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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JORGE ALMANZAR, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

HOME DEPOT U.S.A., INC., a
Delaware Corporation,

Defendant.

CASE NO.: 2:20-cv-00699-TLN-KJN

**CLASS AND PAGA REPRESENTATIVE
ACTION**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S [UNOPPOSED]
SUPPLEMENTAL MOTION FOR
PRELIMINARY APPROVAL OF CLASS
AND REPRESENTATIVE ACTION
SETTLEMENT**

Date: November 22, 2022
Time: 9:00 a.m.
District Judge: Hon. Troy L. Nunley
Mag. Judge: Hon. Kendall J. Newman
Dept.: 25
Complaint Filed: April 2, 2020

1
2
3 **TABLE OF CONTENTS**

4 I. INTRODUCTION5
5 II. ADDITIONAL INFORMATION REGARDING *KULLAR* ANALYSIS AND
6 SETTLEMENT DISCOUNTS APPLIED5
7 A. Valuation for Class Claims.....5
8 B. Valuation for PAGA Claim17
9 III. MODIFICATIONS TO SETTLEMENT AGREEMENT20
10 IV. MODIFICATIONS TO SETTLEMENT NOTICE.....21
11 V. ALLOCATION FOR DISTRIBUTION OF CLASS SETTLEMENT PROCEEDS
12 22
13 VI. ADDITIONAL INFORMATION IN SUPPORT OF INCENTIVE AND
14 ATTORNEYS' FEE AWARDS23
15 VII. CONCLUSION24
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

<i>Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.</i> , 2009 WL 2448430 (S.D. Cal. 2009)	18
<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal.App.4th 1157 (2008)	15, 18, 19
<i>Balderas v. Massage Envy Franchising, LLC</i> , 2014 WL 3610945 (N.D. Cal. July 21, 2014)	8
<i>Bravo v. Gale Triangle, Inc.</i> , 2017 WL 708766 (C.D. Cal. Feb. 16, 2017)	18
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5 th 504 (2018)	20
<i>Casey v. Home Depot</i> , 2016 WL 7479347, (C.D. Cal. Sep. 15, 2016)	15
<i>Craft v. County of San Bernardino</i> , 624 F.Supp.2d 1113 (C.D. Cal. 2008)	24
<i>Culley v. Lincare, Inc.</i> , 236 F.Supp.3d 1184 (E.D. Cal. 2017)	19
<i>Dearaujo v. Regis Corp.</i> , 2017 WL 3116626 (E.D. Cal. July 21, 2017)	23
<i>Ferra v. Loews Hollywood Hotel, LLC</i> , 11 Cal. 5th 858 (2021)	10
<i>Fleming v. Covidien Inc.</i> , 2011 WL 7563047 (C.D. Cal. Aug. 12, 2011)	19
<i>Franco v. Ruiz Food Products, Inc.</i> , 2012 WL 5941801 (E.D. Cal. Nov. 27, 2012)	18
<i>Galvan v. Superior Tank Co Inc.</i> , 2016 WL 11502115 (C.D. Cal. July 19, 2016)	8, 11
<i>Hammit v. Lumber Liquidators</i> , 19 F.Supp.3d 989 (S.D. Cal. 2014)	14
<i>In re MyFord Touch Consumer Litigation</i> , 2019 WL 1411510 (N.D. Cal. Mar. 28, 2019)	9, 16, 17
<i>In re Uber FCRA Litig.</i> , 2017 WL 2806698 (N.D. Cal. June 29, 2017)	8
<i>Knight v. Red Roof Salons, Inc.</i> , 2009 WL 248367 (N.D. Cal. Mar. 6, 2014)	24
<i>Kullar v. Foot Locker Retail</i> , 168 Cal.App.4th 116 (2008)	6
<i>Ma v. Covidien Holding, Inc.</i> , 2014 WL 360196 (C.D. Cal. Jan. 31, 2014)	8
<i>Mendez v. Tween Brands, Inc.</i> , 2010 WL 2650571 (E.D. Cal. June 30, 2010)	20
<i>Milburn v. PetSmart, Inc.</i> , 2019 WL 5566313 (E.D. Cal. Oct. 29, 2019)	8, 11
<i>Naranjo v. Spectrum Sec. Servs., Inc.</i> , 13 Cal. 5th 93, 509 P.3d 956 (2022)	15, 16
<i>Nichols v. Smithkline Beecham Corp.</i> , 2005 WL 950616 (E.D. Pa. April 22, 2005)	17
<i>Ochoa-Hernandez v. CJADERS Foods, Inc.</i> , 2010 WL 1340777 (N.D. Cal. Apr. 2, 2010)	20
<i>Richardson v. THD At-Home Servs.</i> , 2016 WL 1366952 (E.D. Cal. Apr. 6, 2016)	24
<i>Ruch v. AM Retail Grp., Inc.</i> , 2016 WL 5462451 (N.D. Cal. Sept. 28, 2016)	20
<i>Schiller v. David's Bridal, Inc.</i> , 2012 WL 2117001 (E.D. Cal. June 11, 2012)	18
<i>Sengvong v. Probuild Company LLC</i> , 2021 WL 4504620 (S.D. Oct. 1, 2021)	24

1	<i>Stovall-Gusman v. W.W. Granger, Inc.</i> , 2015 WL 3776765 (N.D. Cal. June 17, 2015).....	8
2	<i>Thomas v. Cognizant Technology Solutions U.S. Corp.</i> , 2013 WL 12371622 (C.D. Cal. June 24, 2013)	8
3	<i>Trang v. Turbine Engine Components Technologies Corp.</i> , 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012)	18
4	<i>Troester v. Starbucks Corp.</i> , 5 Cal. 5th 829 (2018).....	12
5	<i>Viceral v. Mistras Grp., Inc.</i> , 2016 WL 5907869 (N.D. Cal. Oct. 11, 2016).....	8
6	<i>Villacres v. ABM Indus. Inc.</i> , 189 Cal. App. 4th 562 (2010).....	18, 19
7	<i>Villegas v. J.P Morgan Chase & Co.</i> , 2012 WL 5878390 (N.D. Cal. Nov. 21, 2012)	17
8	<i>Williams v. Superior Court</i> , 221 Cal.App.4th 1353 (2013).....	12

Statutes

10	Cal. Lab. Code § 203	13
11	Cal. Lab. Code § 226	13
12	Cal. Lab. Code § 226.7(c)	9
13	Cal. Lab. Code § 2699(h).....	16
14	Cal. Lab. Code § 558	16

I. INTRODUCTION

After hard fought negotiations facilitated by highly-regarded private mediator Louis Marlin, plaintiff Jorge Almanzar (“Plaintiff”) and defendant Home Depot U.S.A., Inc. (“Defendant” or “Home Depot”) ultimately agreed to resolve the putative class and PAGA representative claims of Home Depot’s Night Team Merchandising Execution Associates. The \$750,000.00 Settlement represents an excellent outcome for the Class, particularly in light of the substantial risks, challenges, and costs to both sides were the case to proceed to trial.

