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IN THE SUPREME COURT OF CALIFORNIA

DOUGLAS TROESTER,
Plaintiff and Appellant,

v.

STARBUCKS CORPORATION,
Defendant and Respondent.

SUPREME COURT
FILED
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Deputy

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NO. 14-55530

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT STARBUCKS CORPORATION

HORVITZ & LEVY LLP
ROBERT H. WRIGHT (BAR NO. 155489)
FELIX SHAFIR (BAR NO. 207372)
*LACEY L. ESTUDILLO (BAR NO. 311977)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
rwright@horvitzlevy.com
fshafir@horvitzlevy.com
lestudillo@horvitzlevy.com

ATTORNEYS FOR AMICUS CURIAE
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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IN THE SUPREME COURT OF CALIFORNIA

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT STARBUCKS CORPORATION

Pursuant to California Rules of Court, rule 8.520(f)(1), the Association of Southern California Defense Counsel (the Association) requests permission to file the attached amicus curiae brief in support of defendant and respondent Starbucks Corporation.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

The Association is a preeminent regional organization of lawyers who specialize in defending civil actions. It is comprised of approximately 1,100 leading attorneys in California. The Association is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. The Association is also actively engaged in assisting courts by appearing as amicus curiae in cases involving issues of vital significance to its members.

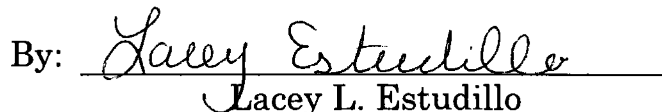
Among the clients represented by the Association's members are many California employers. The Association's members assist these businesses in complying with California's wage laws. The Association's members therefore benefit from clarity in the California rules governing employment law since this helps them to better assist their clients in complying with the law. This case is of significant interest to the Association because this appeal calls on this Court to decide a question of fundamental importance to every California employer: whether California law requires employers to pay employees for *de minimis* amounts of work time (i.e., a few seconds or minutes of work beyond the scheduled working hours) that cannot as a practical administrative matter be easily recorded for payroll purposes. The United States Supreme Court has long held that employees may not recover for such *de minimis* amounts of time in wage and hour cases brought under federal labor law, and courts have since applied that "*de minimis*" rule to wage claims arising under California law. Businesses that have relied on this rule might now face crushing financial liability if this Court reaches a contrary conclusion in this case.

The proposed amicus brief supplements the parties' briefs by examining authorities that support the application of the *de minimis* rule to California wage law, including the longstanding doctrine *de minimis non curat lex*, the Division of Labor Standards Enforcement's opinion letters adopting the *de minimis* rule as part of California law, and the Legislature's acquiescence in this long-standing administrative practice, all of which should guide this Court's analysis of the issue here. This amicus brief also provides a broader perspective on how the legal issues raised in this appeal will affect California employers, and offers information concerning how other jurisdictions have handled issues like those presented here.

Accordingly, the Association requests that this Court accept and file the attached amicus curiae brief.

April 13, 2017

HORVITZ & LEVY LLP
ROBERT H. WRIGHT
FELIX SHAFIR
LACEY L. ESTUDILLO

By: 
Lacey L. Estudillo

Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

AMICUS CURIAE BRIEF

INTRODUCTION

Decades ago, the United States Supreme Court recognized a "*de minimis*" rule for cases where employees bring wage and hour claims that seek compensation for "negligible" amounts of time. (*Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 692 [66 S.Ct. 1187, 90 L.Ed. 1515] (*Anderson*).) Under this rule, employees generally "cannot recover for otherwise compensable time if it is *de minimis*." (*Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1062 (*Lindow*).)

Although the United States Supreme Court articulated this rule in a wage and hour case brought under the federal Fair Labor Standards Act (FLSA), the rule is not grounded in principles of federal law and both federal and state appellate courts have indicated that the rule applies to wage claims arising under California law. (See, e.g., *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership* (9th Cir. 2016) 821 F.3d 1069, 1081, fn. 11 (*Corbin*); *Gillings v. Time Warner Cable LLC* (9th Cir. 2014) 583 F.App'x. 712, 714 (*Gillings*); *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 527-528 (*Gomez*).)

Plaintiff Douglas Troester argues that this Court should reach a contrary conclusion. But his argument rests upon an analysis which is flawed in several critical respects.

First, the *de minimis* rule is a generally applicable standard and not, as plaintiff contends, a "federal" doctrine that can be restricted to federal wage claims. When the United States Supreme

Court first recognized the rule in an FLSA lawsuit, it did so based not on any unique aspect of federal law but instead on the common sense proposition that where only a few seconds or minutes of work beyond the scheduled work hours are at issue, they can be disregarded as trivial. (*Anderson*, *supra*, 328 U.S. at p. 692.)

This rule is thus an application of the "doctrine *de minimis non curat lex* (the law does not take account of trifles)." (*Sandifer v. U.S. Steel Corp.* (2014) 571 U.S. __ [134 S.Ct. 870, 880, 187 L.Ed.2d 729] (*Sandifer*).) This doctrine has deep roots at common law, has been codified by the California Legislature, and has been applied by California courts in a broad range of contexts. Because the *de minimis* rule derives from a doctrine that ordinarily governs all enactments, including California laws, there is no reason this same rule does not apply with equal force to California wage claims. Indeed, plaintiff's contrary position is out of step not just with California and federal authorities but with numerous decisions in other states that have expressly applied the *de minimis* rule to wage claims.

