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12
13 **UNITED STATES DISTRICT COURT**
14 **EASTERN DISTRICT OF CALIFORNIA**
15

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

17
18 Plaintiff,

19 v.

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

21
22 Defendant.
23
24
25
26
27
28

CASE NO.: 2:20-cv-00699-TLN-KJN
CLASS AND PAGA
REPRESENTATIVE ACTION

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

Date: November 18, 2021
Time: 2:00 p.m.
District Judge: Hon. Troy L. Nunley
Magistrate Judge: Hon. Kendall J.
Newman

Complaint Filed: April 3, 2020
Trial Date: None

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I. INTRODUCTION

Plaintiff Jorge Almanzar (“Plaintiff”) seeks preliminary approval under Federal Rule 23(e) of a \$750,000 non-reversionary Settlement on behalf of approximately 1,992 current and former Night Team Merchandising Execution Associates (“Night Team MEAs”) who worked for Defendant Home Depot (“Home Depot” or “Defendant”) in California between April 3, 2016 through the earlier of the date of the order granting preliminary approval or November 1, 2021 (the “Class Period”).

This is a non-reversionary cash settlement and all Class Members who do not opt out will receive a payment, without a requirement to submit a claim form. Plaintiff alleges that he and other class members were not provided timely and uninterrupted meal and rest periods, nor paid premiums at the correct rate for all non-complying breaks, not paid all overtime wages, including for time spent travelling between Defendant’s stores, incurred unreimbursed cell phone and mileage expenses, and other derivative claims.

This case was resolved with the assistance of an experienced mediator, Louis Marlin, Esq. of Louis Marlin Mediation. Plaintiff argues Home Depot’s maximum potential liability for his direct overtime, meal and rest break, and unreimbursed expense claims is \$4,839,255, and \$8,926,428 for all his claims, including derivative wage statement and waiting time penalty claims. This assumes Plaintiff would prevail on his claims that he and other class members worked 15 minutes of unpaid overtime on *50% of shifts*, experienced meal break violations on 35% of shifts (based on the facial violation rate from expert’s review of the class data sample), experienced rest break violations on *50% of shifts*, incurred approximately \$20 in unreimbursed cell phone expenses per month and unreimbursed mileage expenses of up to \$0.40 per mile, and that all applicable meal premium wages were calculated at an incorrect base rate, rather than the regular rate, and thus underpaid.

The \$750,000 Settlement Amount represents 63% of what Plaintiff considers Home Depot’s maximum potential liability for underpaid meal premiums and

1 unreimbursed business expenses, over 15% of what Plaintiff considers Home Depot's
2 maximum potential liability for all of Plaintiff's direct claims, and over 8% of what
3 Plaintiff considers Home Depot's maximum potential liability for all of Plaintiff's
4 claims, including derivative claims. Plaintiff believes this is an excellent result,
5 especially considering Defendant had a system in place to pay meal break premiums
6 and paid over \$1,200,000 in meal break premiums during the Class Period. This
7 Settlement is well in range – or exceeding – the settlements commonly approved by
8 California federal and state courts.

9 Plaintiff seeks an order: (1) preliminarily approving the proposed Settlement; (2)
10 approving the form and content of the Class Notice; (3) directing that Class Notice be
11 given to Class Members; (4) provisionally certifying the Settlement Class and
12 appointing Plaintiff as a Class Representative and Plaintiff's counsel as Class Counsel;
13 (5) preliminarily approving Settlement administration services to be provided by the
14 Settlement Administrator, and; (6) scheduling a Fairness Hearing.

15 **II. FACTUAL AND PROCEDURAL BACKGROUND**

16 Home Depot employs Night Team MEAs whose job duties include stocking and
17 merchandising Home Depot's products. Declaration of David R. Markham ("Markham
18 Decl."), ¶2. Plaintiff worked for Home Depot as a Night Team MEA at Defendant's
19 locations in the Los Angeles area, from June 2018 to April 2020. *Id.* at ¶3. Plaintiff
20 worked 10-hour shifts four days a week, with three to four shifts per week spent
21 traveling between Home Depot stores. *Id.*

22 Plaintiff filed a complaint against Defendant on April 3, 2020, alleging that Night
23 Team MEAs were not compensated at an overtime rate for all time worked, including
24 for time spent traveling between Defendant's stores, and based on Defendant's
25 rounding policy, which resulted in an underpayment of overtime. Further, Plaintiff
26 alleges that Defendant under-reimbursed mileage when Night Team MEAs used their
27 personal vehicles to travel between Defendant's stores. Additionally, Plaintiff alleges
28 that he and other Night Team MEAs incurred unreimbursed cell phone expenses when

1 they were contacted on their personal cell phones for work-related tasks and questions,
2 and that their meal and rest breaks would be interrupted for the same reasons. *Id.*, ¶4.
3 Plaintiff would also receive late meal breaks when a manager was unavailable to unlock
4 the store, which was kept locked at night. Plaintiff further alleged derivative claims
5 stemming from Plaintiff's primary unpaid wage and meal and rest break claims,
6 including violation of Labor Code section 226(a) for inaccurate wage statements and
7 Labor Code section 203 for waiting time penalties, and violations of PAGA (alleged in
8 an amended complaint dated July 24, 2020) and UCL under the same predicate factual
9 and legal theories. *Id.*, ¶5.

10 The parties have stipulated to Plaintiff's filing of a Second Amended Complaint
11 ("SAC"), which includes claims that Defendant did not pay meal break premiums at a
12 regular rate of pay, in that the premium rate calculation does not include non-
13 discretionary bonuses issued to employees during the COVID-19 pandemic. Plaintiff
14 alleges this violates the California Supreme Court's recent authority in *Ferra v. Loews*
15 *Hollywood Hotel, LLC*, 11 Cal. 5th 858 (2021), which applies retroactively. *Id.*, ¶6; *see*
16 *also* Settlement Agreement, §II (1), Ex. D. All claims released in the Settlement are
17 alleged in the SAC. Markham Decl., ¶6.

18 Defendant disputes all of these allegations and asserted a wide variety of
19 defenses, which were critical in Plaintiff's evaluation of the settlement value of this
20 case.

21 III. VIGOROUS PROSECUTION OF THIS ACTION

22 Class Counsel has vigorously advanced Plaintiff's position and thoroughly
23 investigated Class Members' claims. Prior to attending the mediation, the Parties
24 engaged in discovery. Plaintiff reviewed hundreds of pages of documents including
25 Plaintiff's employment records and Defendant's policies and handbooks. Plaintiff's
26 expert analyzed a 20% class sample of time and payroll records and prepared a damages
27 model in advance of mediation. *Id.*, ¶7.

