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similarly situated and aggrieved

13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA**

15 THE ESTATE OF JOHN UTNE THROUGH
16 HIS SUCCESSOR IN INTEREST KAREN
17 UTNE and ALFRED PINTO, on behalf of
themselves and all others similarly situated,
and the general public;

18 Plaintiff,

19 vs.

20 HOME DEPOT U.S.A., INC., a Delaware
21 Corporation; and DOES 1-50, inclusive,

22 Defendants.
23

CASE No. 3:16-cv-01854-RS

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION AND PAGA
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF SHAUN SETAREH
IN SUPPORT THEREOF;
DECLARATION OF CODY KENNEDY;
DECLARATION OF SHANE LORD
{PROPOSED} ORDER**

Date: July 27, 2023

Time: 1:30pm

Courtroom: 3

Action Filed: March 8, 2016

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Case No. 3:16-cv-01854-RS

MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT

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1 **TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on July 27, 2023 at 1:30 p.m., or as soon thereafter as the
3 matter may be heard in Courtroom 3 of this Court, located at 450 Golden Gate Avenue, 17th Floor,
4 San Francisco, CA 94102, THE ESTATE OF JOHN UTNE THROUGH HIS SUCCESSOR IN
5 INTEREST KAREN UTNE and ALFRED PINTO, on behalf of themselves and all others
6 similarly situated and the general public (“Plaintiffs”), seek an order that this case be maintained
7 as a class action for the purposes of settlement under Federal Rule of Civil Procedure (“Rule”) 23,
8 on behalf of a settlement class comprised of Plaintiff and all other persons similarly situated, for
9 an order directing notice to the class, and for a scheduling order setting a Fairness Hearing for
10 final approval of the proposed settlement.

11 This motion is based upon this Notice, the accompanying Memorandum of Points and
12 Authorities, the Declaration of Shaun Setareh, and all documents and arguments in support
13 thereof.

14 Plaintiffs request the following relief:

15 1. Preliminary approval of the Class Action Settlement, (“Settlement”) attached as
16 Exhibit 1 to the Declaration of Shaun Setareh (“Setareh Decl.”), and all related notice and other
17 deadlines as set forth in the agreement or as otherwise ordered by the Court subject to the terms
18 and conditions of the agreement so that Plaintiff may then move the Court for Final Approval of
19 the Settlement Agreement;

20 2. Conditional certification of the Settlement Classes as defined in the
21 Settlement;

22 3. The appointment of Shaun Setareh, Thomas Segal, Farrah Grant, and Tyson Gibbs
23 of Setareh Law Group; and Alan Lazar, and Cody Kennedy of Marlin & Saltzman LLP as
24 Settlement Class Counsel;

25 4. The appointment of Plaintiffs as the Class Representatives;

26 5. An Order directing the dissemination of the notice of class action settlement to the
27 Settlement Class, via United States First-Class Mail as proscribed by the Settlement;

28 6. Appointment of a Settlement Administrator;

1 7. An Order setting a schedule for the dissemination of notice to the Settlement Class;
2 deadlines for Settlement Class Members to opt-out of the Settlement; and deadlines for Settlement
3 Class Members to object to the settlement or to enter an appearance through counsel; and for a
4 Fairness Hearing to address final approval of the Class Action Settlement Agreement following
5 the notice period.

6 8. Any other relief that the Court deems just and equitable under the circumstances.
7

8 DATED: June 22, 2023

SETAREH LAW GROUP

9
10 /s/ Shaun Setareh

SHAUN SETAREH

THOMAS SEGAL

11 FARRAH GRANT

12 TYSON GIBBS

Attorneys for Plaintiffs

13 DATED: June 22, 2023

MARLIN & SALTZMAN LLP

14
15 /s/ Cody R. Kennedy

ALAN LAZAR

16 CODY KENNEDY

Attorneys for Plaintiffs
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1 **I. INTRODUCTION**

2 After years of hard fought litigation, the parties have reached a settlement of this class
3 action and representative PAGA lawsuit. The settlement (Setareh Decl. Exh. 1) provides for a non-
4 reversionary common fund of \$72,500,000 (seventy-two million five hundred thousand dollars).
5 No class member will have to make a claim, instead checks will be mailed directly to them. No
6 money will revert to the Defendant, and any deductions from the fund not approved by the Court
7 will go back into the net settlement fund.

8 The settlement fund is allocated based on the relative exposure and strength of the claims
9 released. 95% of the net settlement fund is allocated to settle class claims, and 5% for the
10 representative PAGA claims. Of the class settlement 50% is allocated to the claims of class
11 members who worked closing shifts and allegedly had to wait off-the-clock. Class members who
12 worked more closing shifts will receive more money. 41% is allocated to the walk time claim
13 regarding walking to the back of the store to don an apron before clocking in. Class members who
14 worked more total shifts will receive more money. 9% is allocated to the rounding claim which
15 will be shared equally between all class members who incurred a loss due to rounding. (While the
16 Court previously granted summary judgment on that claim, it could have been appealed from any
17 trial verdict. Subsequent appellate authority which the Court did not have the benefit of means that
18 reversal would be a real possibility). For both the closing shift and rounding claims, the settlement
19 allocation exceeds the wages allegedly owed. That is not true for the walk time claim, but that is a
20 legally nuanced claim where the risk of losing on the merits was considerable.

21 This case was litigated to the eve of trial, including over 40 depositions, what the Court
22 once referred to as a “tsunami” of motions, and substantive and impactful rulings by the Court on
23 motions in limine. Because of the extent and duration of litigation, the parties were in a very good
24 position to evaluate the risks of trying the case versus accepting the mediator’s proposal of a
25 \$72,500,000 settlement. For the reasons set forth herein, the proposed settlement is an excellent
26 one, and the Court should preliminarily approve it and direct that notice go to the class.

27 ///

28 ///

1 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

2 **A. PLEADINGS AND MATERIAL ALLEGATIONS**

3 On March 8, 2016, Plaintiff John Utne commenced this action against defendant Home
4 Depot U.S.A., Inc. in the Superior Court of California, County of Alameda. Dkt. 1-1, ¶ 2, Ex. A.
5 Plaintiff asserted four causes of action for (1) failure to pay hourly wages (Labor Code §§ 223,
6 510, 1194, 1194.2, 1197, 1997.1, and 1198); (2) failure to provide accurate written wage
7 statements (Lab. Code § 226(a)); (3) failure to timely pay all final wages (Lab. Code §§ 201-203);
8 and (4) Unfair Competition (Bus. & Prof. Code §§ 17200, et seq.). On April 7, 2016, Plaintiff
9 filed his First Amended Complaint (“1AC”) in the Alameda County Superior Court to add a cause
10 of action for civil penalties pursuant to California’s Public Attorneys General Act (“PAGA”). Dkt.
11 1-1, ¶ 4, Ex. C.