Second, plaintiff's contention that the *de minimis* rule is "incompatible" (OBOM 35) with the Legislature's "clear intent expressed in the Labor Code's provisions" (OBOM 16) is erroneous. Courts have consistently applied the *de minimis* standard to wage claims under California law. Further, courts from many different jurisdictions have recognized that the *de minimis* rule applies to statutes not materially different from California's laws. Additionally, California's Division of Labor Standards Enforcement (DLSE)—"the state agency charged with administering and

enforcing the state's labor statutes and wage order regulations" (*Sumuel v. ADVO, Inc.* (2007) 155 Cal.App.4th 1099, 1109 (*Sumuel*))—has repeatedly issued opinion letters adopting the *de minimis* standard under California law. (See, e.g., Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1994.02.03-3 (Feb. 3, 1994) p. 4 <http://goo.gl/HKTk1q> [as of Apr. 11, 2017] ["the Division has adopted the *de minimis* rule relied upon by the federal courts"].) The California Legislature's decision not to modify the statutory scheme to abrogate the *de minimis* rule in light of the DLSE's longstanding administrative practice adopting the rule is a strong reason for this Court to follow the DLSE's lead.

Plaintiff argues that California labor law's silence on this issue is dispositive. But the general applicability of the *de minimis* rule, combined with the Legislature's acquiescence in the decisions applying that rule to California wage claims, show that California labor law was never meant to prohibit its use. There is no reason to deviate from this widely accepted doctrine that repeatedly has been found to apply to wage claims not just under the law of this state but under federal law and the laws of other jurisdictions.

Third, contrary to plaintiff's contention, public policy weighs in favor of applying the *de minimis* rule to California wage and hour law. Because "it would be impracticable for [employers] to capture" (*Troester v. Starbucks Corp.* (C.D.Cal., Mar. 7, 2014, No. CV 12-7677 GAF (PJWx)) 2014 WL 1004098, at p. *4 (*Troester*) [nonpub. opn.]) "a few seconds or minutes of work beyond the scheduled working hours" of each employee (*Anderson, supra,* 328 U.S. at p. 692), requiring employers to calculate and compensate employees for

negligible time imposes a *substantial* burden on employers without creating a meaningful benefit to employees. Certainly, employee time must be respected, and in the limited circumstance when an employee is required to give up a "*substantial* measure of his time and effort," the employee must be appropriately compensated. (*Ibid.*, emphasis added.) But adopting a policy that would render all time-keeping systems unlawful based on mere minutes, seconds, or milliseconds is unworkable, as the United States Supreme Court recognized when it articulated the rule over 70 years ago.

Accordingly, this Court should confirm the continued vitality of the longstanding principle that "[t]he law disregards trifles" (Civ. Code, § 3533) and apply the *de minimis* rule to California wage claims.

LEGAL ARGUMENT

I. THE *DE MINIMIS* RULE IS NOT LIMITED TO FEDERAL CASES BUT INSTEAD REFLECTS THE LONGSTANDING, WIDELY-ADOPTED PRINCIPLE THAT THE LAW DISREGARDS TRIFLES.

A. The *de minimis* rule should be applied to California wage claims because it derives from the traditional common law doctrine *de minimis non curat lex*, which governs *all* enactments, including those in California.

The United States Supreme Court first recognized the *de minimis* rule for wage claims more than seven decades ago.

(*Anderson*, *supra*, 328 U.S. at p. 692.) Although the Court did so in a case construing the FLSA, the rule is by no means tied to that federal law. (See *ibid.*) As the Supreme Court explained, the *de minimis* rule embodies the common sense proposition that the law does not care about "negligible" trivialities: "in light of the realities of the industrial world," when the issue involves "only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." (*Ibid.*; see also 29 C.F.R. § 785.47 [following *Anderson* to provide that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded" due to "industrial realities"].)

The *de minimis* rule does not give employers license to freely avoid compensating their employees for work done in increments of time less than an hour. To the contrary, the "*de minimis* rule is concerned with the practical administrative difficulty of recording small amounts of time for payroll purposes" and employers must therefore "compensate employees for even small amounts of daily time *unless that time is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes*." (*Lindow*, *supra*, 738 F.2d at pp. 1062-1063.) Consequently, courts have long "determin[ed] whether otherwise compensable time is *de minimis*" by considering three key guideposts that significantly narrow the *de minimis* rule's reach: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work."

(*Id.* at p. 1063; accord, *Carlsen v. U.S.* (Fed.Cir. 2008) 521 F.3d 1371, 1380-1381 [adopting Ninth Circuit's *Lindow* test]; *De Asencio v. Tyson Foods, Inc.* (3d Cir. 2007) 500 F.3d 361, 374-375 [same]; *Reich v. Monfort, Inc.* (10th Cir. 1998) 144 F.3d 1329, 1333-1334 [same]; *Reich v. New York City Transit Authority* (2d Cir. 1995) 45 F.3d 646, 653 [same].) In short, *Anderson*'s *de minimis* rule "applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." (29 C.F.R. § 785.47.)

The *de minimis* rule derives from the common law "doctrine *de minimis non curat lex* (the law does not take account of trifles)," whose "roots . . . stretch to ancient soil." (*Sandifer, supra*, 134 S.Ct. at p. 880; see *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 514 (*Gerawan*) [this doctrine "is a maxim of ancient origins"]; Nemerofsky, *What Is a "Trifle" Anyway?* (2002) 37 Gonz. L.Rev. 315, 316-321, 341 [tracing this maxim to the English Court of Chancery].) This common law doctrine has been applied in the United States for over 200 years, and in California for well over 100 years. (See *Davidson v. Devine* (1886) 70 Cal. 519, 521 ["the law disregards trifles [citation], and as only *one cent* is involved in the determination of the question at issue, the doctrine of *De minimis non curat lex* should be invoked, and the judgment of the court below should be affirmed"]; *Moffett v. Ayres* (1810) 3 N.J.L. 655 ["*De minimis non curat lex;* it is too, small a thing to take notice of"].)