28 The parties carefully investigated the claims and facts alleged in this action and

1 have made a thorough study of the legal principles applicable to the claims asserted
2 against Home Depot. As a result of Class Counsel's investigation of the claims in this
3 action, the expert's damages analysis, a careful review of the applicable policy and
4 operative documents, and an informal exchange of discovery and information, the
5 parties had a clear understanding of their respective claims and defenses. *Id.*, ¶8.

6 The parties settled this case with the assistance of an experienced mediator, Louis
7 Marlin, Esq. The mediation took place on August 4, 2021. At the conclusion of the
8 mediation session, the parties reached the settlement in principle and executed a
9 Memorandum of Understanding. *Id.*, ¶9. After additional weeks of arms'-length
10 negotiations, the parties finalized the terms of the settlement agreement. The executed
11 version of the Settlement Agreement is attached as **Exhibit 1** to Markham Declaration.¹

12 IV. SETTLEMENT TERMS

13 A. Settlement Relief

14 The monetary relief will be provided to the Settlement Class Members who are
15 defined as:

16 All persons who are employed or have been employed by Defendant in
17 California as a non-exempt, hourly Night Team Merchandising Execution
Associate during the Class Period.

18 Settlement Agreement, §I (5).

19 The Settlement Class does not include any person who submits a timely and valid
20 opt-out request. *Id.*, §III (11). The Class Period is from April 3, 2016 through the earlier
21 of the date of preliminary approval of the Settlement or November 1, 2021. *Id.*, §I (6).

22 The Settlement Amount is \$750,000. *Id.*, § I (17). This amount includes
23 payments to Class Members, attorneys' fees and costs, \$37,500 allocated as PAGA
24 penalties, of which 25% (or \$9,375) shall be paid to the class and 75% (or \$28,125)
25 shall be paid to the LWDA, the Class Representative's Enhancement Award, and
26

27 ¹ The Settlement Agreement was submitted to the LWDA concurrent to the filing of
28 this motion, and proof of submission is attached as **Exhibit 2** to Markham Declaration.

administration costs. *Id.* Notably, Home Depot will pay the employer's portion of the payroll taxes in addition to the Maximum Settlement Amount. *Id.*

1. Net Settlement Amount.

From the Settlement Amount, administration costs, attorneys' fees and costs, the LWDA's share of PAGA penalties, and the Enhancement Award to the Class Representative - as the Court awards and in the proposed amount discussed below - will first be deducted, to result in a Net Settlement Amount, which is approximately \$412,625. *See* Settlement Agreement, §III (15). The Net Settlement Amount will then be distributed as follows:

2. Settlement Formula and Distribution

Class Members who do not opt out of the Settlement will receive Individual Settlement Payments from the Net Settlement Amount based on the number of workweeks they worked as members of the putative class during the Settlement Class Period. *Id.*, §§I (9)(18)(26). Distribution amounts will be calculated and allocated as follows:

$$\frac{\text{Workweeks Worked by Class Member}}{\text{Total Workweeks Worked by all Class Members}} \times \text{Net Settlement Amount} = \text{Class Member's Payment}$$

Id.

This is a non-reversion cash Settlement and Class Members need not submit a claim form to receive a payment. *Id.*, §III (15)(18). Class Members who do not opt out of the Settlement will release Home Depot from all claims that relate to the causes of action asserted in this action – or that those that could have been asserted in this action based on the facts alleged in Plaintiff's Second Amended Complaint. *Id.* §I (29).

Settlement checks will be valid and negotiable for 180 calendar days. *Id.*, §III (20). After that time, the Parties propose that the funds represented by uncashed checks be tendered to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Civil Code § 1500 *et seq.*, for the benefit of those

1 Class Members who did not cash their checks, until such time that they claim their
2 property, in compliance with Code of Civil Procedure section 384(b), and subject to
3 the Court's approval. *Id.* In no event will any of the funds revert to Defendant. *Id.*

4 All Settlement payments are subject to taxation, and will be reported to the IRS
5 and state tax authorities. Twenty percent (20%) of each Class Member's Individual
6 Settlement Payment will be allocated as wages, forty percent (40%) as penalties and
7 forty percent (40%) as interest, with withholding to apply only to the portion allocated
8 to wages. *Id.*, §III (16). Settlement Class Members shall seek their own tax advice
9 regarding this Agreement. *Id.*, §III (3).

10 **3. Settlement Amount Calculations (Kullar analysis)**

11 The Settlement Amount of \$750,000 derives primarily from: (a) Plaintiff's meal
12 and rest break claims including allegations that premiums were paid at the incorrect
13 rate; (b) unreimbursed business expenses; and (c) unpaid overtime claims. Markham
14 Decl., ¶10. Home Depot produced time records and payroll data for a 20% sample of
15 class members. Plaintiff also received timekeeping, meal and rest break, and business
16 expense policies, and Plaintiff's personnel file. *Id.*, ¶7. The pre-mediation exchange of
17 information revealed there are 1,992 class members who worked 97,121
18 workweeks/50,761 pay periods during the class period, for an average of 3.6 shifts per
19 week, and 9.5 hours per shift. *Id.*, ¶11. Based on information provided from Defendant,
20 the Class members' average hourly rate is \$13.51 (\$20.27 overtime rate). There were
21 335,988 shifts over 5 hours and 346,038 shifts over 3.5 hours in length. 732 individuals
22 left employment during the relevant time period. *Id.*, ¶12. Based on the information
23 collected, Plaintiff calculated Home Depot's maximum potential exposure to be as
24 follows:

25 Meal break claim: \$429,030. This is based on Plaintiff's expert's findings that
26 35% of shifts over 5 hours and/or 10 hours appeared to be potential exceptions
27 (identified as a short, late and/or missing meal period in the time records), subtracted
28 by the \$1,222,095 in meal break premiums that Home Depot paid during the Class

1 Period. There were 122,215 shifts identified in the time records with exceptions x
2 \$13.51 per hour = \$1,651,124, deducted by the \$1,222,095 that Home Depot paid in
3 premiums, arrives at a maximum potential exposure of \$429,030 in unpaid meal break
4 premiums, before accounting for Home Depot's defenses.

5 Underpaid meal break premiums: \$147,528. Allegations relating to potentially
6 underpaid meal premiums were calculated by taking the purported difference between
7 the regular rate of pay and the base rate of pay in each pay period in the class sample
8 where bonuses were issued. The difference was multiplied by the number of meal
9 premium hours paid in each pay period to calculate the amount of potentially underpaid
10 meal premium payments. The expert then extrapolated these findings based on the pay
11 periods analyzed in the class sample pay data. Plaintiff's expert found that the average
12 difference in rates (between the re-calculated regular rate and the base rate of pay) was
13 \$2.35. The total maximum potential exposure for this claim is \$147,528, before
14 accounting for Home Depot's defenses.