On July 19, 2022, the Court issued an Order on Preliminary Approval (“Order”), granting provisional certification of the settlement class and denying preliminary approval of the settlement, without prejudice to renewal. Order at pp. 1, 37. Plaintiff submits this unopposed supplemental Memorandum in support of Plaintiff’s Renewed Motion for Preliminary Approval, to address the matters discussed in the Order. As outlined herein, the Parties met and conferred and agreed to modify the Settlement Agreement and Settlement Notice in accordance with the Court’s instructions. Plaintiff addresses each of the items below which the Court identified in its Order.

Additionally, for the convenience of the Court and its staff, Plaintiff is submitting a redlined copy of the revised Settlement Agreement, as well as a final copy signed by all parties, as Exhibits 1 and 2, respectively, to the Supplemental Declaration of David R. Markham (“Supp. Markham Decl.”), filed concurrently with this supplemental briefing. The revised Settlement Notice will be filed as Exhibit 3 and Exhibit 4 will show the redlined edits made to the Notice. Exhibit 5 is a proof of submission of the revised Settlement Agreement to the LWDA.

II. ADDITIONAL INFORMATION REGARDING *KULLAR* ANALYSIS AND SETTLEMENT DISCOUNTS APPLIED

A. Valuation for Class Claims

1 The Court asked that Plaintiff provide further information regarding the *Kullar*¹
2 analysis, including the maximum value of each claim with no compromise position applied,
3 and explanation of each discount applied to reach the settlement valuation. Order at pp. 19,
4 22. Plaintiff provides additional information to the Court as outlined below:

5 1. Failure to Provide Meal Breaks Claim

6 Plaintiff calculates the maximum valuation for Plaintiff's meal break claim is
7 \$429,030, with no discounts applied. This is based on Plaintiff's expert's findings that 35%
8 of shifts over 5 hours and/or 10 hours appeared to be *potential* exceptions (i.e., identified
9 as a short, late and/or missing meal period in the time records without consideration of why
10 the break was missed, late or short, of if it was a matter of individual employee choice),
11 subtracted by the \$1,222,095 in meal break premiums that Home Depot paid during the
12 Class Period. There were 122,215 shifts identified in the time records with exceptions x
13 \$13.51 per hour = \$1,651,124, deducted by the \$1,222,095 that Home Depot paid in
14 premiums, arrives at a maximum potential exposure of \$429,030 in unpaid meal break
15 premiums, before accounting for Home Depot's defenses. Supp. Markham Decl., ¶5.

16 Using the full 35% damages rate as indicated in Plaintiff expert's review of the class
17 data sample, Plaintiff then discounts the damages rate by a cumulative 50 percent to account
18 for risks both to succeeding on the merits and in obtaining and maintaining class
19 certification. Given the evidence Home Depot provided in support of its defenses to
20 certification and the merits, this is a conservative discount. *Id.*, ¶6.

21 First, Home Depot provided evidence that they have a robust history of paying meal
22 premiums (more than \$1.2 million in premiums were paid), and that premiums were
23 *automatically* paid when the timekeeping system identified even potential violations.
24 Indeed, Home Depot provided evidence that it had a nearly 100% rate of paying premiums
25 for potential violations, except with respect to "waivable" meal periods. *Id.*, ¶3. On the basis
26 of such facts, Home Depot argued that their practice of paying premiums cuts against a

27 ¹ *Kullar v. Foot Locker Retail*, 168 Cal.App.4th 116 (2008).
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1 finding that Defendant has a systemic policy intended to avoid paying such premiums. For
2 example, Defendant provided evidence that Plaintiff was paid premiums for all instances in
3 which his time records reflected a potential violation.

4 Second, Home Depot provided evidence that their timekeeping system was
5 configured with a “lock out” module that prevented employees from clocking in before they
6 took a complete 30-minute meal break.

7 Third, Home Depot’s written policies appear to facially comply with the *Brinker*
8 standards, and there was evidence that Home Depot provides formal and informal training
9 intended to remind employees of their meal period rights. On this basis, Home Depot argued
10 that Plaintiff would struggle to establish the existence of a common unlawful meal period
11 policy. *Id.*, ¶3.

12 Finally, there was substantial risk associated with Home Depot providing testimony
13 from individuals who voluntarily skipped meals or took late or short meals as a matter of
14 personal preference even though they were provided the opportunity to take compliant meal
15 breaks. *Id.*, ¶4.