The function of the doctrine *de minimis non curat lex* is to place "outside the scope of legal relief" the type of injuries,

"normally small and invariably difficult to measure, that must be accepted as the price of living in society." (Nemerofsky, *supra*, 37 Gonz. L.Rev. at p. 323, internal quotation marks omitted.) The maxim signifies "that mere trifles and technicalities must yield to practical common sense and substantial justice" (*Goulding v. Ferrell* (1908) 106 Minn. 44, 45 [117 N.W. 1046]) so as "to prevent expensive and mischievous litigation, which can result in no real benefit to complainant, but which may occasion delay and injury to other suitors" (*Schlichtman v. New Jersey Highway Authority* (N.J.Super.Ct. Law Div. 1990) 243 N.J.Super. 464, 472 [579 A.2d 1275] (*Schlichtman*); see also Veech & Moon, *De Minimis Non Curat Lex* (1947) 45 Mich. L.Rev. 537, 543-544 ["The function of the maxim is, therefore, as an interpretative tool to inject reason into technical rules of law and to round-off the sharp corners of our legal structure"]).

Because the doctrine *de minimis non curat lex* "is a maxim of ancient origins" (*Gerawan, supra*, 24 Cal.4th at p. 514), it is "part of the established background of legal principles against which *all* enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." (*Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.* (1992) 505 U.S. 214, 231 [112 S.Ct. 2447, 120 L.Ed.2d 174], emphasis added; see Manning, *Textualism and the Equity of the Statute* (2001) 101 Colum. L.Rev. 1, 114 ["all statutes are now enacted against the venerable maxim '*de minimis non curat lex*' " (emphasis added)].) Accordingly, since the *de minimis* rule derives from a common law doctrine that typically governs *all* enactments, including those in California, it is not a

"federal" standard that can be restricted to federal law. Rather, it is a generally applicable rule and must be applied to California wage claims.

B. California courts have long recognized that the maxim *de minimis non curat lex* is a fundamental part of California law and apply it in a broad range of contexts.

The maxim *de minimis non curat lex* is a bedrock component of California law and was codified in California Civil Code section 3533 in 1872. (See Civ. Code, § 3533 ["law disregards trifles"].) This maxim has influenced a broad range of California legal issues, including contract, tort, civil, and criminal matters. (Nemerofsky, *supra*, 37 Gonz. L.Rev. at p. 324.) The doctrine conserves judicial resources and forestalls expensive litigation of inconsequential matters. (*Ibid.*) Indeed, California case law demonstrates wide acceptance of the *de minimis* maxim. For example, in addition to the authorities cited by Starbucks (ABOM 18-19), California courts have applied the doctrine to:

- evidence not satisfying the substantial factor causation test (*People v. Caldwell* (1984) 36 Cal.3d 210, 220-221);
- a $16 discrepancy between the amount of a cost award in an order and the clerk's notice of that order, which the Court of Appeal held was *de minimis* and did not divest the trial court of jurisdiction or excuse payment (*People v. National American Ins. Co.* (1995) 32 Cal.App.4th 1176, 1182 ["The Legislature expressed

the concept in modern terms in 1872: 'The law disregards trifles' "], citing Civ. Code, § 3533);

- a 12/3650 share of retirement benefits that the parties and the court treated as a *de minimis* consideration (*In re Marriage of Ward* (1975) 50 Cal.App.3d 150, 154, fn. 1, citing Civ. Code, § 3533, disapproved of on other grounds by *In re Marriage of Brown* (1976) 15 Cal.3d 838);

- arguments on appeal that affected only $12.48 out of a $10,778.73 judgment (*Buffalo Arms, Inc. v. Remler Co.* (1960) 179 Cal.App.2d 700, 705 ["To endeavor to erect these minor discrepancies into triable issues of fact requiring reversal of the judgment . . . is to make a mockery of the summary judgment procedure. It is a maxim as old as our jurisprudence that 'the law disregards trifles.' "], quoting Civ. Code, § 3533);

- an adoption referral order that did not authorize a parental termination action but was construed as if it did "since the law disregards trifles" (*In re Eli F.* (1989) 212 Cal.App.3d 228, 236, citing Civ. Code, § 3533);

- a claim for material breach of a logging contract when only one tree snag was left standing (*Pfaff v. Fair-Hipsley, Inc.* (1965) 232 Cal.App.2d 274, 278 ["We think that the rule of 'de minimis' is applicable here"], quoting Civ. Code, § 3533);

- a $10 dispute over costs in a judicial sale involving $35,000 (*Barry v. Slattery* (1932) 119 Cal.App. 727, 730, citing Civ. Code, § 3533);

- an eight-cent difference in the calculation of accrued interest that the court considered "too trifling to be considered as

grounds for requiring a trial" (*Layport v. Rieder* (1939) 37 Cal.App.2d Supp. 742, 748, disapproved of on other grounds by *Heald v. Friis-Hansen* (1959) 52 Cal.2d 834);

- an award of 45 cents in court costs for the transmission of briefs (*Sime v. Hunter* (1921) 55 Cal.App. 157, 159-160, citing Civ. Code, § 3533);

- a boundary line that the trial court erroneously placed "a trifle to the north" (*McKenzie v. Nichelini* (1919) 43 Cal.App. 194, 197 ["the error is so small that we think it is a case for the application of the legal maxim 'The law disregards trifles' "], quoting Civ. Code, § 3533); and

- a challenge to only $17.70 out of a $1,000 judgment (*Brady v. Ranch Mining Co.* (1907) 7 Cal.App. 182, 185 [the contention that the judgment "should be reduced to the extent of $17.70 involves the maxim, '*De minimis*' "]).

