery now, with settlement dollars being paid out now, as opposed to battling at trial and a lengthy appeal process, is a significant factor to be considered. *DIRECTV*, 221 F.R.D. at 526-27 (“Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation”).

The settlement in this case is therefore consistent with the “overriding public interest in settling and quieting litigation” that is “particularly true in class action suits.” See *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); 4 Newberg on Class Actions, at § 11.41.

d. Non-Admission of Liability by Defendant.

Finally, Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in this lawsuit. Defendant further maintains that it has complied at all times with California wage and hour laws, and that the class and PAGA claims could not be tried as certified. Because of such denial and as is evidenced by the history of litigation in this case, if this case is not resolved, there is a high likelihood that the case will continue even after trial and into the process of appeal.

F. The Notice to be Given is the Best Practicable.

“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). “The 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).

Here, the terms of the Settlement Agreement provide for a notice distribution plan that is designed to achieve the best notice that is practicable under the circumstances. The Claims Administrator is to mail via first-class U.S. mail a copy of the Court-approved Notice of Class Action Settlement (“Class Notice”) to all class members, using their most up-to-date address available. (Settlement Agreement § 6.2.) The Claims Administrator will use a single skip-trace, computer or other search using the name, address and/or Social Security Number of the individual involved for undeliverable Class Notices. (Settlement Agreement § 6.4.) The Class Notice provides Settlement Class Members with the information needed to make an informed decision, including: a brief summary of the

proposed settlement and information about the lawsuit; a summary of the allocations under the Settlement and the amount that the Settlement Class Member is estimated to receive; the Settlement Class Member's rights and claims that are included in the release; the Settlement Class Member's options including procedures on how to object and opt-out of the settlement; Class Counsel's contact information for any questions; information regarding the final approval hearing and how to appear; procedures on how to obtain more information or access Pacer and/or court records; and contact information and website of the Claims Administrator. It also explains that those who do not opt out will be bound by the Settlement, except with respect to the release of the PAGA Claims. (Settlement Agreement § 7.8; *Arias v. Superior Court*, 46 Cal. 4th 969 (2009).)

G. Attorney's Fees, Costs, and Service Award to Plaintiff.

Pursuant to the terms of the Settlement Agreement, and without opposition from Defendant, Plaintiff will also be entitled to request an enhancement up to a maximum of \$10,000.00. (Settlement Agreement § 2.26.) This amount is to compensate Plaintiff for his efforts and work in prosecuting this case, participating in discovery, including preparing for, traveling to, and sitting for his deposition; meeting and communicating with his counsel; reviewing the pleadings and documents in this case, including reviewing and signing the Settlement Agreement and declarations; and for executing a general release under California Civil Code section 1542. (Chavez Decl. ¶¶ 4, 5, 7.)

Similarly, Class Counsel will seek an award of attorneys' fees of not more than 1/3 of the Class Settlement Amount (\$625,000.00). (Settlement Agreement § 2.2.) To date, Class Counsel estimates that they have incurred over 1,500 hours in the prosecution of this matter, with an average hourly rate of approximately \$600 per hour. (Lee Decl. at ¶ 26.) Based thereon, Class Counsel believes that no multiplier will be necessary.

Finally, Plaintiff and Class Counsel will seek the reimbursement of costs, which mainly includes filing fees, deposition costs, mediation costs, class notice costs, expert fees and travel expenses. To date, such costs are approximately \$200,000.00. (Lee Decl. at ¶ 27.) Both the requested enhancement amounts and attorneys' fees and costs will be requested simultaneously with Plaintiff's motion seeking final approval of this class action settlement.

H. Settlement Administrator.

1 The Parties have selected Phoenix Settlement Administrators as the Claims Administrator.
 2 (Settlement Agreement § 2.29.) Pursuant to the Northern District Procedural Guidelines for Class
 3 Settlements, the selection process of the Claims Administrator is as follows: Plaintiff's counsel obtained
 4 quotes from Phoenix Settlement Administrators, Simpluris, and JND Legal Administration. (Lee Decl.
 5 at ¶ 18.) Given that Phoenix Settlement Administrators provided the lowest quote, the Parties
 6 subsequently agreed to use Phoenix Settlement Administrators. (*Id.*) Further, notice by U.S. mail along
 7 with the National Change of Address search and skip trace for undeliverable mail has been approved by
 8 numerous courts and, therefore, the Parties agreed to notice by U.S. mail. (*Id.*) Additionally, a list of
 9 cases in which Phoenix Settlement Administrators was appointed as the claims administrator in cases
 10 involving Plaintiff's counsel over the last two years is set forth in Mr. Lee's declaration. (*Id.*)

11 Moreover, the anticipated costs for the settlement administration are not to exceed \$25,000.00.
 12 (Settlement Agreement § 2.29; Lee Decl. at ¶ 18.) Plaintiff and his counsel believe that this amount is
 13 reasonable in relation to the value of the settlement, as the administration costs account for only 1.3% of
 14 the Class Settlement Amount. (Lee Decl. at ¶ 18.) The administration costs will be deducted from the
 15 Class Settlement Amount.

16 **III. CONCLUSION.**

17 Based on the foregoing, Plaintiffs respectfully request that the Court (1) grant preliminary
 18 approval for the proposed class action settlement; (2) authorize the mailing of the proposed notice to the
 19 Settlement Class of the settlement; and (3) schedule a "fairness hearing," i.e. a hearing on the final
 20 approval of the settlement.

21 DATED: June 3, 2020

DIVERSITY LAW GROUP

22
 23 By: /s/ Larry W. Lee
 24 Larry W. Lee
 25 Kristen M. Agnew
 26 Nicholas Rosenthal
 27 Attorneys for Plaintiff and the Certified Class
 28