16 In short, although Plaintiff would argue that the Court should apply a rebuttable
17 presumption of liability with respect to shifts where time records show a compliant meal
18 period was not taken, Home Depot presented meaningful evidence that its efforts could
19 rebut such a presumption and would require individualized inquiry into the experiences and
20 recollection of individual employees. As these arguments could weigh against findings of
21 commonality, predominance or manageability, Plaintiffs concluded that a fifty percent
22 discount on theoretical exposure was conservative and reasonable. *Id.*

23 Further, Plaintiff’s counsel concluded that a fifty percent discount off exposure is
24 well within the realm of precedent for settlement approval – especially given the facts of
25 this case. *Id.*, ¶6. Settlements are routinely approved as fair and reasonable when the
26 maximum valuation is discounted by fifty percent, or more, to account for the class
27 certification and merits risks. *See e.g., Milburn v. PetSmart, Inc.*, 2019 WL 5566313 *4
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(E.D. Cal. Oct. 29, 2019) (approving settlement as fair and reasonable where Plaintiff applied forty to fifty percent discount each for class certification and risks on the merits); *Galvan v. Superior Tank Co Inc.*, 2016 WL 11502115 *7 (C.D. Cal. July 19, 2016) (approving settlement as fair and reasonable where maximum valuation was discounted for the risk of non-certification, i.e. the rest period claim was discounted by 85% for a risk of non-certification and by 65% on the merits); *Thomas v. Cognizant Technology Solutions U.S. Corp.*, 2013 WL 12371622 *6 (C.D. Cal. June 24, 2013) (concluding that settlement between 4 and 5.5% of maximum liability was fair and reasonable, which included a forty percent discount applied to account for risks to class certification); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) (granting final approval where total settlement amount represented approximately 10% of potential value, and recognizing the risk to maintaining class certification throughout the litigation due to individualized issues); *Ma v. Covidien Holding, Inc.*, 2014 WL 360196, at *4-5 (C.D. Cal. Jan. 31, 2014) (granting preliminary approval of settlement for 9.1% as within “range of reasonableness” and recognizing the strength of “arguments that employees were given the opportunity to take breaks and employees were not improperly pressured to forego them. Furthermore, there would be significant risks that the class could not remain certified...”).

In sum, courts have recognized that the risks of success on the merits coupled with certification risks often support a substantial discount to the maximum exposure valuation when balanced against the risks of not achieving a classwide recovery:

...[T]here are several deficiencies in Plaintiffs’ case that could jeopardize their recovery at trial. In such circumstances, courts have approved settlements below the 10% threshold that reflect the plaintiffs’ judgment that “a deeply discounted recovery is better than the substantial likelihood of recovering nothing.” *Viceral v. Mistras Grp., Inc.*, No. 15-CV-02198-EMC, 2016 WL 5907869, at *8 (N.D. Cal. Oct. 11, 2016). *See, e.g., id.* at *7 (approving settlement representing 8.1% of the full verdict value in recognition of the “daunting” risks plaintiffs faced in proving their case); *In re Uber FCRA Litig.*, No. 14-CV-05200-EMC, 2017 WL 2806698, at *7 (N.D. Cal. June 29, 2017) (approving a settlement worth less than 7.5% of the possible verdict where the class faced “substantial risks and obstacles” to prevailing at trial, as well as “the inevitable expense of litigating a large, complex case through trial”); *Balderas v. Massage Envy Franchising, LLC*, No. 12-CV-06327 NC, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (approving a settlement

representing 5% of the maximum recovery in light of “the strengths of plaintiff’s case and the risks and expense of continued litigation”).

In re MyFord Touch Consumer Litigation, 2019 WL 1411510 *10 (N.D. Cal. Mar. 28, 2019).

Here, Plaintiff’s settlement valuation for his meal break claim uses as a baseline the full violation rate from Plaintiff’s expert’s analysis of the class data sample. It then discounts this valuation by a cumulative amount of fifty percent to account for both risks on the merits and to certification. Thus, Plaintiff’s valuation for the meal break claim is \$214,515. As supported by the case law above, and as presented in prior briefing, this discounted valuation for the meal break claim is appropriate as balanced against the risks both on the merits and in obtaining and maintaining certification. Supp. Markham Decl., ¶6.

2. Underpaid Meal Break Premium Claim

The maximum total exposure for this claim is \$147,528. Plaintiff’s expert calculated exposure for potentially underpaid meal premiums by taking the purported difference between the regular rate of pay and the base rate of pay in each pay period in the class sample where bonuses were issued. The difference was multiplied by the number of meal premium hours paid in each pay period to calculate the amount of potentially underpaid meal premium payments. The expert then extrapolated these findings based on the pay periods analyzed in the class sample pay data. Plaintiff’s expert found that the average difference in rates (between the re-calculated regular rate and the base rate of pay) was \$2.35. The total maximum potential exposure for this claim is \$147,528, before accounting for Home Depot’s defenses. Supp. Markham Decl., ¶7.

In support of his claim for underpayment of meal break premium payments, Plaintiff would rely on that the fact that since the start of the COVID-19 pandemic in March of 2020 class members were paid COVID-19 related employee bonuses, and that Plaintiff’s expert analysis shows the rate at which premiums were paid did not include the impact of such bonus payments. On this basis, Plaintiff would argue that Home Depot miscalculated a subset of premium payments made to Class Members for a relatively short portion of the

1 putative class period, in violation of California Supreme Court's recent authority in *Ferra*
2 *v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858 (2021).

3 In response to such arguments, Home Depot asserted that the COVID bonuses were
4 discretionary, were not subject to inclusion in the rate for premium payments, and that there
5 is evidence Home Depot actually *overpaid* meal breaks premiums on numerous occasions.
6 Further, Home Depot would argue that *Ferra* could not be applied retroactively in this case
7 because it substantially adhered to the requirements of the Labor Code section 226.7(c) and
8 made over \$1,200,000 in premium payments throughout the Class Period. Home Depot also
9 asserted that it paid putative class members a retroactive payment to cover any amounts
10 purportedly owed due to the *Ferra* development. Further, Home Depot focused on the fact
11 that exposure relating to this claim was limited because it only paid relevant bonuses during
12 a short portion of 2020. Supp. Markham Decl., ¶8. To account for these risks to certification
13 and success on the merits, Plaintiff applies a 50% discount to the maximum valuation of
14 this claim, to result in a total discounted valuation of \$73,764. *Id.*

15 3. Failure to Provide Rest Breaks Claim

16 Plaintiff calculated the maximum theoretical recovery for unpaid rest break
17 premiums at \$4,674,974. This claim is based on the allegation that Plaintiff and Class
18 Members were interrupted with work-related calls/tasks during their rest breaks. For the
19 maximum valuation analysis, and despite Home Depot's argument that there are no facts
20 that come close to supporting a 100% violation rate, Plaintiff assumed that 100% of the
21 time class members were not able to take one or more rest breaks uninterrupted. There were
22 346,038 shifts of over 3.5 hours x 100% violation rate x \$13.51 per hour results in maximum
23 potential exposure of \$4,674,974 in unpaid rest break premiums, before accounting for
24 Home Depot's defenses. *Id.*, ¶9. Plaintiff applied an assumed 100% violation rate based on
25 the allegation that, despite having a lawful written rest break policy, Home Depot
26 nonetheless undermined its formal policies "by pressuring employees to perform their
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1 duties in ways that omit breaks.” *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.4th 1004, 1040
2 (2012). *Id.*