These authorities confirm the doctrine *de minimis non curat lex* is a fundamental part of California law. Courts have long applied general maxims of statutory interpretation and other generally applicable maxims that are codified in California's Civil Code to California wage claims. (See, e.g., *Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729, 736-739 [applying maxims of statutory construction to state claim for unpaid overtime wages]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726, citing Civ. Code, § 3523 [applying legal maxim "for every wrong there is a remedy" to state claim for unpaid overtime wages]; *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 437 [relying on " 'maxim of statutory construction, *expressio unius est exclusio*

alterius' " to invalidate Wage Order section which exempted employees covered by qualifying collective bargaining agreements from meal period requirements]; *Gateway Community Charters v. Spiess* (2017) 9 Cal.App.5th 499, 504 ["to assist us in the interpretation of the phrase in [Labor Code section 220, subdivision (b)]—'other municipal corporation'—we turn to the related maxims of construction of *noscitur a sociis* ('literally, "it is known from its associates" ') and *ejusdem generis* ('literally, "of the same kind" ')"].) Because the *de minimis* rule derives from the foundational, generally applicable doctrine *de minimis non curat lex*, it is not a "federal" standard that can or should be restricted to federal law.

C. Courts nationwide apply the *de minimis* rule to state law claims, including state wage claims.

Courts in other states have recognized that the *de minimis* rule reflects a generally applicable standard that applies equally to state wage claims. (See, e.g., *Bartoszewski v. Village of Fox Lake* (1995) 269 Ill.App.3d 978, 985 [647 N.E.2d 591, 596] [applying the *de minimis* test to state wage claim for unpaid overtime where plaintiffs spent 10 minutes at roll call before each shift]; *England v. Advance Stores Co. Inc.* (W.D.Ky. 2009) 263 F.R.D. 423, 444-445 [applying the *de minimis* test to claim for unpaid overtime wages under the Kentucky Wages and Hours Act and holding *de minimis* rule is *not* "a creature of the FLSA" because "the principle of *de minimis non curat lex* has been recognized in the common law of Kentucky . . . for many years"]; *England*, at p. 444 ["[O]ne cannot say with any persuasive force that Kentucky courts do not recognize

the *de minimis* defense, or that the concept is somehow exclusive to federal law. It is not and [case law] confirm[s] this to be so."].) Such jurisdictions follow *Anderson*'s common sense proposition that, where "only a few seconds or minutes of work" are at issue, "such trifles may be disregarded." (*Anderson, supra,* 328 U.S. at p. 692.)

Furthermore, like California courts, other jurisdictions have broadly applied the common law doctrine *de minimis non curat lex* from which *Anderson*'s *de minimis* rule originates. (See, e.g., Mueller, *All Mixed Up:* Bridgeport Music v. Dimension Films *and De Minimis Digital Sampling* (2006) 81 Ind. L.J. 435, 453 ["The *de minimis* doctrine . . . applies in *all* civil cases" (emphases added)]; Nemerofsky, *supra,* 37 Gonz. L.Rev. at p. 341.) These out-of-state courts regularly apply the doctrine *de minimis non curat lex* in a wide variety of contexts. (E.g., *Craven v. Canal Barge Co., Inc.* (5th Cir. 2004) 135 F.App'x. 632, 635 [applying doctrine *de minimis non curat lex* to unjust enrichment claim under Louisiana Civil Code because the doctrine "instructs that there is no reasonable basis for going to trial for one cent in late-paid wages"]; *Pacini v. Regopoulos* (1996) 281 Ill.App.3d 274, 276, 279 [665 N.E.2d 493, 495, 497] ["doctrine of *de minimis non curat lex* applied where a rental occupancy guaranty agreement required 95% occupancy and the evidence only proved 94.9953% rental occupancy" because "the doctrine of *de minimis non curat lex* . . . continues to be recognized in Illinois"]; *Dickinson v. Atkins* (1918) 132 Ark. 84 [200 S.W. 817, 820] [holding appellee could not recover accrual of any penalty after date of tender because "the amount of the interest was so small as

to come within the maxim, '*De minimis non curat lex*' " (emphasis added)].)

This Court should likewise follow this broadly applicable doctrine to apply the *de minimis* rule to wage claims arising under California law.

II. CALIFORNIA LAW DOES NOT PROHIBIT THE APPLICATION OF THE *DE MINIMIS* RULE TO STATE WAGE CLAIMS.

A. California state and federal courts have consistently indicated that the *de minimis* rule applies to California wage claims.

Consistent with *Anderson*, Civil Code section 3533, and more than 150 years of California precedent recognizing the law disregards trivialities, the Ninth Circuit and federal district courts have repeatedly applied the *de minimis* rule to wage claims under California law. (See, e.g., *Corbin*, *supra*, 821 F.3d at p. 1081, fn. 11 [applying the *de minimis* doctrine to plaintiff's "California wage claims"]; *Gillings*, *supra*, 583 F.App'x. at p. 713 ["The employees argue that the *de minimis* doctrine does not apply to claims of unpaid wages under California's Labor Code. Not so." (footnote omitted)]; *Cervantez v. Celestica Corp.* (C.D.Cal. 2009) 618 F.Supp.2d 1208, 1217-1219 [denying plaintiffs' motion for summary judgment where plaintiffs sought compensation for pre- and post-shift time under the California Labor Code because defendants raised triable issue of fact that time was *de minimis*];

Alvarado v. Costco Wholesale Corp. (N.D.Cal., June 18, 2008, No. C 06-04015 JSW) 2008 WL 2477393, at pp. *1, *3-*4 [nonpub. opn.] [the "amount of time, aggregate uncompensated time and the administrative difficulties in recording the small amounts of time spent in compliance with [defendant's] security measures, renders Plaintiff's claims [under the California Labor Code] *de minimis*"]; *Cornn v. United Parcel Service, Inc.* (N.D.Cal., Aug. 26, 2005, No. C03-2001 TEH) 2005 WL 2072091, at p. *4 [nonpub. opn.] [applying *de minimis* rule to California law in the class certification context].) After thorough analysis of California authorities, these courts—like the district court here—predicted that the doctrine would apply under California law. (See *Corbin*, at p. 1081, fn. 11.)