12 The Second through Fifth Amended Complaints add the following allegations (1) claims
13 that Defendant underpaid the class because of rounded time records (Dkt. 28 and 29); (2)
14 allegations of uncompensated time walking to the back of the store and donning their apron and
15 then clocking in (Dkt. 50); and (3) adding Alfred Pinto due to John Utne’s failing health and
16 Home Depot’s challenge to John Utne’s standing to pursue Labor Code section 203 claims. (Dkt.
17 287).

18 **B. FORMAL DISCOVERY BEFORE CLASS CERTIFICATION**

19 Plaintiff obtained class contact information, a sampling of time-keeping and payroll data,
20 and thousands of pages of documents describing, *inter alia*, all applicable and relevant policies
21 and practices pertaining to the claims in the case including, but not limited to, Home Depot’s store
22 closing procedures and rounding practices. Setareh Decl. ¶ 9.

23 On July 18, 2017, Plaintiff’s counsel flew to Atlanta, Georgia and took the depositions of
24 Home Depot’s Rule 30(b)(6) designees Barbara Pennington and Christine Barnaby. Setareh Decl.
25 ¶ 10.

26 As part of pre-class certification discovery, Plaintiff’s counsel also interviewed dozens of
27 percipient witnesses regarding the claims in this Action, which resulted in obtaining over 40
28 declarations that were used to support Class Certification. Setareh Decl. ¶ 11.

1 **C. THE COURT’S SUMMARY JUDGMENT ORDERS BEFORE AND AFTER**
2 **CLASS CERTIFICATION**

3 **1. Motion for Partial Summary Judgment on Rounding Claim Before the**
4 **Class Was Certified**

5 On December 4, 2017, the Court granted Home Depot’s Motion for Partial Summary
6 Judgment (“MPSJ”) on the rounding claim. Dkt. 74. Home Depot successfully argued that its
7 rounding policy had a neutral impact and was therefore lawful under California law. Dkt. 39; *See*’s
8 *Candy Shops, Inc. v. Superior Court*, 2010 Cal. App. 4th 889 (2012). Plaintiff opposed Home
9 Depot’s MPSJ, arguing the rounding resulted in substantial amounts of unpaid time worked for an
10 identifiable number of putative class members, and that Plaintiff Utne himself was underpaid by
11 more than half a minute per shift. Dkt. 68. Plaintiff further argued that because California law
12 requires payment for “all hours worked,” a rounding policy that underpays some employees is
13 impermissible even if the policy as applied to the class is neutral or even favorable. *Id.* at 21:9-18.

14 **2. Cross Motions for Partial Summary Judgment on “Lock in” and**
15 **“Walk Time Claim” After the Class Was Certified**

16 On July 11, 2019, the Court issued an order denying Home Depot’s motion for summary
17 judgment to dismiss the pre-shift walk time claim for unpaid wages, but granting it as to the Labor
18 Code section 203 and 226 penalties, and denying Plaintiff’s motion for partial summary judgment
19 on the “lock in claim.” Dkt. 148.

20 **D. THE COURT’S CLASS CERTIFICATION ORDER**

21 Class counsel successfully moved to certify two California classes:

- 22 (1) the “**Lock-In Class**,” consisting of “[a]ll individuals employed by Home Depot in
23 hourly-paid or non-exempt positions in Home Depot stores in California at any time since
24 March 8, 2012, and who worked at least one shift ending after the time that the Home
25 Depot store was scheduled to close to the public for the evening”; and
26 (2) the “**Hourly Employee Class**,” consisting of “[a]ll individuals employed by Home
27 Depot in hourly-paid or non-exempt positions in California at any time since March 8,
28 2012.” Dkt. 92.

29 Class counsel then successfully opposed Home Depot’s repeated efforts to attack the
30 Court’s class certification order, first by successfully defeating Home Depot’s Rule 23(f) Petition
31 in the Ninth Circuit Court of Appeals, and later by successfully opposing Home Depot’s Motion
32 for Decertification. Dkts. 99, 272.

1 **E. POST-CERTIFICATION DISCOVERY, RETENTION OF EXPERT**
2 **WITNESSES, AND DEFENDANT’S DECERTIFICATION MOTION**

3 Class Counsel retained four experts: (1) Dr. Jon Krosnick (survey expert), (2) James Toney
4 (damages expert), (3) Brian Kriegler (economic and statistical expert), and (4) Gary White (retail
5 expert). Dkt 347. Home Depot also retained four expert witnesses: (1) Robert Crandall (labor
6 study expert), (2) G. Edward Anderson (damages expert), (3) Stephen Smith (survey expert), and
7 (4) F. Timothy Trujillo (human resources expert). Setareh Decl. ¶ 12. Dr. Krosnick performed a
8 comprehensive survey aimed at providing evidence regarding the existence and prevalence of the
9 alleged Labor Code violations. *Id.* Dr. Krosnick ultimately provided three expert reports, with the
10 first being 597 pages, the second being 214 pages, and the final report being 816 pages. *Id.*

11 On December 6, 2019, Magistrate Judge Sallie Kim issued, and this Court later adopted, a
12 recommendation for an adverse jury instruction against Home Depot in connection with a dispute
13 over the production of footage from Home Depot store surveillance cameras recorded during class
14 members’ closing shifts. Dkt. 160, 171.

15 Also following class certification, Home Depot deposed 25 members of the certified class,
16 all of which were defended by Class Counsel (most by attorney Shaun Setareh). Setareh Decl. ¶ 13.
17 Home Depot also deposed Plaintiffs Utne and Pinto and Plaintiff’s experts. Class Counsel deposed
18 Home Depot’s designated experts, as well as two of Home Depot’s Rule 30(b)(6) designees.
19 Approximately 40 depositions were taken in this Action. Setareh Decl. ¶ 14.

20 On October 16 2019, Home Depot filed a motion to decertify. Dkt. 152. On March 14,
21 2022, following several years of intensive expert discovery, Plaintiff opposed the motion. Dkt.
22 231. On May 6, 2022 this Court denied Defendant’s motion. Dkt. 272.

23 **F. POST-CERTIFICATION MOTIONS FOR JUDGMENT ON THE**
24 **PLEADINGS AND TO DISMISS**

25 Home Depot’s motion for Judgment on the Pleadings in relation to Plaintiff’s UCL claims
26 was granted based on the argument that Plaintiff has an adequate remedy at law. Dkt. 273, at 2:1-
27 5:7. The Court dismissed the claim without prejudice, and plaintiffs duly refiled the UCL cause of
28 action in State Court, where it is currently pending. *Utne v. Home Depot U.S.A., Inc.*, Case No.

1 22CV011360 (Superior Court for the State of California, County of Alameda). The state court
2 case will be dismissed if this settlement is approved.