3 Home Depot, of course, vigorously disputed this allegation and Plaintiff’s ability to
4 certify a class based on arguments about individual employees’ experiences and subjective
5 interpretation of written policies. Home Depot argued that there is no common policy of
6 “pressure” on employees and pointed out that Class Members often (on different occasions
7 and for different reasons) voluntarily choose not to take compliant breaks. This could create
8 individualized issues defeating commonality and predominance, and manageability. Home
9 Depot would also point to evidence that many Class Members received compensation for
10 their rest break claims as required by law. Additionally, as discussed in Plaintiff’s
11 preliminary approval briefing, even if the rest break class were certified, damages and
12 penalties calculations could present complicated issues because Home Depot employees
13 did not have to clock out to take rest breaks, or otherwise record them. Supp. Markham
14 Decl., ¶10. There was no evidence that Class Members have independent records that would
15 establish the frequency of alleged rest break violations, making it difficult to quantify
16 damages on a class-wide or individual basis. Plaintiff investigated if there were alternative
17 records (i.e., “First Phone” device records) that could serve as a proxy for time records
18 relating to rest breaks, but determined that such information was not available and thus
19 would not be probative of if and when employees took rest breaks. As discussed in Section
20 II(A)(1), *supra*, discounts in the range of forty to fifty percent, or more, to account for risks
21 to class certification and on the merits are frequently approved as reasonable. *See Milburn*,
22 2019 WL 5566313 at *4 (approving settlement as fair and reasonable with forty to fifty
23 percent discount each for class certification and risks on the merits); *Galvan*, 2016 WL
24 11502115 at *7 (approving settlement with rest period claim discounted by 85% for a risk
25 of non-certification and by 65% on the merits). Here, the discounted valuation of the rest
26 break claim by 50%, to \$2,337,487, is justified when balanced against the challenges of
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prevailing on the merits and the risks to certification based on the Defendant's lawful policies and likely need for individualized inquiries. Supp. Markham Decl., ¶10.

4. Unpaid Overtime Claim

Plaintiff calculates maximum potential exposure for Plaintiff's unpaid overtime time at \$1,767,016. *See* Order at p. 19. Plaintiff asserts that employees were not consistently paid for all overtime hours worked. Plaintiff calculates maximum damages based on 30 minutes of unpaid overtime on every other shift, for a total of approximately 87,174 unpaid hours during the Class Period. This is calculated based on an average of almost 1 hour per workweek per class member, calculated at an overtime rate of \$20.27 = \$1,767,016 in maximum exposure relating to unpaid wages, before accounting for Home Depot's defenses. Home Depot vigorously disputes this claim. Supp. Markham Decl., ¶11.

In support of his overtime claim, Plaintiff would argue, based on *Williams v. Superior Court*, 221 Cal.App.4th 1353 (2013) that an overtime/off the clock class can be certified when an employer has a de facto practice of not paying employees for all hours worked, even if the employer's official written policy forbids off the clock work. *Id.* at 1365, 1369. Plaintiff would also argue, that as confirmed by the California Supreme Court in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018), there is no *de minimis* doctrine in California, and employers must compensate employees for the minutes routinely worked off-the-clock. *Id.* at 848. However, Plaintiff acknowledges that Defendant would attempt to distinguish these cases. *Williams* would likely be distinguished on the basis that in *Williams* the employer's policy specifically excluded from payment employee hours that were indisputably worked every day, whereas here, Home Depot's overtime and timekeeping policy advised Class Members that they would be paid for all hours worked, including for the travel time between stores. Supp. Markham Decl., ¶12. Additionally, Defendant would likely distinguish *Starbucks* by arguing that here, in contrast to the facts at issue in *Starbucks*, Plaintiff and class members could obtain – and did frequently obtain – overtime, as a typical shift was 9.5 hours in length, and payroll records indicate frequent overtime payments were made to

1 Class Members. Further, Defendant would likely cite other recent cases where it has
2 prevailed on summary judgment for the rounding claim on the basis that its rounding policy
3 is neutral and does not result in systematic under compensation. *Id.*, ¶13. Home Depot
4 would also assert that there is no evidence of off-the-clock work and its policies squarely
5 prohibit employees from working off-the-clock. What is more, Class Members generally
6 do not have independent records of hours they may have worked off-the-clock, therefore
7 amplifying challenges quantifying damages on a class-wide or individual basis. Finally,
8 Home Depot would argue that Plaintiff would face significant certification challenges in
9 order to establish which employees allegedly worked off the clock, why they did so, and if
10 Home Depot had actual or constructive knowledge of such work. Based on these risks on
11 both the merits and to certification, Plaintiff applies a cumulative 50% discount to this
12 claim, to reach a discounted valuation of \$883,508. *See* Order at p. 22.

13 5. Unreimbursed Cell Phone Expenses Claim

14 Plaintiff calculates the maximum potential valuation for this claim at \$975,238. Order
15 at p. 19. Plaintiff asserts that employees were sometimes required to use their cell phones
16 for work purposes. Plaintiff estimates that the maximum calculation for this claim is \$40
17 per month per Class Member to cover expenses for use of their personal cell phones for
18 work-related communications, including messages with managers assigning tasks and
19 answering questions. The maximum exposure of \$975,238 does not account for Home
20 Depot's defenses. Supp. Markham Decl., ¶14.