15 Rest break claim: \$2,337,487. This claim is based on the allegation that Plaintiff
16 and Class Members were interrupted with work-related calls/tasks during their rest
17 breaks. Home Depot vigorously disputed that this ever occurred. As a compromise
18 between the parties' positions, Plaintiff estimates that 50% of the time class members
19 were not able to take one or more rest breaks uninterrupted. There were 346,038 shifts
20 of over 3.5 hours x 50% violation rate x \$13.51 per hour results in maximum potential
21 exposure of \$2,337,487 in unpaid rest break premiums, before accounting for Home
22 Depot's defenses.

23 Unpaid overtime claim: \$883,508. Plaintiff asserts that employees were not
24 consistently paid for all overtime hours worked. Home Depot disputes that this ever
25 occurred. As a compromise between the parties' positions, Plaintiff estimates that class
26 members had on average 15 minutes of unpaid overtime on every other shift, for a total
27 of approximately 43,587 unpaid hours during the Class Period. This is calculated based
28 on an average of almost 30 minutes (0.5 hours) per workweek per class member,

1 calculated at an overtime rate of \$20.27 = \$883,508 in maximum exposure relating to
2 unpaid wages, before accounting for Home Depot's defenses.

3 Unreimbursed cell phone expenses: \$487,619. Plaintiff asserts that employees
4 were sometimes required to use their cell phones for work purposes. Home Depot
5 disputes this ever occurred. As a compromise between the parties' positions, Plaintiff
6 estimates that each class member is entitled to approximately \$20 per month to cover
7 expenses for use of their personal cell phones for work-related communications,
8 including messages with managers assigning tasks and answering questions. On this
9 basis, the maximum exposure is \$487,619, before accounting for Home Depot's
10 defenses.

11 Under-reimbursed mileage expenses: \$554,083. This is based on Plaintiff's
12 assumption that class members were underpaid \$0.40/mile before November of 2019
13 (when Defendant's rate for mileage payment increased). The expert calculated an
14 average of 37.91 miles per pay period, resulting in underpayment of \$15.16 each pay
15 period. Defendant disputes all of these allegations. Based on Plaintiff's assumptions,
16 the maximum exposure is \$554,083, before accounting for Home Depot's defenses.

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

23 Waiting time penalties: \$3,019,673. Plaintiff calculated daily wages for 732
24 former employees during the relevant time period, multiplied by the daily pay rate of
25 approximately \$138 (9.5 average hour shift length (8 hours at \$13.51 hourly rate and
26 1.5 hours at \$20.27 overtime rate)) times 30 days, to arrive at maximum potential
27 exposure of \$3,019,673, before accounting for Home Depot's defenses. *Id.*, ¶20.

28 Thus, based on the assumptions above, Home Depot's potential maximum

1 liability for Plaintiff's direct claims is \$4,839,255, and an additional \$4,087,173 for
2 Plaintiff's derivative claims, possible only if Plaintiff prevailed on his underlying
3 claims. Thus, the Settlement Amount of \$750,000 represents 63% potential maximum
4 liability for Plaintiff's strongest under-paid meal break premium and unreimbursed
5 business expense claims, over 15% (15.5%) of Home Depot's maximum potential
6 liability for Plaintiff's cumulative direct claims and over 8% (8.4%) of Home Depot's
7 maximum liability for all of Plaintiff's claims. *Id.*, ¶¶13-21.

8 This is an excellent result given the strength of Home Depot's defenses; well in
9 range of – or exceeding – settlements commonly approved by California district and
10 state courts. *Id.* See also section V(C)(2) below for a detailed explanation.

11 **4. Attorneys' Fees and Costs**

12 The parties agreed that, subject to approval by the Court, up to \$250,000, or
13 33.33% of the Settlement Amount, may be allocated to pay attorneys' fees, and up to
14 \$30,000 may be allocated to reimburse Class Counsel for litigation costs. Settlement
15 Agreement, §III (22). Courts in California wage and hour cases, where the common
16 fund is under \$10 million, tend to award attorneys' fees in the 30% - 40% range.
17 *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92 (E.D. Cal. 2010) (citing
18 to five wage and hour class actions where courts approved fee awards ranging from 30
19 to 33%). The trial court has discretion to award attorneys' fees based on either the
20 lodestar/multiplier calculation or the percentage-of-recovery method. *Laffitte v. Robert*
21 *Half International Inc.*, 1 Cal.5th 480, 503 (2016). Class Counsel intends to brief the
22 fee application using both methodologies, as cross checks.² Defendant agrees not to
23 oppose or object to the application for attorneys' fees and costs in the amounts
24 described above. See Settlement Agreement, §III (22). Any portion of the requested
25 attorneys' fees and costs not awarded to Class Counsel shall be part of the Net

26
27 ² In accordance with *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d
28 988, 993 (9th Cir. 2010), Plaintiff will file his application for attorneys' fees, costs and
Plaintiff's incentive award at least 14 days prior to the due date for objections.

1 Settlement Amount and shall be distributed to Settlement Class Members as provided
2 in the Agreement. *Id.*

3 **5. PAGA Payment to Labor Workforce Development Agency**

4 The Parties agreed that \$37,500 (or 5%) of the Gross Settlement Amount will be
5 allocated for payment under the PAGA. 75% of this amount (\$28,125) will be paid to
6 the LWDA, and 25% (\$9,375) to Settlement Class Members. *Id.*, §III (26). This amount
7 is well within or exceeds the range of the PAGA penalties typically awarded as part of
8 class action settlements. *See Bravo v. Gale Triangle, Inc.*, 2017 WL 708766, at *19
9 (C.D. Cal. Feb. 16, 2017) (\$10,000 as PAGA penalties found reasonable); *Franco v.*
10 *Ruiz Food Products, Inc.*, 2012 WL 5941801, at *14 (E.D. Cal. Nov. 27, 2012)
11 (approving PAGA penalties of \$10,000 and noting that amount was in line with
12 settlement approval of PAGA awards in other cases.); *Schiller v. David's Bridal, Inc.*,
13 2012 WL 2117001, at *14 (E.D. Cal. June 11, 2012) (\$7,500 to LWDA reasonable).

14 **6. Settlement Administration Costs**

15 The parties selected CPT Group, Inc. as the Settlement Administrator in this
16 action. Settlement Agreement, §I (34); *see also* Declaration of Julie Green on behalf of
17 CPT Group, Inc. (“Green Decl.”), submitted concurrently with this motion. CPT
18 Group, Inc. has years of experience in the field of class action administration. Green
19 Decl., ¶5, Ex. A. The costs of the Administrator, estimated at \$14,250, will be deducted
20 from the Settlement Amount. Settlement Agreement, §I (34).