Moreover, in *Gomez*, the California Court of Appeal likewise indicated that the *de minimis* rule applied to a wage claim arising under California law. (See *Gomez, supra*, 173 Cal.App.4th at pp. 526-528.) There, the defendant "provide[d] respiratory services and medical equipment setup to patients in their homes," and the plaintiffs were service representatives who worked for defendant driving vans containing liquid oxygen and compressed oxygen. (*Id.* at p. 511.) These plaintiffs argued that the defendant was required "to compensate them for time spent telephonically responding to patient calls during the evening and weekends, when a service call to the patient's home was not ultimately required." (*Id.* at p. 527.) Applying the *de minimis* test, the Court of Appeal concluded that the hours in question "exceed[ed] a *de minimis* amount." (*Id.* at pp. 527-528, emphasis added.) Thus, although the appellate court ultimately found the *de minimis* rule had not been satisfied, the

court recognized—as did *Corbin, Gillings*, and every other federal court to consider the issue—that the common sense *de minimis* rule set forth by the United States Supreme Court in *Anderson* is not specific to the FLSA but applies equally to California wage claims. (See, e.g., *Gillings, supra*, 583 F.App'x. 712 [citing *Gomez* as authority that the *de minimis* exception applies to California wage claims]; *Corbin, supra*, 821 F.3d at pp. 1075, fn. 3, 1079-1082 & fn. 11 [citing *Gomez* as authority applying *de minimis* rule to wage claims under California Labor Code].)

In contrast, plaintiff cites no authority—and there is none—holding that the *de minimis* defense is inapplicable to California law. (See *Gillings, supra,* 583 F.App'x. at p. 714 ["We have found no Court of Appeal case refusing to apply the *de minimis* standard to a wage claim under California law"].)

B. The plain language of the California Labor Code and Wage Order No. 5 does not prohibit application of the *de minimis* rule to state wage claims.

California labor law requires employers to pay for all of the "hours" worked by employees. (See, e.g., Lab. Code, §§ 226, subd. (a), 226.7; Cal. Code Regs., tit. 8, § 11050, subd. 4(A).) Accordingly, California law contemplates that compensation be measured by "hours" worked, rather than by seconds or other increments of time shorter than an hour.

This is not to say that wage violations occur only when an employer improperly withholds payment for *more* than an hour's

work. But by creating a statutory and regulatory scheme that sets "hours" worked as a general frame of reference for compensation, California labor law raises important practical questions about how an employee's work time should be calculated given that fractions of an hour could be measured in any number of lesser increments. Even when a time clock is used, it becomes arbitrary at some point to measure time too finely. This statutory scheme highlights the practical problem of arbitrarily focusing on time measured in the range of a minute, a second, or even a millisecond where the statutory and regulatory provisions address "hours worked" rather than these significantly smaller fractions of time. The long-standing, statutorily-codified doctrine *de minimis non curat lex* provides a common sense solution to this challenge by calling on employers to compensate employees for all work time unless the time in question is a trifle, in which case it may be disregarded just as other trifles are equally disregarded under California law in other legal contexts. (*Ante*, pp. 21-24.)

Plaintiff, however, argues that "[t]he Legislature's use of the word[s] 'any' in [Labor Code] section 510(a)" and "all" in Labor Code section 204 and Wage Order No. 5 are "inconsistent with a *de minimis* exception" because they, in effect, do require compensation for seconds of work. (OBOM 11-12, 14-16, 18-20, 34.) Plaintiff is mistaken.

"[T]he reference to 'All wages' in section 204, subdivision (a) pertains to the timing of wage payments and not to the manner in which an employer ascertains each employee's worktime." (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889,

904 (*See's Candy*).) Thus, " 'the sole purpose of [section 204] is to require an employer of labor who comes within its terms to maintain two regular pay days each month, within the dates required in that section.' " (*Id.* at p. 905) Likewise, Labor Code section 510, subdivision (a), "has nothing to do with . . . calculating time. Rather, this provision sets the multiplier for the rate at which 'Any' overtime work must be paid." (*Ibid.*) Neither of these statutes addresses how wages are to be measured for increments of work time below an hour. (*Ibid.*)

Wage Order No. 5 is no different. Although it mandates that employers pay the minimum wage "for all hours worked," sets a multiplier for overtime pay based on work done in excess of certain "hours," and defines the workday and workweek based on "hour"-long periods, it does not address how wages are to be measured for *de minimis* fractions of work time significantly shorter than an hour. (See, e.g., Cal. Code Regs., tit. 8, § 11050, subds. 2(P), (Q), 3(A), 4(A).)

In sum, both the Labor Code and wage orders are silent on whether employees can recover for trifling fractions of time that fall far short of hour-long segments. Plaintiff concedes the "absence of any word, phrase, or provision anywhere in the entire Labor Code" (OBOM 15) addressing *de minimis* amounts of time but asserts that the omission of such a provision is "dispositive" (OBOM 16-17) because it "reveals a clear and unmistakable intent on the part of the Legislature" to permit employees to recover compensation for *de minimis* fractions of an hour (OBOM 15). In other words, plaintiff argues that the California labor law must necessarily prohibit

application of the *de minimis* rule because it is silent about whether its use is permitted. But silence generally creates the opposite "default" inference. (See *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1197, fn. 19 ["total silence" indicates "an absence of intent to affect that subject"].) Thus, California labor law's silence concerning application of Civil Code section 3533's longstanding doctrine *de minimis non curat lex* to California wage requirements indicates that California labor law was never meant to deviate from this generally applicable rule.

Furthermore, far from offering no guidance, as plaintiff contends, it is telling that federal authorities have construed parallel provisions of federal labor law to hold that employees cannot recover for trifling amounts of time that fall within the *de minimis* rule.