21 Defendant vigorously disputes Plaintiff's position. Although Plaintiff would argue
22 that Defendant did not reimburse Class Members for calls and text messages on Class
23 Members' personal cell phones, Defendant will likely contend that its policy expressly
24 prohibits employees from using their cell phones for any work purpose, that there is no
25 reason for Class Members to have ever used their personal cell phones because Home Depot
26 provides Class Members with alternative devices that make use of a phone unnecessary,
27 and that to the extent Class Members also did not report or otherwise make Home Depot
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1 aware of personal cell phone expenses, Home Depot would not be responsible for a failure
2 to reimburse. It is also dubious whether Class Members maintained records that would
3 establish the extent of allegedly unreimbursed cell phone expenses. Plaintiff would thus
4 face significant hurdles in quantifying and proving commonality for certification purposes;
5 indeed, many courts have denied certification of Section 2802 claims after observing that
6 the question of whether an expense is “necessary” and thus reimbursable is in individualized
7 inquiry. *See e.g., Hammit v. Lumber Liquidators*, 19 F.Supp.3d 989, 1001 (S.D. Cal. 2014)
8 (granting summary judgment when employee failed to request reimbursement); *Tokoshima*
9 *v. Pep Boys-Manny Moe & Jack of California* (N.D. Cal. Apr. 28, 2014) No. C-12-4810-
10 CRB, 2014 WL 1677979, at *10 (denying class certification of claims alleging failure to
11 reimburse for tool expenses); *Chavez v. Lumber Liquidators, Inc.* (N.D. Cal. Mar. 26, 2012)
12 No. CV- 09-4812, 2012 WL 1004850, at *9-10 (denying in part portion of plaintiffs’ motion
13 for class certification seeking certification of unpaid reimbursement claims based on failure
14 to reimburse employees for mileage and cellphone usage). To account for these risks, both
15 to certification and on the merits, Plaintiff discounts this claim by 50% to a discounted
16 settlement valuation of \$487,619. *See* Order at p. 22. Supp. Markham Decl., ¶16.

17 6. Under-Reimbursed Mileage Expenses Claim

18 Plaintiff calculates the maximum potential valuation for this claim at \$554,083. This
19 is based on Plaintiff’s assumption that class members were underpaid \$0.40/mile before
20 November of 2019 (when Defendant’s rate for mileage payment increased). The expert
21 calculated an average of 37.91 miles per pay period, resulting in underpayment of \$15.16
22 each pay period. Based on Plaintiff’s assumptions, the maximum exposure is \$554,083,
23 before accounting for Home Depot’s defenses. *Id.*, ¶17.

24 Defendant disputes these allegations. For the mileage claim, Defendant would likely
25 argue that its payroll records evidence that it *did* reimburse Class Members’ mileage and
26 that *Plaintiff* would bear the burden to prove the amount paid was insufficient to cover each
27 Class Member’s actual costs, which would necessitate consideration of disputed testimony
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1 regarding the make and model of their cars, the maintenance and mileage characteristics of
2 each such car, the reasonableness of individuals' insurance rates, each person's driving
3 habits, the reasonableness of those habits, the routes taken, and so on. According to Home
4 Depot, this highly-intensive fact inquiry is why courts consistently deny certification on
5 mileage claims – including several decisions that have held in Home Depot's favor on this
6 very issue. *Casey v. Home Depot*, 2016 WL 7479347, *26-29 (C.D. Cal. Sep. 15, 2016).
7 *See also Ortiz v. CVS Caremark Corp.*, 2013 WL 6236743, at *11 (N.D. Cal. Dec. 2, 2013).
8 To account for these risks both on the merits and to certification, Plaintiff discounts this
9 claim by 50%, to \$277,041.50. Supp. Markham Decl., ¶18.

10 7. Wage Statement Penalties Claim

11 The maximum potential exposure for Plaintiff's derivative wage statement penalties
12 claim is \$1,067,500, before accounting for Home Depot's defenses. This is based on the
13 \$50 per pay period for initial and subsequent violations under *Amaral v. Cintas Corp. No.*
14 *2*, 163 Cal.App.4th 1157, 1207–09 (2008), for 21,350 pay periods during the applicable 1-
15 year statute of limitations. Supp. Markham Decl., ¶19.

16 Plaintiff's success on his derivative wage statement is highly uncertain and
17 contingent on the success of Plaintiff's primary claims. Here, the claim for wage statement
18 penalties is purely a derivative claim. Plaintiff does not dispute that his wage statements
19 accurately reflect the wages *actually paid to him* during the corresponding pay period in
20 which he earned them. *Id.*, ¶20.

21 Plaintiff would cite the recent California Supreme Court decision, *Naranjo v.*
22 *Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93, 509 P.3d 956 (2022), to support that unpaid break
23 premiums support claims under Labor Code section 203 and Labor Code section 226.

24 However, despite this favorable decision, Plaintiff's biggest risk to recovery on this
25 claim remains – the derivative claims can *only* succeed where Plaintiff succeeds on the
26 merits on his primary claims, which carry substantial risks on both certification and the
27 merits as outlined above. In the event Plaintiff does not succeed on the primary claims,
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1 Plaintiff will not recover *at all* on the 226-derivative claim. Thus, Plaintiff applies a 50%
2 discount to the maximum claim valuation to account for these risks, resulting in discounted
3 valuation of \$533,750. Supp. Markham Decl., ¶20.

4 8. Waiting Time Penalties Claim

5 Plaintiff calculates the maximum potential valuation for this claim at \$3,019,673.
6 Plaintiff calculated daily wages for 732 former employees during the relevant time period,
7 multiplied by the daily pay rate of approximately \$138 (9.5 average hour shift length (8
8 hours at \$13.51 hourly rate and 1.5 hours at \$20.27 overtime rate)) times 30 days, to arrive
9 at maximum potential exposure of \$3,019,673, before accounting for Home Depot's
10 defenses. *Id.*, ¶21.

11 As discussed for Plaintiff's wage statement claim above, *Naranjo, supra*, 13 Cal. 5th
12 93 allows for a potential recovery of 203 waiting time penalties for unpaid break claims,
13 but there remain substantial risks of success on the merits for this purely derivative claim.
14 Thus, Plaintiff applies a 50% discount to the maximum potential valuation, to arrive at a
15 discounted valuation of \$1,509,836.50. Supp. Markham Decl., ¶21.