3 This Court granted Defendant's Motion to Dismiss Plaintiff's Third and Fifth Causes of
4 Action based on the argument that Plaintiff John Utne lacked standing to assert his Labor Code
5 section 203 claim because he was still employed by Home Depot at the time he filed this action.
6 Dkt. 279; 308, at 9:1-6.

7 **G. DAUBERT MOTIONS**

8 The parties fully briefed six motions *in limine* to exclude and/or limit each other's experts.
9 Dkt. 302, 317, 324 (Robert Crandall); 303, 321, 325 (Gary White); 304, 315, 327 (Timothy
10 Trujillo); 305, 320, 328 (Dr. Jon Krosnick); 306, 316, 326 (Stephen Smith); & 307, 319, 329
11 (James Toney). On November 10, 2022, the Court excluded Toney's and Krosnick's reports to the
12 extent they proffered calculations of classwide damages. Dkt. 347. *Id.* at 9:24-10:8. The Court
13 excluded the report of Plaintiff's retail practices expert Gary White. *Id.* at 11:11-12:7. The Court
14 excluded portions of the Crandall report to the extent Mr. Crandall was opining on the percentage
15 of class members engaged in personal tasks during pre-shift walk time. *Id.* at 5:22-25.

16 **H. THE PARTIES' MEDIATION EFFORTS**

17 Over the years the parties engaged in extensive settlement discussions and negotiations
18 including, but not limited to, participating in two mediation sessions. The parties first mediated
19 with Antonio Piazza after class certification. As the trial date neared, the parties mediated with
20 Hunter Hughes. After a full-day mediation session and weeks of additional follow up facilitated
21 by Mr. Hughes, the parties accepted Mr. Hughes' mediator's proposal.

22 **III. SUMMARY OF SETTLEMENT TERMS**

23 **A. COURT'S DISCRETION TO MODIFY NON-MATERIAL TERMS**

24 For the Court's discretion and efficiency, the Settlement Agreement attached to the Setareh
25 Declaration as Exhibit 1 provides that the Court has the authority to modify the non-material terms
26 of the parties' Agreement. For example, the Court could, if it deems it appropriate, modify
27 language in the class notice or modify the deadlines and requirements for objecting or opting out.
28 However, the material terms—such as the total amount paid by Defendant, the class definitions,

1 and the scope of the releases—may not be unilaterally changed by the Court. SA ¶ 145.

2 **B. MAXIMUM SETTLEMENT AMOUNT, ATTORNEY FEES AND COSTS,**
3 **CLASS REPRESENTATIVE SERVICE AWARDS AND PAGA**
4 **ALLOCATION**

5 The Settlement Agreement provides for a Gross Settlement Amount of \$72,500,000. SA ¶
6 38. That amount is the maximum Defendant will pay unless the Escalation Clause in paragraph 97
7 is triggered.

8 Settlement checks will be mailed directly to class members unless they opt out. SA ¶ 124.
9 Any uncashed checks will be sent to the State of California’s unclaimed property fund to be held
10 in the class member’s name. SA ¶ 126.

11 Subject to court approval, the following amounts will be deducted from the Gross
12 Settlement Amount: 1) Attorney fees in the amount of up to one third of the Gross Settlement
13 Amount (\$24,166,666.66; 2) costs not to exceed actual out-of-pocket costs incurred, but also not
14 to exceed \$3,500,000; 3) Settlement Administration Expenses of up to \$750,000.00; 4) Service
15 Enhancements, and 5) a Reserve Fund of \$10,000.00 for disputed, untimely and self-identified
16 claims. SA ¶ 94.

17 The requested Service Enhancements for The Estate of John Utne Through His Successor
18 in Interest Karen Utne is \$25,000.00. Although this is admittedly several multiples of what courts
19 in the Northern District of California typically award, Mr. Utne by estimation spent dozens of
20 hours helping Plaintiff’s counsel achieve this significant recovery over the course of over 7 years.
21 Even after Mr. Utne was ill and at times in the hospital and in very poor health, he continued to be
22 actively involved. Setareh Decl. ¶ 26. The Settlement provides for an award of up to \$7,500 for
23 Alfred Pinto. SA ¶ 82. The amount left over after these deductions is the Net Settlement Fund. SA
24 ¶ 48.

25 Any amounts for attorney fees, expenses, class representative service awards, or settlement
26 administration expenses not approved by the Court will be reallocated to the Net Settlement Fund.
27 SA ¶ 96.

28 The PAGA Settlement Fund is 5% of the Net Settlement Fund. SA ¶ 53. The PAGA
Settlement Fund will be divided with 75% going to the California Labor Workforce Development

1 Agency (LWDA) and 25% going to the PAGA Group Members. SA ¶¶ 47, 51-53.

2 The remaining 95% of the Net Settlement Fund is designated as the Class Settlement Fund.
3 SA ¶ 15.

4 Accordingly, assuming all requested deductions are approved, the Net Settlement Fund
5 will be \$44,040,833.34. The amount allocated to the PAGA Settlement Fund will be
6 \$2,202,041.66 and the amount allocated to the Class Settlement Fund will be \$41,838,791.68.

7 **C. CLASS RELEASES AND ALLOCATION**

8 The Class Period is March 8, 2012, through the date of Preliminary Approval. SA ¶ 13.
9 The three Settlement Classes are: The Hourly Employee Class, the Post-Shift Class, and the
10 Rounding Class. SA ¶¶ 40, 60, 74. The Settlement also provides for a PAGA Group, and the
11 PAGA Group Period is March 8, 2015 through the date of Preliminary Approval. SA ¶ 56.

12 The Settlement Class Members are releasing the following claims:

13 *[A]ny claims, rights, liabilities, demands for restitution, penalties, civil penalties, fees, costs,*
14 *damages, or any other form of relief, of every nature and description, of any and all kinds,*
15 *whether arising in law, equity, contract or otherwise, whether known or unknown, that*
16 *accrued or will accrue prior to the date of Preliminary Approval, that were or could have been*
17 *asserted based on the facts alleged in any Complaint or any notice provided to the LWDA by*
18 *any Named Plaintiff, and including but not limited to claims based on employee Walking Time*
19 *and/or Waiting Time and rounding, but excluding the claims specifically set forth in*
20 *Paragraph 132 “Exclusion of Specific Lawsuits.”¹ The Released Class Claims include, but are*
21 *not limited to, claims for or predicated on: (1) violations of the California Labor Code ; (2)*
22 *violations of the Fair Labor Standards Act (29 U.S.C. Section 20, et seq.); (2) unpaid wages;*
23 *(3) California’s Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, et seq.; (4)*
24 *claims under Labor Code Section 2698 et seq.; and/or (5) claims under the applicable Wage*
25 *Order.*

25 ¹ Paragraph 132 carves out two certified and consolidated class actions pending in the Eastern
26 District of California which raise claims related to overtime compensation not related to the claims
27 in this case. Those cases are *Henry v. Home Depot USA, Inc.*, Alameda Superior Court Case No.
28 RG14741264 or *Bell v. Home Depot USA, Inc.*, Sacramento Superior Court Case No. 34-2012-
0012821. While Henry was pending in this district, Judge Tigar ruled that it was not related to
Utne because “the actions do not concern substantially the same parties, property, transaction or
event.” Dkt. No. 15.