21 **7. Enhancement Award**

22 Home Depot agreed, subject to Court approval, to pay up to \$15,000 from the
23 Settlement Amount to Mr. Almanzar for his services as a Class Representative.
24 Settlement Agreement, §III (21); Section V(C)(3) below. Any portion of the requested
25 Enhancement Award not awarded to the Class Representative shall be part of the Net
26 Settlement Amount, to be distributed to Settlement Class Members. *Id.*

27 **B. Settlement Administration**

28 Among the customary duties of the Settlement Administrator, CPT Group, Inc.

1 will send the Class Notice to each Class Member as provided in this Settlement,
2 determine the eligibility for, and the amounts of, any Individual Settlement Payments
3 under the terms of this Agreement, process and distribute Class Members' payments,
4 and process and mail tax payments to the appropriate state and federal taxing
5 authorities. Green Decl., ¶6. Further, Class Members will also be able to contact the
6 Settlement Administrator by telephone or e-mail, or access the settlement website,³ if
7 they have any Settlement questions or need assistance. See Class Notice, attached as
8 **Exhibit A** to the Settlement Agreement. Also, any opt-outs from the Settlement or
9 objections must be delivered to the Settlement Administrator. Settlement Agreement,
10 §III (11)(12).

11 **C. Proposed Notice Plan**

12 Within 30 calendar days after the preliminary approval of the Settlement, the
13 Settlement Administrator will send the Class Notice to Settlement Class Members via
14 first class mail. *Id.*, §III (7). Before mailing the Notice, the Settlement Administrator
15 will run a check of the Class Members' addresses against those contained in the USPS's
16 National Change of Address database, and take any other appropriate steps to validate
17 the correctness of the addresses provided by the Defendant. *Id.* If the Notice is returned
18 with a forwarding address, the Settlement Administrator will use the forwarding
19 addresses to locate the missing Class Members, and re-mail the Notice to the correct
20 address. *Id.*, §III (8). For Notices remailed after being returned as non-deliverable,
21 Class Members' deadline to opt out from or object to the Settlement will be the later
22 of: (i) 14 calendar days from the date of re-mailing of the Notice or (ii) the remaining
23 notice period. *Id.* The Settlement Administrator will use all appropriate tracing methods
24 to ensure that the Class Notice is received by all Settlement Class Members. *Id.*

25 The Class Notice will summarize the terms of the Settlement Agreement, advise
26 the Class Members of their estimated individual settlement payment, and inform Class

27
28 ³ The website will contain settlement-related documents, including the attorney fee motion when filed, and notice of final judgment.

1 Members of their right to object to or exclude themselves from the Settlement within
2 45 days after the Notice mailing. Ex. A. Because this is the California-only class, and
3 the mailing will occur only in California, 45 days to opt out from or object to the
4 Settlement is sufficient. Class Members will also be able to opt out of the Settlement
5 via facsimile. Markham Decl., ¶31. Further, because Class Members worked as Night
6 Team MEAs in California, communicating with their superiors and colleagues on a
7 daily basis in English, and speaking English was a job requirement, English-only notice
8 is sufficient. *Id.*

9 **V. THE SETTLEMENT SATISFIES THE PRELIMINARY APPROVAL**
10 **CRITERIA**

11 A class action may not be settled without court approval. Fed. R. Civ. P. 23(e).
12 However, there is a strong judicial preference for pre-trial settlement of complex class
13 actions. *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625
14 (9th Cir. 1982); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). In
15 determining whether to preliminarily approve a settlement, the court should evaluate
16 the fairness of the settlement in its entirety. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
17 1026 (9th Cir.1998). In contemplating the preliminary approval of a proposed
18 settlement, “[t]he recommendations of plaintiffs’ counsel should be given a
19 presumption of reasonableness.” *Knight v. Red Door Salons, Inc.*, No. 08-01520, 2009
20 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009). The trial judge exercises discretion in
21 deciding whether to grant preliminary approval of a class action settlement and “great
22 weight is accorded to [the] judge’s views.” *7-Eleven Owners for Fair Franchising v.*
23 *Southland Corp.*, 85 Cal. App. 4th 1135, 1145 (2000).

24 Preliminary approval is the first of three steps of the settlement approval process.
25 Second is the dissemination of a settlement notice to all class members. Third is a final
26 approval hearing, where the evidence concerning the fairness, adequacy, and
27 reasonableness of the settlement may be presented, and class members may be heard
28 regarding the Settlement. See Manual for Complex Litigation, Fourth, § 21.632 (2004).

1 The court does not need to perform a final analysis of the settlement's fairness to
2 preliminarily approve a proposed settlement. Rather, a more detailed assessment is
3 reserved for the final approval hearing, after class notice has been sent and class
4 members have had the opportunity to object to or opt-out of the settlement. See Moore's
5 Federal Practice, 23.165[3] (3d ed. 2005). Generally, there is an initial presumption of
6 fairness when a proposed settlement, which was negotiated at arms'-length by Class
7 counsel, is presented for court approval. 4 Newberg on Class Actions, § 11.41, p. 90
8 (4th ed. 2002). In approving a settlement where the class has not yet been certified, the
9 court must first determine that a class exists. *Staton v. Boeing Co.*, 327 F.3d 938, 952
10 (9th Cir. 2003), citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 619-20
11 (1997) (commonality must be shown at a preliminary approval stage, although not
12 necessarily manageability). Then, the Court should examine the settlement as a whole
13 to determine if it is fair, adequate and reasonable. *Id.*, *Hanlon, supra*, 150 F.3d at 1019.

14 **A. The Proposed Class Meets the Qualifications for Certification for
Settlement Purposes.⁴**

15 A proposed class may be certified for settlement purposes if it satisfies the
16 requirements of Rule 23(a), namely: "(1) numerosity; (2) commonality; (3) typicality;
17 and (4) adequacy of representation." *Hanlon*, 150 F.3d at 1019 (citing *Amchem*, 521
18 U.S. at 613). Then, a plaintiff must satisfy one of the prongs of Rule 23(b). *True v.*
19 *American Honda Motor Co.*, 749 F.Supp.2d 1052, 1062 (C.D. Cal. 2010). The Parties
20 in this case request certification of the Settlement Class under Rule 23(b)(3)

21 The Class meets all standards for conditional certification:

22 **1. An Ascertainable and Numerous Class Exists that can be Determined**
23 **from Payroll Records**

24 Rule 23(a)(1) requires "the class is so numerous that joinder of all members is
25 impracticable." Generally, "classes of 40 or more are numerous enough" to satisfy this
26 requirement. *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988).

27 ⁴ Defendant agrees to certify a class for settlement purposes only, and their agreement
28 to do so shall not be construed as an admission of the propriety of class certification
outside of the settlement context. Settlement Agreement, §II(2).

1 Here, the Class is composed of approximately 1,992 current and former Night
2 Team MEAs who worked for Defendant in California, who can be identified and
3 located from Home Depot's personnel and payroll records. Home Depot will provide
4 the Settlement Administrator with a database with all Class Members' names and
5 contact information, and further steps will be taken to locate the Class Members for
6 whom the addresses are not current. Settlement Agreement, §§III (7)(8); *see also*
7 Section IV(C). Numerosity is satisfied.