16 9. Total Class Settlement Valuation

17 Without discounting Home Depot's liability based on its strong defenses, and before
18 applying the 50% discounts to account for merits and certification risks that are applied in
19 Sections II(A)(1-8), the maximum **potential** recovery of Plaintiff's direct claims is
20 \$8,547,869, for which the class settlement amount of \$712,500 represents over 8%, and for
21 all claims is \$12,635,042, or nearly 6%, of the maximum **potential** damages amount. Such
22 recovery is in line with the settlements frequently approved by California courts. *E.g., In re*
23 *MyFord Touch Consumer Litig., supra*, 2019 WL 1411510, at *10 (granting preliminary
24 approval of settlement of consumer warranty claims for approximately 6% of valuation)
25 (collecting cases); *Thomas, supra*, 2013 WL 12371622, at *6 (concluding that settlement
26 between 4 and 5.5% of maximum liability was fair and reasonable, which included a forty
27 percent discount applied to account for risks to class certification). However, when
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1 considering the discounts based on Home Depot's strong defenses, as applied in Sections
2 II(A)(1-8) above, Plaintiff believes that that this settlement represents nearly 17% of Home
3 Depot's maximum **realistic** liability for Plaintiff's cumulative direct claims
4 (\$712,500/\$4,273,934.50) and over 11% of Home Depot's maximum **realistic** liability for
5 all of Plaintiff's claims (\$712,500/\$6,317,521). Supp. Markham Decl., ¶22; *see also* Order
6 at p. 19.

7 In total, without accounting for the length of each class member's employment with
8 Home Depot, this will amount to an approximate average recovery of over \$200 (\$202) per
9 class member. Supp. Markham Decl., ¶22. To address the Court's request for information
10 regarding the highest and lowest possible payments under the settlement, the estimated
11 highest settlement payment, (in the scenario of a now former employee class member who
12 worked every workweek in the class period), is approximately \$1,127.50, and, the lowest
13 possible payment, if applicable, would be to a current employee who worked for only one
14 workweek during the class period, which would be approximately \$3.75. *Id.*, ¶24. At an
15 average hourly rate of \$13.50, the average settlement payment equates to over 10 meal and
16 rest break premiums per class member and over \$60 in unreimbursed expenses, or nearly
17 10 hours of compensation at an overtime rate. This is an excellent result and within the
18 range of approved settlement payments. *Villegas v. J.P Morgan Chase & Co.*, 2012 WL
19 5878390, at *2, 6 (N.D. Cal. Nov. 21, 2012) (approving settlement with approximately \$255
20 settlement payment per class member); *see also In re MyFord Touch Consumer Litig.*,
21 *supra*, 2019 WL 1411510, at *10 (granting preliminary approval of settlement of consumer
22 warranty claims for approximately 6% of valuation) (collecting cases); *Ma, supra*, 2014
23 WL 360196, at *5 (granting preliminary approval of settlement for 9.1% as within "range
24 of reasonableness"); *Nichols v. Smithkline Beecham Corp.*, 2005 WL 950616, at *16 (E.D.
25 Pa. April 22, 2005) (approving settlement that represented between 9.3% and 13.9% of the
26 claimed damages).

27 **B. Valuation for PAGA Claim**

1 The Parties agreed that \$37,500 (or 5%) of the Gross Settlement Amount will be
2 allocated for payment under the PAGA. 75% of this amount (\$28,125) will be paid to the
3 LWDA, and 25% (\$9,375) to PAGA Settlement Members. Settlement Agreement, §III, ¶
4 29. This amount is within the range of the PAGA penalties typically awarded as part of
5 class action settlements. *See Bravo v. Gale Triangle, Inc.*, 2017 WL 708766, at *19 (C.D.
6 Cal. Feb. 16, 2017) (\$10,000 as PAGA penalties found reasonable); *Franco v. Ruiz Food*
7 *Products, Inc.*, 2012 WL 5941801, at *14 (E.D. Cal. Nov. 27, 2012) (approving PAGA
8 penalties of \$10,000 and noting that amount was in line with settlement approval of PAGA
9 awards in other cases); *Schiller v. David's Bridal, Inc.*, 2012 WL 2117001, at *14 (E.D. Cal.
10 June 11, 2012) (\$7,500 to LWDA reasonable).

11 Regarding the valuation for Plaintiff's PAGA claim, although the PAGA statute
12 provides penalties at \$100 per employee per pay period for the initial violation, and \$200
13 for each employee per pay period for each subsequent violation, Defendant will contend
14 that for Plaintiff to recover for a "subsequent violation," an employer must have notice that
15 it has violated the Labor Code. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207–
16 09 (2008); *see also Trang v. Turbine Engine Components Technologies Corp.*, 2012 WL
17 6618854 (C.D. Cal. Dec. 19, 2012) ("courts have held that employers are not subject to
18 heightened penalties for subsequent violations unless and until a court or commissioner
19 notifies the employer that it is in violation of the Labor Code"); *Amalgamated Transit Union*
20 *Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, 2009 WL 2448430 (S.D. Cal. 2009)
21 (finding that California law imposes the "subsequent violation penalty" only after an
22 employer has been notified its conduct violates the Labor Code). Here, Home Depot was
23 not cited for violations, and therefore, the \$100 penalty for every pay period applies. Supp.
24 Markham Decl., ¶26.

25 Further, Defendant would likely argue that under Labor Code section 558, penalties
26 should be \$50 per violation, because although Plaintiff seeks penalties through PAGA,
27 PAGA provides the applicable civil penalty only if a particular Labor Code provision does
28

1 not specify one. *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 580 (2010). Here,
2 meal and rest break premiums are not penalties, but wages, so section 226.7 premiums
3 should not be treated as penalties, and the penalty under section 558 should be applied
4 instead, as 558 penalties apply to unpaid wages. *Culley v. Lincare, Inc.*, 236 F.Supp.3d
5 1184, 1195 (E.D. Cal. 2017). Failure to pay overtime is also subject to the \$50 civil penalty
6 provided in section 558, because section 558 applies to the penalties contained in the same
7 chapter as section 510. *Villacres, supra*, 189 Cal.App. at 580; Supp. Markham Decl., ¶27.