1 SA ¶ 66.²

2 The PAGA Group Members and the LWDA are releasing the following claims:

3 *[A]ny civil penalty claims under PAGA, whether known or unknown, that has accrued or will*
4 *accrue prior to the date of Preliminary Approval, and that were or could have been asserted*
5 *based on the facts alleged in any Complaint or any notice provided to the LWDA by any*
6 *Named Plaintiff, including but not limited to claims based on employee Walking Time and/or*
7 *Waiting Time, and excluding the PAGA claims referenced in Paragraph 132 “Exclusion of*
8 *Specific Lawsuits.”. SA ¶ 57. See also id. at ¶ 132 (“the above Releases do not release Home*
9 *Depot from the claims asserted in Henry v. Home Depot USA, Inc., Alameda Superior Court*
10 *Case No. RG14741264 or Bell v. Home Depot USA, Inc., Sacramento Superior Court Case*
11 *No. 34-2012-0012821. Notwithstanding, to the extent permitted by law, this Settlement is*
12 *intended to have preclusive effect on PAGA claims in these excluded cases to the extent the*
13 *PAGA penalty claims in those cases are predicated on the same Labor Code violations and*
14 *cover the same pay period as those included in the PAGA Released Claims here.”)³*

15 **1. Hourly Employee Class**

16 The Hourly Employee Class is defined as “all individuals employed by Home Depot who
17 worked one or more shifts in retail stores in hourly paid or non-exempt positions in California
18 during the Class Period, including persons hired after notice of class certification.” SA ¶ 40. The
19 Hourly Employee Class will receive 41% of the Class Settlement Fund. SA ¶ 42.

20 There are estimated to be 272,386 members of the Hourly Employee Class as of March 10,
21 2023. SA ¶ 86. The individual settlement shares of the Hourly Employee Class Members will be
22 based on

23 “the shifts worked by an individual Hourly Employee Class member during the Class
24 Period divided by the aggregate number of shifts worked by the Hourly Employee Class
25 during the Class Period subject to reduction for all employee and employer withholdings
26 and taxes.” SA ¶ 42.

27 ² “Walking Time” is defined in the Settlement as “any time spent by Class Members and/or
28 PAGA Group Members during the Class Period or PAGA Period, respectively, for which they
were not paid, and during which time they were walking to or from the entrance of the Home
Depot store to or from the time clock or break room; donning, removing or putting away required
work equipment, including their apron; and/or waiting in line to clock-in or out at the time clock.”
SA ¶ 84. “Waiting Time” is defined in the Settlement as: “any time spent by Class Members
and/or PAGA Group Members during the Class Period or PAGA Period, respectively, for which
they were not paid, and during which time they were waiting as a result of locked doors at a Home
Depot store after it was closed to the public for the night.” Id.

³ Plaintiffs have submitted an amended PAGA letter to Home Depot and the LWDA adding
Mr. Pinto as a representative plaintiff and additional factual allegations regarding walking time,
and plaintiffs will file an amended complaint after expiration of the time period for doing so.

1 For tax reporting purposes, the Settlement allocates 35% of each Hourly Employee Class
2 Member Settlement Amount as wages and 65% as penalties and interest. SA ¶ 118.

3 **2. Post Shift Class**

4 The Post-Shift Class is defined as:

5 “all individuals employed by Home Depot in hourly-paid or non-exempt positions
6 in Home Depot stores in California during the Class Period, including persons hired
after notice of class certification who worked at least one Closing Shift.” SA ¶ 40.

7 The Post Shift Class will receive 50% of the Class Settlement Fund. SA ¶ 61. There are
8 estimated to be 235,934 members of the Post-Shift Class as of March 10, 2023. SA ¶ 86. All Post-
9 Shift Class Members would also be members of the Hourly Employee Class.

10 The individual settlement share of the Post-Shift Class Members will be based on

11 “the Closing Shifts worked by an individual Post-Shift Class member during the
12 Class Period divided by the aggregate number of Closing Shifts worked by the
Post-Shift Class during the Class Period subject to reduction for all employee and
employer withholdings and taxes.” SA ¶ 63.

13 For tax reporting purposes, the Settlement allocates 10% of each Post-Shift Class Member
14 Settlement Amount as wages and 90% as penalties and interest. SA ¶ 118.

15 **3. Rounding Class**

16 The Rounding Class is defined as:

17 “all individuals employed by Home Depot who worked one or more shifts in retail
18 stores in hourly-paid or non-exempt positions in California during the Class Period
and who were paid less than their actual clock-in and clock-out time for his or her
total hours worked during the Class Period as a result of Home Depot’s practice of
rounding time to the nearest quarter hour, including persons hired after notice of
class certification.” SA ¶ 74.

19 The Rounding Class will receive 9% of the Class Settlement Fund. SA ¶ 68.

20 There are estimated to be 149,551 Rounding Class members. SA ¶ 86. All Rounding Class
21 Members would also be members of the Hourly Employee Class.

22 The individual settlement shares of the Rounding Class members will be based on “the
23 Rounding Claim Member Fund divided equally by the number of individual Rounding Claimants
24 and paid to each individual Rounding Claimant subject to reduction for all employee and
25 employer withholdings and taxes.” SA ¶ 72.

26 For tax reporting purposes, the Settlement allocates 35% of each Rounding Class Member
27 Settlement Amount as wages and 65% as penalties and interest. SA ¶ 118.

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1 **E. DISPOSITION OF UNCASHED CHECKS AND RESERVE FUND**

2 Settlement Class Members and PAGA Group Members will have 120 calendar days after
3 mailing to cash their checks. SA ¶ 126. Reminder postcards will be mailed to them 30 days before
4 the check cashing deadline. SA ¶ 126. Replacement checks will be reissued upon request up to 30
5 days after the mailing of reminder postcards. *Id.* Settlement Class Members and PAGA Group
6 Members will then have 60 days to cash their replacement checks. *Id.* Any uncashed funds
7 remaining after the mailing of the replacement postcards will be sent to California’s unclaimed
8 property fund. *Id.*

9 Any unused amount in the Reserve Fund a year after preliminary approval will be sent to a
10 Cy Pres recipient. SA ¶ 69. The Settlement Agreement provides that the Cy Pres recipient will be
11 the Homer Fund or another appropriate 501(c)(3) organization agreed to by the parties. *Id.* The
12 Homer Fund is tax-exempt 501(c)(3) charity established by Home Depot for the benefit of its
13 employees which provides assistance to employees who encounter unexpected financial hardship.
14 Lord Declaration ¶¶ 2-5.