8 2. Common Issues of Law and Fact

9 To certify a class, there must be "questions of law or fact common to the class."
10 Fed. R. Civ. Proc. 23(a)(2).) The Ninth Circuit construes "the requirements of Rule
11 23(a)(2) . . . permissively." *Hanlon*, 150 F.3d at 1019. To satisfy commonality, even a
12 single common question is sufficient. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541,
13 2556 (2011). "As a general rule if the defendant's liability can be determined by facts
14 common to all members of the class, a class will be certified even if the members must
15 individually prove their damages." *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.4th 1004,
16 1022 (2012). The court only determines whether or not "the theory of recovery
17 advanced by the proponents of certification is, as an analytical matter, likely to prove
18 amenable to class treatment." *Sav-On Drug Stores*, 34 Cal. 4th 319, 327 (2004).

19 Here, as Class Counsel's concurrently filed declaration further shows, there are
20 common questions of law and fact that apply to Class Members across the board,
21 because all Class Members were subject to Home Depot's rules and policies regarding
22 timekeeping, travel time, business expense reimbursement and meal and rest breaks.
23 Markham Decl., ¶¶4-7. Those common questions predominate over any individual
24 inquiries, in that "determination of [their] truth or falsity will resolve an issue that is
25 central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*,
26 131 S.Ct. at 2551. Those questions include: (i) Whether or not Class Members were
27 paid for all hours worked and were provided with meal and rest breaks; (ii) Whether or
28 not Class Members were paid meal break premiums at a correct regular rate of pay; (iii)

1 Whether or not Class Members were reimbursed for all business expenses, including
2 mileage at the correct rate and for the use of personal cell phones for work-related tasks;
3 (iv) Whether or not Class Members were provided with all wages due and owing upon
4 termination and/or separation under Labor Code section 203; (v) Whether or not Class
5 Members were provided with accurate wage statements as required by Labor Code
6 section 226; and (vi) Whether or not Home Depot engaged in unfair business practices
7 affecting Class Members in violation of the UCL. Thus, commonality is met.

8 3. Plaintiff's Claims are Typical of the Claims of Class Members

9 Typicality does not mean that the interests of representative plaintiffs must be
10 identical to those of the absent class members. *Staton v. Boeing Co.*, 327 F.3d 938, 957
11 (9th Cir. 2003). They only need to be “reasonably co-extensive with those of absent
12 class members.” *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014). Further, the
13 representative plaintiff must be a member of the class he seeks to represent. *La Sala v.*
14 *American Sav. & Loan Assn.*, 5 Cal.3d 864, 875 (1971). “Typicality refers to the nature
15 of the claims or defense of the class representative, and not to the specific facts from
16 which it arose or the relief sought.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508
17 (9th Cir. 1992).

18 Here, Plaintiff's claims arise from the same facts and legal theories as the Class
19 Members' claims. Plaintiff was subject to the same Home Depot policies and practices
20 with respect to timekeeping, travel time, business expense reimbursement, and meal
21 and rest breaks. See Declaration of Jorge Almanzar (“Almanzar Decl.”), ¶¶5-10.
22 Plaintiff's claims arise from his employment with Home Depot in California. Thus,
23 typicality is met.

24 4. Plaintiff and Class Counsel will Adequately Protect the Interests of the
25 Class

26 Rule 23(a)(4) requires the Class Representative “fairly and adequately represents
27 the interest of the class.” The adequacy of representation involves two questions: (1)
28 whether the Representative and her counsel have any conflicts of interest with other

1 class members, and (2) whether the Representative and her counsel will vigorously
2 prosecute the action. *See Staton*, 327 F.3d at 957.

3 Here, Plaintiff retained counsel with extensive experience in prosecuting wage
4 and hour class actions. Markham Decl., ¶¶42-51; Declaration of Walter L. Haines
5 (“Haines Decl.”), ¶3. In addition, Plaintiff has the same interests as the rest of the
6 Settlement Class, because he has allegedly been injured in substantially the same
7 manner.

8 **B. Rule 23(b)(3) Factors**

9 In addition to Rule 23(a) requirements, “the proposed class must satisfy at least
10 one of the three requirements listed in Rule 23(b).” *Dukes*, 131 S.Ct. at 2548. Here,
11 Plaintiff seeks certification under Rule 23(b)(3), which calls for two separate inquiries:
12 whether issues common to the class “predominate” over issues unique to individual
13 class members, and whether the proposed class action is superior to other methods
14 available for adjudicating the controversy. Rule 23(b)(3).

15 Here, questions of law or fact common to all Settlement Class Members
16 predominate over questions affecting individual members, because Plaintiff alleges that
17 all Settlement Class Members were subject to Home Depot’s same policies and
18 practices, including with respect to timekeeping, travel time compensation, meal and
19 rest break policies and business expense reimbursement. *See also* Section A(2), *supra*.

20 Adjudication of these common questions in one action will preserve the court’s
21 time and resources. “Implicit in the satisfaction of the predominance test is the notion
22 that the adjudication of common issues will help achieve judicial economy.” *Valentino*
23 *v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

24 Next, the court considers whether a class action would be superior to individual
25 suits under Rule 23(b)(3) by weighing: (1) the class members’ interests in individually
26 controlling the prosecution or defense of separate actions; (2) the extent and nature of
27 any litigation concerning the controversy already begun by or against class members;
28 and (3) the desirability or undesirability of concentrating the litigation of the claims in

1 the particular forum. A fourth factor—the difficulties of managing the class action—is
2 not considered when certification is used for purposes of settlement. *Amchem, supra*,
3 521 U.S. at 616; *True, supra*, 749 F.Supp.2d at 1062 n. 12.

4 Here, Settlement Class Members’ interests are relatively small, so they are
5 unlikely to prosecute separate actions. Further, regarding any litigation already begun
6 by class members, although other class action cases are pending against Home Depot
7 in other jurisdictions, this is the only action to the parties’ knowledge which is
8 exclusively brought on behalf of the Night Team MEAs. Finally, this forum is
9 appropriate, as Defendant does substantial business within Sacramento County, and
10 Plaintiff resides in California. Because several issues are common to all Class
11 Members, a class action is superior to numerous individual actions, and the
12 maintenance of this action as a class action will save judicial resources and help avoid
13 inconsistent judgments. *See Sav-On Drug Stores*, 34 Cal.4th at 326.