8 Defendant will also likely raise that PAGA gives the Court wide latitude to reduce
9 the amount of civil penalties “based on the facts and circumstances of a particular case”
10 when “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
11 confiscatory.” Cal. Lab. Code § 2699(h). In reducing PAGA penalties, courts have
12 considered issues including whether the employees suffered actual injury from the
13 violations, whether the defendant was aware of the violations, and the employer’s
14 willingness to fix the violation. Here, for example, factors such that Defendant paid over
15 \$1,000,000 in premiums, and had automatic systems in place to issue these payments,
16 would likely be considered in the Court’s potential latitude to reduce any awarded penalties.

17 Further, it is unclear the Court would award such penalties as there is little guidance
18 as to the standard for determining the amount of appropriate penalties under PAGA:
19 [S]ection 2699, subdivision (e)(2) describes the conditions under which a trial
20 court may exercise its discretion to reduce penalties. It does not specify
21 guidelines for exercising discretion in general with regard to the amount of
22 penalties, because the amount is fixed by statute....A court can only exercise
23 its discretion to award lesser penalties based on the enumerated considerations.
24 *Amaral, supra*, 163 Cal. App. 4th at 1213 (internal quotations omitted); *see also Fleming v.*
25 *Covidien Inc.*, 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011).

26 Here, there are approximately 20,128 pay periods worked by 961 PAGA Settlement
27 Members during the PAGA Period, and the maximum amount of penalties Plaintiff could
28 recover at trial for Plaintiff’s direct claims is \$8,051,200 (20,128 pay periods x \$100 penalty
times 4 for overtime, meal premiums, rest premiums and unreimbursed business expenses

1 (assuming at least one violation in every pay period). For Plaintiff's derivative claims,
2 Plaintiff calculates an additional penalty in every pay period for Plaintiff's 226 claim, and
3 violations in 37% of pay periods for Plaintiff's 203 claim, to correspond to the percentage
4 of former employees within the class (732/1,992). Thus, 226 PAGA penalties are calculated
5 at an additional \$2,012,800 in maximum penalties, and the 203 penalties are calculated at a
6 maximum of \$744,736. Supp. Markham Decl., ¶29. Thus, the total maximum potential
7 penalty exposure for Plaintiff's PAGA claim is \$10,808,736. See Order at p. 30.

8 As such, the PAGA Settlement Amount of \$37,500 represents approximately 0.35%
9 of the total maximum PAGA penalties. This result falls within the range of other approved
10 PAGA settlements, as courts frequently approve PAGA awards between 0.2% to 2.2% of
11 the total potential penalties. See e.g., *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504,
12 at 528 (2018) (awarding PAGA penalties of 0.2% of the maximum, or \$5 per pay period);
13 *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, at *2, 7 (N.D. Cal. Sept. 28, 2016)
14 (settlement allocating \$10,000 to PAGA penalties where potential value was over \$5.2
15 million, resulting in 0.2 percent PAGA recovery approved). Supp. Markham Decl., ¶30.

16 These PAGA penalties conform to the courts' reasoning that "[t]he remedy sought in
17 a PAGA suit consists of civil penalties, not individual or class damages" [*Mendez v. Tween*
18 *Brands, Inc.*, 2010 WL 2650571, at *4 (E.D. Cal. June 30, 2010)], and in PAGA "[u]nlike
19 class actions, these civil penalties are not to compensate unnamed employees because the
20 action is fundamentally a law enforcement action." See *Ochoa-Hernandez v. CJADERS*
21 *Foods, Inc.*, 2010 WL 1340777, at *4 (N.D. Cal. Apr. 2, 2010).

22 Additionally, Plaintiff confirms the LWDA was properly notified of the settlement
23 and has not objected or commented. Supp. Markham Decl., ¶39; see also Order at p. 30.

24 **III. MODIFICATIONS TO SETTLEMENT AGREEMENT**

25 The Parties have agreed to modify the Settlement Agreement to address each of the
26 Court's concerns and comments raised in the Order. See Order at pp. 30-35. All edits to the
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1 Settlement Agreement are shown in redline in Exhibit 1, with an executed revised copy
2 attached as Exhibit 2.

3 The Parties revised the Settlement Agreement to clarify that there is a separate PAGA
4 release from the release of class claims, and that class members may not opt-out of the
5 PAGA portion of the settlement. Settlement Agreement, §§ I, ¶ 28, III, ¶ 12. As such, the
6 Settlement Agreement has been updated with separate definitions for Class Settlement
7 Members and PAGA Settlement Members and clarifies the applicable PAGA Period for
8 PAGA Settlement Members. *Id.*, § I, ¶¶ 25-29. The Settlement Agreement clarifies that if a
9 class member submits an opt-out request, the opt-out will *only* apply to the class action
10 portion of the settlement, and as a PAGA Settlement Member the individual will still receive
11 a PAGA Settlement Payment. *Id.*, § III, ¶ 12. The PAGA Settlement Member releases
12 PAGA claims during the covered PAGA Period, as defined in the PAGA Released Claims.
13 *Id.*, § I, ¶ 28. Additionally, the Settlement Agreement clarifies that there will be separate
14 settlement payments for the Class and PAGA portions of the Settlement. *Id.*, § I, ¶¶ 18, 24.
15 In addition, the Settlement Agreement is updated to address the Waiting Time Penalties
16 Subclass and Allocation, and updates the formula for calculating Class Members'
17 Individual Settlement Payment accordingly. *Id.*, § I, ¶¶ 18, 32, 42-43.

18 IV. MODIFICATIONS TO SETTLEMENT NOTICE

19 The Settlement Notice has been updated per instructions from the Court and to mirror
20 the revisions made to the Settlement Agreement. *See generally*, Supp. Markham Decl.,
21 Exhibit 3 and Exhibit 4. All changes made to the Notice are provided in both redline version,
22 as well as a revised clean copy of the proposed Notice.

23 First, the Settlement Notice was updated to clarify that the in the event the class
24 member opts-out of the settlement, the request for exclusion will not apply to the PAGA
25 claim, the PAGA Settlement Member will still receive a PAGA Payment, and PAGA claims
26 are released for the PAGA Period (PAGA Released Claims). Supp. Markham Decl., Ex. 3,
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1 at pp. 4-6; Ex. 4, at pp. 4-6. at These updates have been made in all necessary places
2 throughout the Settlement Notice. *Id.*, Ex. 3, Ex. 4.