15 “The cy pres remedy must account for the nature of the plaintiffs’ lawsuit, the objectives of
16 the underlying statutes, and the interests of the silent class members.” *Nachsin v. AOL LLC*, 663
17 F.3d 1034, 1036 (9th Cir. 2011). Here, that standard is met—the Homer Fund provides direct
18 benefits to the Home Depot employees who make up the classes here.

19 **IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL OF CLASS ACTION**
20 **SETTLEMENTS IN THE NORTHERN DISTRICT**

21 There is a “strong judicial policy that favors settlements, particularly where complex class
22 action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008)
23 (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)).

24 Federal Rule of Civil Procedure 23(e) sets forth a multi-step process for determining
25 whether a proposed class action settlement should be preliminarily approved by the Court. The
26 parties must first “provide the court with information sufficient to enable it to determine whether
27 to give notice of the proposal to the class.” Fed. R. Civ. Proc. 23(e)(1)(A). Then, “[t]he court must
28 direct notice in a reasonable manner to all class members who would be bound by the proposal if

1 giving notice is justified by the parties' showing that the court will likely be able to: (i) approve
2 the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the
3 proposal." Fed. R. Civ. Proc. 23(e)(1)(B). Federal Rule of Civil Procedure 23(e)(2), in turn,
4 provides:

5 "If the proposal would bind class members, the court may approve it
6 only after a hearing and only on finding that it is **fair, reasonable,**
and adequate after considering whether:

7 (A) the class representatives and class counsel have
adequately represented the class;
8 (B) the proposal was negotiated at arm's length;
9 (C) the relief provided for the class is adequate, taking into
account:

10 (i) the costs, risks, and delay of trial and appeal;
11 (ii) the effectiveness of any proposed method of
distributing relief to the class, including the method
of processing class-member claims;
12 (iii) the terms of any proposed award of attorney's
fees, including timing of payment; and
13 (iv) any agreement required to be identified under
Rule 23(e)(3); and

14 (D) the proposal treats class members equitably relative to
15 each other."⁵

16 *Id.* (emphasis added). As shown below, the settlement here meets the Rule 23(e) factors,
17 as well as the Northern District's Procedural Guidance on Class Action Settlements

18 **V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT**
19 **BECAUSE IT IS "FAIR, REASONABLE AND ADEQUATE" UNDER RULE 23(e)**
20 **(2) AND THE CHURCHILL FACTORS**

21 **A. Class Counsel and Plaintiffs Adequately Represented the Class**

Counsel representing the class must be qualified, experienced, and capable of conducting

22 ⁵ The Ninth Circuit Court of Appeals has identified eight factors district courts may also
23 consider in evaluating the fairness and adequacy of a pending settlement: (1) the strength of the
24 plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the
25 risk of maintaining class action status throughout the trial; (4) the amount offered in settlement;
26 (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and
27 views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class
28 members to the proposed settlement ("**Churchill Factors**"). *Churchill Vill., L.L.C. v. Gen. Elec.*,
361 F.3d 566, 575–76 (9th Cir. 2004). Factors 1-4 and 6 are duplicative of the Rule 23(e) factors.
As to factor 5, as detailed herein there has been extensive discovery. Factor 7 is not applicable,
although the LWDA will receive notice of the settlement. Factor 8 will be relevant upon final
approval when the class will have had the opportunity to request exclusion or object.

1 the litigation. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Here, the
2 Setareh Law Group and Marlin and Saltzman are highly experienced and skilled Plaintiff's class
3 action firms that worked efficiently and diligently before resolving the case on the eve of trial.
4 Setareh Decl. ¶¶ 29-32; Kennedy Decl. ¶¶ 2-9. Attorneys and staff at both firms dedicated
5 thousands of hours to this case. Setareh Decl. ¶ 32. Setareh Law Group has also incurred
6 approximately \$2.7 million in costs to prosecute the case, more than \$1.8 million of which was for
7 expert fees, and \$103,455 was to pay the cost of class notice. Setareh Decl. ¶¶ 34-35. Marlin &
8 Saltzman LLP has incurred in excess of \$700,000 in costs to prosecute the case. Kennedy Decl.
9 ¶ 12.

10 Class representatives are adequate where they have retained experienced counsel and have
11 actively participated in the litigation. *See e.g. Norton v. LVNV Funding, LLC*, No. 18-CV-05051-
12 DMR, 2021 WL 3129568, at *8 (N.D. Cal. July 23, 2021). Here, class representative John Utne
13 was dedicated to this case and spent substantial time and resources assisting Class Counsel
14 throughout this litigation. Setareh Decl. ¶ 26. When Mr. Utne's health took a turn for the worse in
15 2022, Alfred Pinto stepped up and agreed to serve as a class representative. Setareh Decl. ¶ 25.

16 **B. The Proposal Was Negotiated at Arm's Length**

17 The proposed Settlement arises after years of contentious litigation—and on the eve of
18 trial—following completion of both fact and expert discovery and after a series of informed and
19 non-collusive negotiations facilitated by multiple third-party mediators. *See* Fed. R. Civ. P.
20 23(e)(2)(B); *see also In re NVIDIA GPU Litig.*, 539 F. App'x 822, 825 (9th Cir. 2013).

21 **C. The Relief Provided For the Class Is Adequate**

22 The relief provided for the class is adequate, taking into account:

- 23 (i) the costs, risks, and delay of trial and appeal;
- 24 (ii) the effectiveness of any proposed method of distributing relief to the class,
25 including the method of processing class-member claims;
- 26 (iii) the terms of any proposed award of attorney's fees, including timing of
27 payment; and
- 28 (iv) any agreement required to be identified under Rule 23(e)(3)

1 See Fed. R. Civ. P. 23(e) (2)(C).

2 **1. The Relief for Each of the Claims Is Adequate, Given the Costs, Risks,**
3 **and Delay of Trial and Appeal**

4 **a. The Relief for the “ Post-shift Claim” is Adequate Given the**
5 **Risks, and Delays of a Trial and Appeal**

6 Plaintiffs believe the Post-shift Claim was strong on the merits in terms of the issue of
7 whether the Post-shift time was compensable. However, as with any litigation there are
8 innumerable risks for both parties. For Plaintiffs, the certified classes and aggrieved employees,
9 the risks at the trial Court include, but are not limited to, the following: 1) the risk that the jury
10 would find that Home Depot did not have actual or constructive knowledge that class members
11 were waiting to be let out of the store; 2) the risk that the jury would find class members did not
12 incur any involuntary waiting time; 3) the risk that the jury would believe that Defendant’s experts
13 are more credible than Plaintiff’s experts as to the amount of time people were waiting when they
14 were locked in the store on a closing shift; 3) the risk that the jury would find that Home Depot’s
15 conduct was not willful so as to warrant an award of Labor Code § 226 penalties and/or liquidated
16 damages; 4) the evidence presented was not sufficient to prove the aggregate class damages
17 (particularly given this Court’s order that the damages reports of Dr. Krosnick and Mr. Toney may
18 not be presented to the jury); and 6) the risk that Home Depot would be able to convince the Court
19 post-trial that the class should be de-certified, among others.