14 Thus, the Court should certify Plaintiff’s class claims for the purposes of this
15 Settlement.

16 **C. The Proposed Settlement is Fair, Adequate, and Reasonable**

17 Under Rule 23(e), the district court must determine whether the proposed
18 settlement is “fundamentally fair, adequate, and reasonable.” *Class Plaintiffs v. City of*
19 *Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). At the preliminary approval stage, the
20 Court’s view is “limited to the extent necessary to reach a reasoned judgment that the
21 agreement is not the product of fraud” *Officers for Justice*, 688 F.2d at 625.
22 Generally, the opinions of counsel should be given considerable weight because of
23 counsel’s familiarity with the litigation, and previous experience with cases such as this
24 one. *Id.* At this stage the Court considers whether:

- 25 (1) the proposed settlement appears to be the product of serious, informed,
26 noncollusive negotiations, (2) has no obvious deficiencies, (3) does not improperly
27 grant preferential treatment to class representatives or segments of the class, and
28 (4) falls with the range of possible approval.

In re Tableware Antitrust Litig., 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007) (citing

1 Manual for Complex Litigation, Second, § 30.44 (1985)). This Settlement meets all of
2 these criteria.

3 1. The Settlement is the Product of Serious, Informed and Noncollusive
4 Negotiations

5 This Settlement is the result of extensive and hard-fought negotiations. Markham
6 Decl., ¶9. Plaintiff's law firm specializes in class and representative action litigation
7 representing plaintiffs' interests and the interests of the putative class, and Home Depot
8 was represented by seasoned attorneys at Ogletree, Deakins, Nash, Smoak & Stewart,
9 P.C.

10 Prior to the mediation, Class Counsel thoroughly analyzed and investigated Class
11 Members' claims and potential damages. Markham Decl., ¶¶7-8. The parties engaged in an
12 exchange of data for mediation purposes. Class Counsel engaged an expert to review and
13 analyze the sample of class member time and pay records, and reviewed hundreds of pages
14 of documents. *Id.*

15 The investigation of the claims in this case gave both parties a clear view of the
16 strengths and weaknesses of their respective positions. *See Adams v. Inter-Con Sec.*
17 *Sys., Inc.*, 2007 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007) (preliminarily approving
18 the settlement agreement after finding it was reached through extensive negotiations
19 and plaintiff's counsel's thorough investigation of the claims). Based on their
20 knowledge of this action, Plaintiff determined that the Settlement would constitute the
21 best outcome for the Class Members. Markham Decl., ¶¶30, 54. Likewise, Defendant
22 concluded that this action should be settled in the manner and upon the terms and
23 conditions set forth in the Settlement Agreement in order to avoid the expense,
24 inconvenience, and burden of further legal proceedings, and the uncertainties of trial
25 and appeals.

26 The parties participated in a mediation before a private neutral with extensive
27 experience in wage and hour class actions. *Id.*, ¶9. That indicates the settlement was
28 free of collusion. "The assistance of a well-respected mediator with substantial
experience in employment litigation...supports approval of the settlement." *Glass v.*

1 *UBS Fin. Servs.*, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007); *Murillo v. Pac.*
2 *Gas & Elec. Co.*, 266 F.R.D. 468, 479 (E.D. Cal. 2010).

3 The parties have been cooperative, yet aggressive, and displayed capable and
4 experienced advocacy on both sides. Accordingly, “[t]here is ... every reason to
5 conclude that settlement negotiations were vigorously conducted at arms’ length and
6 without any suggestion of undue influence.” *In re Wash. Public Power Supply Sys.*
7 *Sec. Litig.*, 720 F.Supp. 1379, 1392 (D. Ariz. 1989).

8 2. The Settlement has no “Obvious Deficiencies” and Falls within the
9 Approval Range

10 a) California courts frequently approve class action settlements with similar
11 recoveries

12 “[T]he very essence of a settlement is compromise, ‘a yielding of absolutes and
13 an abandoning of highest hopes.’” *Officers for Justice*, 688 F.2d at 624 (quoting *Cotton*
14 *v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). Thus, when evaluating the amount
15 offered in settlement, the Court should consider “the complete package taken as a
16 whole,” and the amount should “not be judged against a hypothetical or speculative
measure of what might have been achieved by the negotiators.” *Id.* at 625-28.

17 Courts routinely approve class action settlements where the settlement amount
18 is a lower percentage of the claimed amount of damages. *See Bellinghausen v. Tractor*
19 *Supply Co.*, 303 F.R.D. 611, 623-24 (N.D. Cal. 2014) (finding settlement amount of a
20 wage and hour class action that equaled between 9% and 27% of the total potential
21 liability to be fair, adequate and reasonable given the uncertainty of continued
22 litigation); *Glass v. UBS Fin. Servs.*, 2007 WL 221862 * 4 (N.D. Cal. Jan. 26, 2007)
23 (approving a settlement of unpaid overtime wages where the settlement amount was
24 approximately 25 to 35% of the estimated actual loss to the class); *see also In re Mego*
25 *Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (finding recovery of 16.67%
26 of the potential recovery adequate in light of the plaintiff’s risks); *Villegas v. J.P*
27 *Morgan Chase & Co.*, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012); *Nichols v.*
28 *Smithkline Beecham Corp.*, 2005 WL 950616, at *16 (E.D. Pa. April 22, 2005)

1 (approving settlement that represented between 9.3% and 13.9% of the claimed
2 damages); Simply put, “the fact that a proposed settlement may only amount to a
3 fraction of the potential recovery does not mean that [it] should be disapproved.” 7-
4 *Eleven Owners, supra*, 85 Cal.App.4th at 1150, citing *Linney v. Cellular Alaska P’ship*,
5 151 F.3d 1234, 1242 (9th Cir. 1998).

6 Here, the Settlement represents approximately 15% of the maximum potential
7 exposure for Plaintiff’s unreimbursed business expense, meal and rest break and unpaid
8 overtime claims, without any risks, costs, and uncertainty of prolonged litigation.
9 Under the Settlement, each class member will receive approximately \$4.25 per
10 workweek (\$412,625 net divided by 97,121 workweeks). Without accounting for the
11 length of each class member’s employment with Home Depot, this will amount to an
12 approximate recovery of over \$200 per class member. Markham Decl., ¶30. At an
13 average hourly rate of \$13.50, this equates to over 10 meal and rest break premiums
14 per class member and over \$60 in unreimbursed expenses, or nearly 10 hours of
15 compensation at an overtime rate. This is an excellent result, in light of Home Depot’s
16 legal and factual defenses, and when considering that Plaintiff could face difficulties to
17 establish liability and prevail at certification and trial.

18 *b) This Settlement is Excellent Result Based on Certification and Liability Risks*

19 Although Plaintiff believes this is a strong case, he recognizes several risks to
20 succeeding on the merits and obtaining certification.⁵ Markham Decl., ¶32. First, in
21 support of his overtime claim, Plaintiff would argue, based on *Williams v. Superior*
22 *Court*, 221 Cal.App.4th 1353 (2013) that an overtime/off the clock class can be
23 certified when an employer has a *de facto* practice of not paying employees for all hours
24 worked, even if the employer’s official written policy forbids off the clock work. *Id.* at
25 1365, 1369. Plaintiff would also argue, that as confirmed by the California Supreme

26
27 ⁵ This is not intended to be a comprehensive list of all of Home Depot’s defenses. This
28 section merely analyzes those which Plaintiff believes to be most significant to his
assessment of settlement value.