"California wage and hour laws are modeled to some extent on federal laws." (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562.) Consequently, California courts have "frequently referred" to the "FLSA, its supporting federal regulations, and case law interpreting federal law" when "interpreting parallel language in state labor legislation." (*Advanced-Tech Security Services, Inc. v. Superior Court* (2008) 163 Cal.App.4th 700, 707, internal quotation marks omitted; accord, *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1088, abrogated on other grounds by *Martinez v. Combs* (2010) 49 Cal.4th 35, 62-66; *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, 550 ["when California's laws are patterned on federal statutes, federal

cases construing those federal statutes may be looked to for persuasive guidance"].)

While federal and state laws differ in certain respects as to what they consider to be "hours worked," they are parallel in a significant respect: Like California law, federal labor law requires employers to pay for "all" of the hours worked and contemplates that compensation be measured by "hours" worked, rather than seconds or other increments of time shorter than hours. (See 29 C.F.R. § 778.223 ["an employee must be compensated for *all* hours worked" (emphasis added)]; *Bamonte v. City of Mesa* (9th Cir. 2010) 598 F.3d 1217, 1220 [under the FLSA, " 'employers must pay employees for *all* hours worked' " (emphasis added)].)

Thus, the parallel provisions of federal labor law pose the same practical challenge as does California law—i.e., how to deal with time measured in the range of a minute, second, or even a millisecond or less where the statutory and regulatory scheme sets "hours" worked as the general frame of reference for compensation. The United States Department of Labor—"the agency charged with enforcement" of the FLSA (*Barfield v. New York City Health and Hospitals Corp.* (2d Cir. 2008) 537 F.3d 132, 149)—has embraced the *de minimis* rule as solution to this conundrum, with a regulation permitting employers to disregard "insubstantial or insignificant periods of time beyond the scheduled working hours" where they "cannot as a practical administrative matter be precisely recorded for payroll purposes" (29 C.F.R. § 785.47).

"In the absence of controlling or conflicting California law, California courts generally look to federal regulations under the

FLSA for guidance." (*See's Candy*, *supra*, 210 Cal.App.4th at p. 903.) Since California and federal law consistently approach the compensation of employees based on "hours worked," and neither California nor federal statutes specify the method by which employers must deal with fractions of work time below an hour, this Court should follow the federal Department of Labor's guidance to likewise conclude that employers may disregard *de minimis* periods of time.

C. The inapposite case law on which plaintiff relies does not prohibit the application of the *de minimis* rule to California wage claims.

Plaintiff relies on *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (*Morillion*), *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833 (*Mendiola*), and other compensable-time cases, but these authorities are readily distinguishable. *Morillion* held that time spent traveling to and from work on employer-provided buses constituted compensable *hours worked*, and *Mendiola* considered whether federal regulations excluding on-call and sleep time from *hours worked* applied to claims under the California Labor Code. Notably, *Morillion* and *Mendiola* did not consider whether employees could or could not recover for otherwise compensable time *which was de minimis*.

Plaintiff erroneously conflates the question whether closing activities are compensable with the distinct question whether such activity may be disregarded under the *de minimis* rule. As aptly

noted by Starbucks (ABOM 24), *Mendiola*, *Morillion*, and similar compensable-time cases address what constitutes compensable work time. By contrast, the *de minimis* rule is concerned with the different question of whether " 'employees cannot recover for otherwise compensable time if it is *de minimis*' " given " 'the practical administrative difficulty of recording small amounts of time for payroll purposes.' " (*Corbin*, *supra*, 821 F.3d at p. 1081.)

Moreover, when *Mendiola* declined to import the substance of a federal regulation in construing a wage order, it emphasized that the wage order at issue contained no analog to the federal regulation but that other wage orders *did* contain such language. (*Mendiola, supra*, 60 Cal.4th at pp. 843, 847; see *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 266 [construing statute based in part on the Legislature's omission from that statute of a term present in a companion statute]; *Guedalia v. Superior Court* (1989) 211 Cal.App.3d 1156, 1164 [" ' "The fact that a provision of a statute on a given subject is omitted from other statutes relating to a similar subject is indicative of a different legislative intent for each of the statutes" ' "].) In contrast, the *de minimis* rule does have an analog in California law—the generally applicable doctrine *de minimis non curat lex*, codified in Civil Code section 3533. (*Ante*, pp. 21-24.) And unlike the statutes before this Court in *Mendiola*, the Legislature here did not selectively incorporate the *de minimis* rule. (See OBOM 15 [noting the "complete and total absence of any word, phrase, or provision anywhere in the entire Labor Code" addressing the *de minimis* rule].) Nor is there anything in the Labor Code or Wage Order No. 5 to suggest that the generally

applicable doctrine *de minimis non curat lex* codified in Civil Code section 3533 is somehow incompatible with the remedial purpose of these provisions. (See *ante*, pp. 32-33.)

Plaintiff argues that California law offers greater protection to employees than federal law, citing *Morillion*. (OBOM 21-22.) "But [*Morillion*] rejected the value of federal cases interpreting the Portal-to-Portal Act, 29 U.S.C. §§ 251-262, which has *no parallel* in California law." (*Gillings*, *supra*, 583 F.App'x. at p. 714, citing *Morillion*, *supra*, 22 Cal.4th at p. 589, emphasis added.) "*Morillion* establishes no bar against reliance on persuasive federal case law where California and federal law are parallel." (*Ibid.*) Indeed, "*Morillion* itself relied, in part, on a federal case defining the meaning of 'suffer or permit to work' in 29 U.S.C. § 203(g) to construe a nearly identical phrase in an order issued by a California regulatory agency." (*Ibid.*, citing *Morillion*, at pp. 584-585 [looking to 29 U.S.C. § 203(g) and the interpretation of federal labor law in *Forrester v. Roth's IGA Foodliner, Inc.* (9th Cir. 1981) 646 F.2d 413 to construe California labor law].)