20 Additionally, numerous rulings in plaintiff’s favor could be subject to challenges on appeal
21 that would threaten to unwind a Plaintiff’s verdict. For example, the Court’s grant of class
22 certification, denial of summary judgment, and issuance of an adverse jury instruction regarding
23 Home Depot’s video surveillance each bear heavily on the outcome of this case and reversal on
24 appeal would clearly undermine a Plaintiff’s verdict. Setareh. Decl. ¶¶ 15-17.

25 As is self-evident by this case; two major decisions materially impacted the outcome of
26 this case. The *Troester* and *Camp* cases are two California Supreme Court cases which became
27 relevant years after the initial complaint in this case was filed. *Troester* effected the
28 compensability of “de minimis” time worked. The Supreme Court’s pending decision in *Camp*
will affect the rounding claim. Conversely; there was obviously the risk of adverse appellate
rulings as well. Setareh. Decl. ¶ 15.

1 Pursuant to the report of Dr. Krosnick at pp. 732-733 (Setareh Decl. Exh 3) the unpaid
2 wages owed on the closing shift claim through June 1, 2021 claim are \$14,905,918. As shown in
3 Exhibit D to the Toney report, this is based on 16,250,438 closing shifts. (Setareh Decl. Exh. 5)
4 The current number of estimated closing shifts is 25,491,919. SA ¶ 86. Extrapolating through the
5 present, the unpaid wages owed on this claim are \$23,252,728.08. Thus, taking the 50% allocated
6 to this claim under the settlement (\$36,250,000 of the Gross Settlement Amount or \$22,020,416 of
7 the Net Settlement Fund), the allocation actually *exceeds* (or is roughly equal to) the potentially-
8 recoverable unpaid wages for this claim.

9 Of course, this analysis assumes the Krosnick estimates of the frequency of violations is
10 accepted. In expert Toney's second report, he calculated damages using the numbers provided by
11 Home Depot's expert and found that, inclusive of interest and liquidated damages under Labor
12 Code § 1194.2(a), the damages through April 30, 2020 would be \$5,591,665.31. Setareh Decl.
13 Exh 6. The allocation to the Post-Shift claim is multiples of this amount.

14 While Dr. Krosnick's report also calculates \$217,130,313 in waiting time penalties and
15 \$93,556,308 in wage statement penalties, (Setareh Decl. Exh. 3 at pp.735-736), the waiting time
16 penalty number would need to be heavily discounted because the Court dismissed that claim—
17 thus, Plaintiffs would have needed to successfully reverse that order on appeal to obtain waiting
18 time penalties. Assuming a 25% likelihood of success on appeal—meaning a 75% deduction—
19 would bring the waiting time penalty exposure down to \$54,282,578.25. A further 10% reduction
20 to account for the possibility of not prevailing at trial brings the number down to \$48,854,320.425;
21 an additional 20% reduction to account for the possibility of losing the willfulness issue at trial
22 brings it down to \$39,083,456.34; another 25% reduction to account for the possibility of
23 decertification post-trial brings it down to \$29,312,592.255; and a further 10% reduction for the
24 possibility of losing on appeal results in reasonable valuation for the waiting time penalties claim
25 of \$26,381,333.02. Setareh Decl. ¶ 17.

26 Likewise, applying each of the above deductions except the 75% deduction related to
27 requiring reversal of the Court's dismissal Order on appeal to the total wage statement penalties
28 calculated by Dr. Krosnick, the \$93,556,308 in claimed penalties would also be reduced

1 substantially. Assuming a 10% reduction for the likelihood of not prevailing at trial, (bringing the
2 number down to \$84,200,677.2), a 20% reduction for the possibility of losing the willfulness issue
3 at trial (bringing it down to \$67,360,541.76), a 25% reduction for the possibility of decertification
4 post-trial (bringing it down to \$50,520,406.32) and a 10% reduction for the possibility of losing on
5 appeal, a reasonable valuation for the wage statement penalties claim would be \$45,468,365.88.
6 Setareh Decl. ¶ 17. As such, the unpaid wages based on Plaintiffs' experts' calculations—plus a
7 reasonable valuation of the penalties—adds up to \$95,102,427.25. The \$36,250,000 allocated
8 under the settlement represents 38% of this amount.

9 While the 38% allocated to the post-shift claim, including potential penalties, is fair and
10 reasonable in light of the substantial risks the class faces, case law suggests that penalties need not
11 be included in determining whether a settlement amount is fair. *Rodriguez v. West Publishing*
12 *Corp*, 563 F.3d 948, 964-965 (9th Cir. 2019). If only the wages are included, the recovery on this
13 claim exceeds the exposure.

14 **b. The Relief for the “Hourly Employee Class” is Adequate Given**
15 **the Risks and Delays of a Trial and Appeal**

16 While Plaintiffs maintain that their Post-Shift Claims are quite strong, the Hourly
17 Employee Claims are less certain. Not only were the legal theories underlying the Hourly
18 Employee Class claims novel, but perhaps more importantly, on July 11, 2019 this Court
19 expressed doubt as to the viability of such claims. See Dkt. 148. In granting summary adjudication
20 in favor of Home Depot on Plaintiffs' Labor Code section 203 and 226 claims tied to the Hourly
21 Employee Class, this Court noted “...there is a material dispute regarding whether members of
22 the Hourly Employee Class were in fact subject to Home Depot's control from the time they
23 entered the store to the time they clocked in.” Dkt. 148, at 9:12-16. Thus, there was a very real
24 possibility that Plaintiffs may not have prevailed on their Hourly Employee Class. See *id.*

25 According to the Krosnick report, the maximum exposure for unpaid wages inclusive of
26 interest and liquidated damages on the Hourly Employee claim was \$114,468,470. Setareh Decl.
27 Exh.3 at p. 731. Exclusive of interest and liquidated damages this amount is \$39,025,166. (This
28 number is arrived at using the Option 1 Unpaid Wages for Pre-Shift Time, including ppron

1 donning and gathering of materials, and Clock in Time). As the Toney report shows, this number
2 was based on 64,481,889 shifts. (Setareh Decl. Exh. 7 at p. 4).