3 Additionally, the parties made the additional edits as noted by the Court in its Order.
4 The summary chart of “options available” to class members has been updated to show a
5 fourth option to “dispute the information contained in the Notice of Class and
6 Representative Action Settlement,” *Id.*, Ex. 3 at p. 3; Ex. 4 at p. 3. The language below the
7 chart has been edited to match the language in the Court’s Order. Order at p. 36. Finally,
8 the Notice lists the Class Members’ employment dates (in addition to workweeks) within
9 the Class Period. *Id.*, Ex. 3 at p. 3; Ex. 4 at p. 3.

10 **V. ALLOCATION FOR DISTRIBUTION OF CLASS SETTLEMENT**

11 **PROCEEDS**

12 In its Order, the Court inquired whether the class settlement distribution should be
13 based on workweeks as contemplated by the Parties, or if current and former employees
14 should first be separated to account for waiting time penalties. Order at p. 26. The Parties
15 conferred and agreed to modify the settlement distribution so that an allocation is made for
16 Waiting Time Penalties to former employees during the relevant time period (10% of the
17 Net Settlement Amount), and the remaining distribution is completed pro rata based on
18 number of workweeks the Class Member worked during the Class Period. Settlement
19 Agreement, § I, ¶¶ 42-43. This is an equitable distribution as it accounts for separate
20 payments to the over one-third of the Class (732 employees) who are former employees and
21 eligible for potential Waiting Time Penalties. Supp. Markham Decl., ¶31.

22 The Court also asked that the Parties explain why the pro rata workweek settlement
23 distribution plan is more equitable than other distributions, such as an individual plan which
24 takes into account, for example, differing hourly rates earned by Class Members during the
25 Class Period, or whether an individual class member worked hours to trigger an overtime
26 rate rather than regular rate compensation. *See* Order at p. 26. Here, after the initial Waiting
27 Time Penalties payment for former employees, the pro rata distribution based on the number
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1 of workweeks worked in the Class Period is the most equitable and efficient approach in
2 this litigation. First, to address the Court's request for information regarding the range of
3 Class Members' hourly rates and hours worked, Defendant confirms that Class Members'
4 range of hourly pay rates in the Class Period is \$10 to \$25.99, with the average rate of pay
5 \$13.72. The hourly rates earned in the Class Period are similar and within a close range,
6 80% falling between \$11 and \$16.87 per hour. Supp. Markham Decl., ¶32. While there is
7 some minor variance in rates of pay, an equitable per workweek formula is most fair and
8 efficient, and most commonly used for distributing settlement proceeds in a class action,
9 where taking into account individual changes in hourly rates of pay (which often change
10 multiple times by very small increments for each individual employee in the course of a
11 class period), would introduce multiple variances and be incredibly cumbersome to
12 determine and calculate, raising exponentially the costs of settlement administration and
13 minimizing the recovery to the class members, and thus would not be a workable settlement
14 distribution approach. Further, where, as here, the majority of Class Members earned a
15 similar range of wages during the Class Period, the pro rata approach is best applied. *Id.*,
16 ¶33. In regard to the shift lengths, Plaintiff's expert's analysis confirmed that the majority
17 of shifts would trigger an overtime rate for unpaid time. The expert determined that over
18 88% of all shifts were greater than 8 hours, so that any additional compensation would
19 commonly be provided at an overtime rate. Because in this case nearly all shifts would
20 trigger daily overtime pay for off-the-clock work, this is an additional reason why it is
21 equitable to apply a pro rata workweek allocation here. Supp. Markham Decl., ¶34.

22 VI. ADDITIONAL INFORMATION IN SUPPORT OF INCENTIVE AND 23 ATTORNEYS' FEE AWARDS

24 Plaintiff notes that the Court states in its Order that the approved amounts for
25 Plaintiff's incentive award and counsel's attorney fee award will be determined at final
26 approval upon further briefing in the Rule 23(h) motion. At that time, Plaintiff will submit
27 Plaintiff's supplemental declaration outlining risks and sacrifices, and the substantial time
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devoted to this action, to justify the requested incentive award. *See Dearaujo v. Regis Corp.*, 2017 WL 3116626, at *9, *15 (E.D. Cal. July 21, 2017) (Sacramento) (awarding a \$15,000 incentive award which was over 15 times the average per class member recovery in a wage and hour class action); *see also Sengvong v. Probuild Company LLC*, 2021 WL 4504620, *6, 11-12 (S.D. Oct. 1, 2021) (approving \$15,000 incentive award on \$1.4 million settlement, where the average class member recovery was under \$500).

Additionally, regarding the requested attorneys' fees, Plaintiff will provide further justification in the Rule 23(h) motion to support attorneys' fees exceeding 25% of the settlement fund, including the lodestar crosscheck. "[I]n most common fund cases the award exceeds [the 25%] benchmark." *Knight v. Red Roof Salons, Inc.*, 2009 WL 248367, at *6 (N.D. Cal. Mar. 6, 2014). In determining the reasonableness of a fee request, and whether it warrants the upward departure from the 25% benchmark, the courts consider a variety of factors, such as: (a) the results achieved; (b) the risk involved with the litigation; (c) counsel's skill, experience, and quality of work; (d) the contingent nature of the fee; (e) awards made in similar cases; (f) the reaction of the class; and (g) the comparison of the benchmark with counsel's lodestar. *Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1116–17 (C.D. Cal. 2008); *Richardson v. THD At-Home Servs.*, 2016 WL 1366952, *8 (E.D. Cal. Apr. 6, 2016). Here, these factors support Plaintiff's requested attorneys' fees award, and Plaintiff will brief these factors in in full in the attorneys' fee motion.

VII. CONCLUSION

Counsel for the Parties have addressed the Court's concerns as stated in the Order and modified the Settlement Agreement and Settlement Notice accordingly. Thus, the Parties respectfully request that the Court preliminarily approve this Settlement.

Dated: October 17, 2022

Respectfully submitted,

THE MARKHAM LAW FIRM

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