1 Court in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018), there is no *de minimis*
2 doctrine in California, and employers must compensate employees for the minutes
3 routinely worked off-the-clock. *Id.* at 848. However, Plaintiff acknowledges that
4 Defendant would attempt to distinguish these cases. *Williams* would likely be
5 distinguished on the basis that in *Williams* the employer's policy specifically excluded
6 from payment employee hours that were indisputably worked every day, whereas here,
7 Home Depot's overtime and timekeeping policy advised Class Members that they
8 would be paid for all hours worked, including for the travel time between stores.
9 Markham Decl., ¶34. Additionally, Defendant would likely distinguish *Starbucks* by
10 arguing that here, in contrast to the facts at issue in *Starbucks*, Plaintiff and class
11 members could obtain – and did frequently obtain – overtime, as a typical shift was 9.5
12 hours in length, and payroll records indicate frequent overtime payments were made to
13 Class Members. Further, Defendant would likely cite other recent cases where it has
14 prevailed on summary judgment for the rounding claim on the basis that its rounding
15 policy is neutral and does not result in systematic under compensation. *Id.*, ¶35.

16 Second, Plaintiff would argue that *Donohue v. ABN Services, LLC*, 11 Cal.5th
17 58 (2021) creates a rebuttable presumption that where no meal period was provided, or
18 an unlawfully short or late meal period was provided as indicated in the time records,
19 that the employee was not provided a meal break. However, Home Depot would likely
20 argue that application of the presumption would be inappropriate in this case because
21 it maintained accurate records and trained employees regarding the importance of doing
22 so, that it had a policy allowing class members to take meal breaks that complied with
23 the requirements of California law, that it had an automatic-payment policy for
24 premiums. Home Depot would point out that it paid over \$1,200,000 in meal break
25 premiums during the Class Period, significantly diminishing the likelihood Plaintiff
26 would be successful in establishing his meal break claim. Further, Home Depot would
27 argue that in rebutting the presumption that meal breaks were not provided, that
28 evidence of individualized experiences would be necessary, preventing the findings of

1 commonality and predominance. *Id.*, ¶37.

2 Third, also in support of his meal and rest break claims, Plaintiff would argue,
3 based on *Brinker*, that Home Depot undermined its formal policies “by pressuring
4 employees to perform their duties in ways that omit breaks.” *Brinker*, 53 Cal.4th at
5 1040. However, Home Depot would likely respond that there is no evidence of a
6 common policy of “pressure” and point to proof that Class Members often (on different
7 occasions and for different reasons) voluntarily choose not to take compliant breaks.
8 This could create individualized issues defeating commonality and predominance, and
9 manageability. Lastly, even if the rest break class were certified, damages and penalties
10 calculations could present complicated issues as Home Depot employees did not have
11 to clock out to take rest breaks, or otherwise record them. Markham Decl., ¶38. Plaintiff
12 would also face difficulties in showing on a class wide basis that class members’ meal
13 and rest breaks were interrupted, as Defendant has advised that time stamped login/out
14 data from the First Phone device that Class Members used in the course of their job
15 duties is not recorded and/or retained. *Id.*, ¶38.

16 Fourth, in support of his claim for underpayment of meal break premium
17 payments, Plaintiff would rely on that the fact that since March of 2020 class members
18 were paid non-discretionary COVID-19 related employee bonuses, and that Plaintiff's
19 expert analysis shows the meal break premium payments were paid at class members'
20 base hourly rate, and not regular rate of pay, in violation of California Supreme Court's
21 recent authority in *Ferra, supra*, 11 Cal. 5th 858, which applies retroactively. However,
22 Defendant would likely argue that the COVID bonuses were not subject to inclusion in
23 the rate for premium payments, and raise arguments that *Ferra* may not be applied
24 retroactively because it substantially adhered to the requirements of the Labor Code
25 section 226.7(c) and made over \$1,200,000 in premium payments throughout the Class
26 Period. Further, Defendant would likely assert that nonetheless this claim covers a
27 relatively short time period as Defendant issued these bonuses to employees only
28 during a portion of 2020. *Id.*, ¶39.

1 Fifth, Plaintiff would argue that Defendant did not reimburse Class Members for
2 necessarily incurred business expenses, including for calls and text messages on Class
3 Members' personal cell phones. However, Defendant will likely contend that its policy
4 prohibits cell phone use, that Defendant provides Class Members with alternative tools
5 that make use of a phone unnecessary, and that to the extent Class Members also did
6 not submit for reimbursement of personal cell phone expenses, this claim would be
7 susceptible to summary judgment and Plaintiff would face hurdles in quantifying and
8 proving commonality for certification purposes. *See e.g., Hammit v. Lumber*
9 *Liquidators*, 19 F. Supp. 3d 989, 1001 (S.D. Cal. 2014) (granting summary judgment
10 when employee failed to request reimbursement). Further, for the mileage claim,
11 Defendant would likely argue that its payroll records evidence that it did reimburse
12 Class Members' mileage, and that whether the amount of mileage reimbursed was
13 sufficient would lead to individual determinations precluding certification, citing a
14 prior case against Defendant where class certification was denied on similar claims.
15 *See Casey v. Home Depot*, 2016 WL 7479347, *26-29 (C.D. Cal. Sep. 15, 2016).

16 Lastly, regarding Plaintiff's derivative wage statement and waiting time
17 penalties claims, Defendant will likely assert that meal and rest break premiums cannot
18 form the basis of these derivative claims based on *Maldonado v. Epsilon Plastics, Inc.*,
19 22 Cal.App.5th 1308, 1336-37 (2018) and *Naranjo v. Spectrum*, 40 Cal.App.5th 444,
20 473-75 (2019). Markham Decl., ¶41.

21 Thus, when considering the probability of lengthy litigation in the absence of a
22 settlement, the risk that Plaintiff and the Class Members might not have been able to
23 succeed at trial, and the risk that a jury could award damages less than \$750,000, the
24 settlement amount is reasonable. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 458;
25 *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, 2010 WL 2486346 (C.D. Cal. June 15,
26 2010), at *7.