3 The number through the present is 95,382,113 shifts. SA ¶ 86. Extrapolating from Dr.
4 Krosnick's and Mr. Toney's calculations, the exposure for wages on the pre-shift claim would be
5 \$54,366,994. The Settlement allocation of 41%--\$29,725,000 based on the Gross Settlement
6 Amount, or \$18,056,741 based on the Net Settlement Fund—to the pre-shift claim is 54.67%
7 (gross) or 33.2% (net) of this amount.

8 Further, the claim for waiting time and wage statement penalties related to the pre-shift
9 claim was dismissed by the Court, and it is unlikely that the Court's determination that Home
10 Depot's conduct regarding the pre-shift claim was not willful would be overturned on appeal.
11 Setareh Decl. ¶ 19.

12 **c. The relief for the Rounding Class is Adequate Given the Risks**
13 **and Delays of a Trial and Appeal**

14 Plaintiffs' Rounding Claim is equally uncertain. On December 4, 2017, this Court granted
15 Home Depot's motion for summary judgment on Plaintiffs' rounding claim pursuant to 29 C.F.R.
16 § 785.48(b) and *See's Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889, 148 Cal.Rptr.3d
17 690 (2012) ("*See's Candy*"). Class Counsel sought an immediate appeal which was denied. Dkt.
18 85.

19 Shortly thereafter, one of the attorneys who worked on this case through class certification
20 left Setareh Law Group for another firm and filed a separate action titled *Camp v. Home Depot*
21 *U.S.A.* in the Superior Court for the State of California, County of Santa Clara, alleging the same
22 rounding claim ("*Camp*"). This Court remanded *Camp* to the Superior Court of California, and on
23 April 12, 2021, the state court granted Home Depot's motion for summary judgment on the
24 rounding claim. *Camp v. Home Depot, U.S.A., Inc.*, No. 19CV344872, 2021 WL 9794564, at *1
25 (Cal. Super. Apr. 12, 2021). On October 24, 2022, the California Court of Appeal reversed the
26 Superior Court's order granting summary judgment. *Camp v. Home Depot U.S.A., Inc.*, 84 Cal.
27 App. 5th 638, 300 Cal. Rptr. 3d 548 (2022). On February 1, 2023, the California Supreme Court
28 granted Home Depot's petition for review. *Camp v. Home Depot U.S.A.*, 523 P.3d 391 (Cal.

2023). Thus, there is a very real risk that absent Settlement, the Rounding Claim could lose all its value. Setareh Decl. ¶¶ 15, 18.

The estimated exposure on the rounding claim is \$4,450,720 exclusive of interest and liquidated damages. Setareh Decl. ¶ 24. The Settlement agreement allocates 9% to the rounding claim—\$6,525,000 based on the Gross Settlement Amount, or \$3,963,675 based on the Net Settlement Fund—which exceeds the alleged unpaid wages based on the Gross Settlement Amount, or is around 89% of the alleged unpaid wages based on the Net Settlement Fund.

2. The Proposed Method of Distributing relief to the Class is Effective.

The settlement provides that class members will be mailed checks directly and will not need to submit a claim form. And for class members who do not cash their checks, the money will be sent to the State of California Unclaimed Property Fund to be held in the class member's name.

3. The Proposed Award of Attorney Fees is Fair.

The Ninth Circuit “benchmark” for fees is 25% of the fund, but courts may award a higher percentage when merited. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). In appropriate cases, state and federal courts applying the percentage-of-recovery method frequently award 33- 1/3% of the common fund. *See, e.g., Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008) (empirical studies show that California fee awards generally average around one-third of the recovery).

Courts regularly apply a multiplier to the base lodestar to reflect the risks involved, the complexity of the litigation, the length of the case, and other relevant factors. (*See Vizcaino*, 290 F.3d at 1051 (courts “routinely enhance[] the lodestar to reflect the risk of non-payment in common fund cases”).

In addition to the evaluation of “awards made in similar cases” (discussed above), the Court may consider (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of the work; (4) the contingent nature of the fee and the financial burden carried by the Plaintiffs. *See Vizcaino supra* at 1048-50.

The contemplated one-third fee award is extremely reasonable in light of the class benefiting from the substantial risk of the claims litigated, over 7 years of hard work, exceptional results, and

1 over \$3 million in out-of-pocket fees and expenses borne by the Plaintiffs' lawyers without any
2 guarantees of ever recovering these sums.

3 Plaintiffs' Counsel have repeatedly shown their dedication to this case by tackling novel
4 issues of law, devoting a substantial percentage of their resources, and committing to the long-
5 term litigation of this action in the face of great opportunity costs.

6 The second and third factors (i.e. "the risk of litigation"; and, the "skill required and the
7 quality of the work", respectively) are largely intertwined. *In re Washington Public Power Supply*
8 *Sys. Sec. Litig.*, 19 F.3d at 1301 n.10.

9 Here, it is undeniable that Class Counsel faced nearly insurmountable risk in pursuing this
10 litigation that was only overcome by their overwhelming skill and experience in the field of wage
11 & hour class actions. (See Setareh Dec, at ¶¶ 29-31; Kennedy Dec. at ¶¶ 3-9) It is undeniable that
12 this case, and the associated theories of liability, were deeply enmeshed with truly novel issues of
13 law that were yet to be decided at the time of filing.

14 This lawsuit was filed in 2016, years before *Troester v. Starbucks Corp.*, 2014 WL
15 1004098, at *3 (C.D. Cal. Mar. 7, 2014), *rev'd and remanded*, 738 F. App'x 562 (9th Cir. 2018)
16 (recognizing that at that time "numerous courts [had] held that daily periods of approximately 10
17 minutes are de minimis"). Plaintiff's Counsel litigated this action for more than three years, at
18 great risk of summary judgment, until the California Supreme Court issued their seminal ruling in
19 *Troester. Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 844 (2018), *as modified on denial of reh'g*
20 (Aug. 29, 2018)

21 The Court should also note that the "de minimis" issue in was not the only novel issue of
22 law presenting a true and substantial risk in this action. A few other examples include the issue of
23 whether the presence of some uninjured class members would defeat certification (later clarified in
24 *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*) and whether Defendant's
25 rounding practices subject it to liability (currently before the California Supreme Court in *Camp v.*
26 *Home Depot U.S.A.*). See *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31
27 F.4th 651, 669 (9th Cir.); *Camp v. Home Depot U.S.A.*, 523 P.3d 391 (Cal. 2023).

28 ///

1 Plaintiff's Counsel also clearly faced substantial risks associated with certifying and
2 maintaining this class action case until the eve of trial. These numerous exceptional risks faced by
3 Counsel, coupled with their deft skill in keeping this litigation on course towards trial until a
4 settlement was reached, clearly justify the 33.3% award contemplated by the settlement
5 agreement. *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM SHX, 2008 WL
6 8150856, at *15 (C.D. Cal. July 21, 2008) ("Given the novel legal issues raised, the court
7 concludes that the circumstances warrant an award" of 34%).