D. California's Division of Labor Standards Enforcement has repeatedly issued opinion letters adopting the *de minimis* rule.

The DLSE, charged with the administration and enforcement of California's wage and hour laws (*Sumuel*, *supra*, 155 Cal.App.4th at p. 1109), has repeatedly issued opinion letters adopting the *de minimis* rule. These opinion letters confirm that the *de minimis*

rule applies with equal force to California wage claims. (See, e.g., Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1995.06.02 (June 2, 1995) pp. 2-3 <http://goo.gl/sOJh8R> [as of Apr. 11, 2017]; Cal. Dept. of Industrial Relations, DLSE Opn. Letter. No. 1994.02.03-3, *supra,* at p. 4; Cal. Dept. of Industrial Relations, DLSE Opn. Letter, No. 1988.05.16 (May 16, 1988) pp. 1-2 <http://goo.gl/Vj7kWi> [as of Apr. 11, 2017].) The "DLSE's opinion letters, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Brinker Restaurants Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029, fn. 11, internal quotation marks omitted; accord, *Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal.4th 1, 13 ["we generally consider DLSE opinion letters with respect"]; see also *Morillion, supra*, 22 Cal.4th at p. 584.)

In three separate opinion letters dating back nearly 30 years, the DLSE explicitly adopted the *de minimis* rule, and concluded that employers are not obligated to pay employees for work time if "it is *de minimis*." (Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1994.02.03-3, *supra*, at p. 4, emphasis added; see, e.g., *ibid.* ["the Division has adopted the *de minimis* rule relied upon by federal courts"]; Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1995.06.02, *supra*, at p. 2 ["[T]he Labor Commissioner has an established policy which holds that time which is *de minimis* need not be counted toward the employer's obligation to pay and, likewise, *de minimis* time may not be considered for purposes of deduction from an employee's pay. (Cf. Lab. Code, § 2928) . . .

[¶] . . . The Labor Commissioner agrees with the High Court['s] conclusion [in *Anderson*]."]; Cal. Dept. of Industrial Relations, DLSE Opn. Letter, No. 1988.05.16, *supra*, at p. 2 ["the Division . . . adopt[s] the . . . *de minimis* [rule] for purposes of compensation" (emphasis added; original formatting omitted)].)[2]

The DLSE's "established policy" embracing the *de minimis* rule makes sense—legally, textually, and as a matter of policy. (Cal. Dept. of Industrial Relations, DLSE Opn. Letter No. 1995.06.02, *supra*, at p. 2.) The DLSE correctly recognizes that " '[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.' " (*Ibid.*)

E. The California Legislature's decision not to modify the Labor Code in light of the DLSE's guidance confirms that the *de minimis* rule applies to California wage claims.

Plaintiff contends that disregarding trifling fractions of work time is inherently incompatible with the broad protection of the California Labor Code—even if the amount of time is mere seconds. (OBOM 2-4, 13-16.) But the California Legislature disagrees.

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[2] "[E]vidence that the agency 'has consistently maintained the interpretation in question, especially if [it] is long-standing,' " is a factor "suggesting the agency's interpretation is likely to be correct." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13.)

The DLSE adopted the *de minimis* rule for California wage claims decades ago, and has consistently followed this approach in the many years since. (*Ante*, pp. 35-38.) "Because the Legislature is presumed to be aware of a long-standing administrative practice, the [Legislature's] failure to substantially modify a statutory scheme is a strong indication that the administrative practice is consistent with the Legislature's intent." (*Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 207; see *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017-1018 ["a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it"]; Manning, *supra,* 101 Colum. L.Rev. at p. 115 ["Modern legislatures pass statutes in a mature legal system with a whole host of off-the-rack understandings that achieve what once may have been left to the equity of the statute"].) If the Legislature believed that the DLSE's adoption of the *de minimis* rule did not accurately reflect California law, it could have amended the law to clarify this intent. (See *United Parcel Service Wage & Hour Cases* (2011) 196 Cal.App.4th 57, 68 (*UPS*).) Yet, the Legislature has never done so.

Notably, in the many years since the DLSE has issued opinions letters adopting the *de minimis* rule, the Legislature has repeatedly amended the statutory provisions on which plaintiff so heavily relies here, like Labor Code sections 204 and 510, without prohibiting the DLSE's longstanding administrative practice of

applying the *de minimis* rule under California law. (See Stats. 1989, ch. 469, § 1; Stats. 1991, ch. 825, § 2; Stats. 1992, ch. 427, § 120; Stats. 1999, ch. 134, § 4; Stats. 2006, ch. 737, § 2; Stats. 2008, ch. 169, § 4; Stats. 2015, ch. 783, § 2.) That the Legislature has never done so is a strong indication that the Legislature intended for the rule to govern California law. (See, e.g., *See's Candy*, *supra*, 210 Cal.App.4th at p. 905; *UPS*, *supra*, 196 Cal.App.4th at p. 68.)

III. PUBLIC POLICY WEIGHS IN FAVOR OF APPLYING THE *DE MINIMIS* RULE TO CALIFORNIA WAGE CLAIMS.

Public policy supports the *de minimis* rule. "Ancient doctrines have survived in legal forums where they make common sense, serve the public at large, and at the same time do not disserve the ends of justice." (*Schlichtman*, *supra*, 243 N.J.Super. at p. 471.) The *de minimis* rule has survived for decades because it "is founded in reason and policy." (*Id.* at p. 472.) "Its design is to prevent expensive and mischievous litigation, which can result in no real benefit to complainant, but which may occasion delay and injury to other suitors." (*Ibid.*)

The *de minimis* rule "reflects a balance between requiring an employer to pay for activities it requires of its employees and the need to avoid 'split-second absurdities' that 'are not justified by the actuality of the working conditions.' " (*Rutti v. Lojack Corp.* (9th Cir. 2010) 596 F.3d 1046, 1057.) The rule is generally applied only when "the harm is small but measuring it for purposes of

calculating a remedy would be difficult, time-consuming, and uncertain, hence not worthwhile given that smallness." (*Mitchell v. JCG Industries, Inc.* (7th Cir. 2014) 745 F.3d 837, 841 (*Mitchell*).)