27 3. The Settlement does not Improperly Grant Preferential Treatment to
28 Class Representative or Segments of the Class

The Settlement payout amount is based on the number of workweeks each

1 Settlement Class Member worked during the class period. Settlement Agreement, §I
2 (26).

3 In addition, Plaintiff will receive \$15,000 for his time and efforts in representing
4 the Class. *Id.*, §III (21). “Incentive awards [for class representatives] are fairly typical
5 in class actions.” *Cellphone Termination Fee Cases*, 186 Cal.App.4th 1380, 1393
6 (2010), citing *Rodriguez v. West Publ’g*, 563 F.3d 948, 958 (9th Cir. 2009). California
7 courts agree that a class representative is entitled to such an award. *Cellphone*
8 *Termination, supra*, 186 Cal.App.4th at 1394. “Since without a named plaintiff there
9 can be no class action, such compensation as may be necessary to induce him to
10 participate in the suit could be thought the equivalent of the lawyers' nonlegal but
11 essential case-specific expenses, such as long-distance phone calls, which are
12 reimbursable.” *Clark v. Am. Residential Servs.*, 175 Cal.App.4th 785, 804 (2009),
13 citing *Matter of Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992).

14 Here, the incentive award to Plaintiff is based on the extent of Plaintiff’s
15 participation in this action, and not conditioned upon Plaintiff’s support of the settlement.
16 *Cf. Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1165 (2013). Throughout this
17 action, Plaintiff assisted in investigation of the claims, participated in multiple call
18 conferences with counsel, provided and reviewed documents and pleadings, and was
19 on standby during the mediation session. *See Almanzar Decl.*, ¶¶15-16.

20 Courts award incentive awards in this range. *Ross v. U.S. Bank Nat’l Ass’n*, 2010
21 WL 3833922, at *3 (N.D. Cal. Sept. 29, 2010) (approving an award of \$20,000 to each
22 of four named plaintiffs based on their contributions to litigation and the risk that being
23 a class representative would harm their reputation); *see also Ridgeway v. Wal-Mart*
24 *Stores Inc.*, 2017 WL 4071293, at *19 (N.D. Cal., Sept. 14, 2017) (\$15,000 incentive
25 awards for each of the named plaintiffs awarded); *Low v. Trump University, LLC*, 246
26 F.Supp.3d 1295, 1316 (S.D. Cal. 2017) (\$15,000 incentive award approved where
27 plaintiffs “devoted significant amounts of time and energy” to the action); *Ontiveros v.*
28 *Zamora*, 303 F.R.D. 356, 365–66 (E.D. Cal. 2014) (granting \$15,000 incentive award

1 as proportional to the \$3,700 average award of other class members). Thus, the
2 proposed service award is reasonable.

3 4. The Stage of the Proceedings is Sufficiently Advanced to Permit
4 Preliminary Approval of the Settlement

5 “A court is more likely to approve a settlement if most of the discovery is
6 completed because it suggests that the parties arrived at a compromise based on a full
7 understanding of the legal and factual issues surrounding the case.” *Nat’l Rural*
8 *Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523 at 527 (C.D. Cal. 2004).
9 However, the settlement can be approved even in the absence of any discovery, if other
10 factors are satisfied. *In re TD Ameritrade Account Holder Litig.*, 2011 WL 4079226,
11 at *6 (N.D. Cal. Sept. 13, 2011). The bottom line is that “the parties have sufficient
12 information to make an informed decision about the settlement.” *Durham v. Cont’l*
13 *Cent. Credit, Inc.*, 2011 WL 90253, at *3 (S.D. Cal. Jan. 10, 2011), citing *Linney v.*
14 *Cellular Alaska P’ship*, 151 F.3d at 1239.

15 Here, before settling this action, the parties had a sufficient understanding of
16 their respective claims and defenses. The parties engaged in informal discovery prior
17 to the mediation session. Plaintiff received hundreds of pages of documents, including
18 policies and handbooks, and also time and payroll records for a 20% sample of class
19 members. *See* section III, *supra*; Markham Decl., ¶7. Before mediation, Class Counsel
20 had investigated Plaintiff’s claims, examined documents and data, and engaged an
21 expert to perform damages calculations. *Id.*, ¶8. At the time the parties engaged in
22 mediation, they knew and understood their respective positions. As a result of the work
23 performed in this case, the real value of the classes’ claims was well known, and Class
24 Counsel determined that the Settlement with Home Depot is fair, reasonable, adequate,
25 and in the best interest of the Class. *Young v. Polo Retail, LLC*, 2007 WL 951821, at
26 *4 (N.D. Cal. Mar. 28, 2007).

27 **VI. THE PROPOSED NOTICE TO THE CLASS SHOULD BE**
28 **APPROVED**

If the Court concludes after a preliminary evaluation of the settlement that the

1 relief offered and notice provided are fair and adequate, the Court should order that the
2 class notice be provided. Manual for Complex Litig., Fourth, § 21.632 (2004) at 321.
3 The threshold requirement regarding the sufficiency of the class notice is whether the
4 means proposed for distributing the notice are reasonably calculated to apprise the class
5 of the pendency of the action, the proposed settlement, and the right to opt out or object
6 to the settlement. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *Mullane v.*
7 *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

8 Here, the Notice is more than sufficient, because it gives Class Members, in easy
9 to understand and clear language: (1) basic information about the action and the
10 Settlement; (2) an estimate of workweeks Class Members worked during the Class
11 Period, and an explanation how Class Members can dispute this calculation; (3) an
12 explanation how the payout from the Settlement will be calculated for each Class
13 Member, and an estimate of the Class Member's Individual Payment; (4) an
14 explanation how Class Members can exercise their right to opt-out from, or object to,
15 the Settlement; (5) an explanation that any claims against Home Depot that could have
16 been litigated in this Action will be released if the Class Member does not opt out; (6)
17 name of Class Counsel and information regarding attorneys' fees and costs; (7) the date
18 of the Fairness Hearing and an explanation of eligibility to appear at the Fairness
19 Hearing; and (8) the telephone number, e-mail address, and website address, where
20 Class Members can obtain additional information. See Ex. A (proposed Class Notice).

21 Thus, the Notice plan is fair and adequate and complies with the requirements of
22 Rule 23.

23 **VII. CAFA NOTICE IS REQUIRED**

24 This action falls under 28 USC § 1332 as amended by Class Action Fairness
25 Act of 2005 ("CAFA"). As such, notice of settlement under CAFA is required and
26 will be given by Defendant within 10 days of filing of this motion. 28 USC § 1715(b).

27 **VIII. CONCLUSION**

28 Counsel for the parties thoroughly investigated Plaintiff's claims before settling

1 this case. In the judgment of both parties, the proposed Settlement is a fair and
2 reasonable compromise of the issues in dispute in light of the strengths and weaknesses
3 of each party's case. After weighing the substantial, certain and immediate benefits of
4 this Settlement against the uncertainty of further litigation, the parties believe the
5 proposed Settlement is fair, reasonable and adequate. Plaintiff's motion should,
6 respectfully, be granted.

7 Dated: October 21, 2021

Respectfully submitted,
THE MARKHAM LAW FIRM

10 
11 _____
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