In light of the practical realities of the workplace, a rule that requires employers to calculate the precise amount of time each employee works down to the *minute*—or even *second*—and compensate employees for this negligible amount of time is simply unworkable. Must employers place timekeeping systems at the exit of the workplace so that employees can clock out only after they have closed up and locked the workplace door? If so, how far does the timekeeping system have to be from the door? What happens if employees then need to unlock the door, return to the employee break room to grab an item they initially forgot to take with them, and then have to lock the door anew on their way out? For that matter, if, as an employee reaches to "punch in" or "punch out" with a time card, the employee sneezes, drops the time card, and must first pick it up, do the extra seconds really amount to a material variance in the time worked? To ask these questions demonstrates the futility of plaintiff's argument and highlights the practical problem of focusing on time measured in the range of a minute, a second, or even milliseconds. Industrial realities dictate that not every minute of every day can be captured by a time clock. (See 29 C.F.R. § 785.47.) "[T]he *de minimis* doctrine is designed to allow employers to forego just such an arduous task." (*Corbin, supra,* 821 F.3d at p. 1082.)

The benefit to employees of requiring employers to pay employees for time down to the minute, second, or millisecond is

uncertain and minimal, at best. If an employee expends substantial time and effort off the clock, he may recover from the employer. Indeed, "even small amounts of daily time [must be paid] *unless that time is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes*." (*Lindow*, *supra*, 738 F.2d at pp. 1062-1063, emphasis added; accord, 29 C.F.R. § 785.47.)

In contrast, eliminating the *de minimis* rule will impose massive costs and administrative burdens on California employers. (See *Graves: Small businesses face regulatory burden* (Oct. 6, 2016) St. Joseph News-Press <https://goo.gl/o5Y0N7> [as of Mar. 17, 2017] [" 'A lot of small businesses are struggling with the heavy burden of a lot of regulations,' " and "the onus of compliance continues to hamper economic growth"]; Beyda & Jefferiss, *Well-Rounded Timekeeping* (Mar. 1, 2011) Society for Human Resource Management <https://goo.gl/qZwoQF> [as of Mar. 17, 2017] ["[T]he U.S. Department of Labor and many of its state counterparts have approved methods intended to simplify timekeeping while ensuring that employees are paid in full." These methods allow employers to "[e]xclude small amounts of work that, as a practical administrative matter, cannot be precisely recorded."]; Klemm Analysis Group, *Impact of Litigation on Small Business* (Oct. 2005) Small Business Administration, Office of Advocacy <https://goo.gl/BdcVk7> [as of Mar. 17, 2017] [Survey found the impact of litigation on small business goes "well beyond the purely financial impact of legal fees and damages. Because most small business owners are invested in their small businesses, litigation causes not just financial loss, but also substantial emotional hardship, and often changes the tone of

the business."].) Imposing such a tremendous burden on employers would be all the more unfair because it would be without any meaningful benefit to employees.

A ruling in plaintiff's favor would also subject this state's employers to class action lawsuits by employees who work closing shifts and claim trivial amounts of withheld compensation, even though the minutes or seconds at issue are an "incidental part of closing up any store at the end of business hours" and "[t]here will always be some unaccounted-for seconds spent." (*Troester*, *supra*, 2014 WL 1004098, at p. *5.) Saddling employers with an obligation to measure and calculate time with mathematical precision where it "would be difficult, time-consuming, and uncertain" would be bad public policy. (*Mitchell*, *supra*, 745 F.3d at p. 841.)

CONCLUSION

For the foregoing reasons, in addition to those set forth in Starbucks's brief on the merits, this Court should hold that the *de minimis* rule applies to wage claims arising under California law.

April 13, 2017

HORVITZ & LEVY LLP
ROBERT H. WRIGHT
FELIX SHAFIR
LACEY L. ESTUDILLO

By:
Lacey L. Estudillo

Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rules 8.204(c)(1), 8.520(b)(1).)

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Dated: April 13, 2017

Lacey L. Estudillo

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is Business Arts Plaza, 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

On April 13, 2017, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT STARBUCKS CORPORATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 13, 2017, at Burbank, California.

Connie Christopher

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Troester v. Starbucks Corporation
S234969

Shaun Setareh Thomas Alistair Segal H. Scott Leviant Setareh Law Group 9454 Wilshire Boulevard, Suite 907 Beverly Hills, CA 90212	Attorneys for Plaintiff and Appellant Douglas Troester
David Glenn Spivak Spivak Law Firm 9454 Wilshire Boulevard, Suite 303 Beverly Hills, CA 90212	Attorneys for Plaintiff and Appellant Douglas Troester
Louis Max Benowitz Law Offices of Louis Benowitz 9454 Wilshire Boulevard, Penthouse Beverly Hills, CA 90212	Attorneys for Plaintiff and Appellant Douglas Troester
Rex S. Heinke Mark R. Curiel Gregory William Knopp Jonathan P. Slowik Akin Gump Strauss Hauer & Feld LLP 1999 Avenue of the Stars, Suite 600 Los Angeles, CA 90067	Attorneys for Defendant and Respondent Starbucks Corporation
Kimberly Ann Kralowec Kralowec Law Group 44 Montgomery Street, Suite 1210 San Francisco, CA 94104	Attorneys for Amicus curiae Consumer Attorneys of California
Ariel J. Stiller-Shulman Kingsley & Kingsley 16133 Ventura Boulevard, Suite 1200 Encino, CA 91436	Attorneys for Amicus curiae California Employment Lawyers Association