8 The fourth factor (i.e. "the contingent nature of the fee and the financial burden carried by
9 the Plaintiffs) also clearly weighs in favor of the contemplated attorney fee 33.3% award. *In re*
10 *Quantum Health Resources, Inc.* 962 F. Supp. 1254, 1257 (1997). Here, Class Counsel undertook
11 all of the risks of this litigation on a contingent fee basis. They also faced the risks involved in
12 litigating this case for years and spending literally *millions* of dollars in costs, without any
13 guarantee of future pay or reimbursement.

14 Here, Plaintiffs' Counsel invested much more time and money, and carried a much higher
15 financial burden, than that typical of a normal wage and hour class action. See Setareh Decl. at ¶¶
16 32-35; Kennedy Decl. at ¶¶ 11-12.

17 In addition to these hard costs, Plaintiffs' Counsel committed thousands of attorney hours
18 to the action. As the Court is aware, there are nearly four hundred docket entries in this action and
19 Plaintiffs have been faced with repeated major and dispositive motions ranging from class
20 certification, to decertification, and summary judgment. Over forty depositions were taken of class
21 members, corporate witnesses, Plaintiffs and experts and Plaintiffs were well into their preparation
22 for trial. Additionally, the number of attorneys, paralegals, and staff necessary to litigate this
23 action constituted a significant percentage of Plaintiffs' Counsel's respective firms' total
24 workforce. See Setareh Decl. at ¶ 33 Kennedy Decl. at ¶ 11. Again, all of these important
25 resources were willingly committed by Plaintiffs' Counsel knowing that they risked recovering
26 nothing.

27 **4. Any Agreement Required to be Identified Under Rule 23(e) (3).**

28 Other than the Settlement Agreement, there are no such agreements. Setareh Decl. ¶ 21.

1 **D. Class Members Will Be Treated Equitably Relative to One Another**

2 Rule 23(e) (2)(D) requires a court to determine whether the “proposal treats class members
3 equitably relative to each other.” For this factor, “[m]atters of concern could include whether the
4 apportionment of relief among class members takes appropriate account of differences among
5 their claims, and whether the scope of the release may affect class members in different ways that
6 bear on the apportionment of relief.” Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes.

7 Here, the Parties allocated: (1) 95% of the NSF to the Class Settlement Fund (with 5% to
8 PAGA); (2) 41% of the Class Settlement Fund to the Hourly Employee Class, (3) 50% of the
9 Class Settlement Fund to the Post-Shift Class, and (4) 9% of the Class Settlement Fund to the
10 Rounding Class based on the relative valuations of the claims.

11 Moreover, the amount of money each Hourly Employee Class Member receives is directly
12 proportional to the number of Shifts that Hourly Employee Class member worked during the Class
13 Period, and the amount of money each Post-Shift Class Member receives is directly proportional
14 to the number of Closing Shifts that Class Member worked during the Class Period. SA ¶¶ 43, 63.
15 The Rounding Class is limited to those whose time records reflect an overall loss as a result of
16 rounding, each of whom will receive an equal distribution. SA ¶¶ 72-74. Finally, the 5% allocation
17 to the PAGA claim will be distributed pursuant to the California Labor Code, which mandates that
18 75% go to the California Labor and Workforce Development Agency (“LWDA”), and the
19 remaining 25% go to the PAGA aggrieved employees. SA ¶¶ 72, 74. Pursuant to the terms of the
20 Settlement Agreement, the 25% allocation to the PAGA aggrieved employees will be distributed
21 to them pro rata based on the number of pay periods each worked during the applicable PAGA
22 period. Such a distribution is inherently just, fair and reasonable.

23 **VI. THE NORTHERN DISTRICT’S PROCEDURAL GUIDANCE**

24 **A. Information About the Settlement.**

25 **1. Differences Between the Settlement Classes and the Certified Classes.**

26 In order to provide a global peace on the issues litigated in this case, the parties agreed that
27 the time period of the certified classes would be extended through the date of preliminary
28 approval. SA ¶ 13.

1 There is also a change in the class definition of the Hourly Employee Class, which is really
2 a clarification. Specifically, the Settlement Agreement expressly limits the definition of the Hourly
3 Employee Class to persons employed in retail stores. SA ¶ 40. Given that the certified claims of
4 the Hourly Employee Class are based on walking to the back of the store to get the apron and
5 clock in, it was always understood that this was a class of retail employees. The change simply
6 clarifies that.

7 Additionally, the Settlement proposes for settlement purposes certification of a Rounding
8 Class. SA ¶ 74. This is a claim that has been pleaded in the case since December 15, 2016, when
9 this Court granted Plaintiff's motion for leave to file a Second Amended Complaint. Dkt. 29. It is
10 reasonable that Home Depot wishes to settle all claims asserted in the action.

11 **2. Differences in the Claims to be Released and the Claims Pled or**
12 **Certified.**

13 First, the Settlement Agreement expressly releases FLSA claims, even though the
14 pleadings do not assert an FLSA claim. Under Ninth Circuit precedent, FLSA claims based on the
15 same factual predicate as state law wage and hour claims are released even if there is no FLSA
16 claim pleaded in the settled lawsuit. *Rangel v. PLS Check Cashers of California Inc.*, 899 F.3d
17 1106, 1111 (9th Cir. 2018). By including an express release of FLSA claims, settlement class
members are alerted to a consequence of the settlement that would occur anyway.

18 Second, the Settlement Agreement releases the rounding claim. The claim has been in the
19 case since the filing of the Second Amended Complaint, and the Court's order granting partial
20 summary judgment would be reviewable on appeal from any verdict that occurred.

21 Third, the Settlement Agreement, in order to give Home Depot a global peace includes in
22 the definition of walking time activities related to donning and doffing the apron that occur at the
23 end of the shift whereas the pleadings refer only to pre-shift activity. SA ¶ 84.

24 **3. The Class Recovery Under the Settlement.**

25 The class recovery under the Settlement is discussed in section III B-C *supra*.

26 **4. Other Cases Affected by the Settlement.**

27 The case of *White v. Home Depot U.S.A., Inc.*, S.D. Cal., Case No. 22-cv-00276 has a
28 claim for employees locked in stores that would presumably be released by this settlement.

1 Plaintiffs' counsel in that case did not participate in the settlement negotiations in this case.
2 However, in March of 2022, Class Counsel in *Utne* spoke to counsel for White, and White's
3 counsel agreed that they would stipulate to stay any overlapping claims and would also agree not
4 to settle any claims in *Utne*. Setareh Decl. ¶ 22. Class Counsel does not believe that the pendency
5 of the *White* case, which was filed years after this case and does not have any certified classes,
6 bears on the decision regarding approval of this settlement.

7 Further, the case of *Camp v. Home Depot USA Inc.*, Santa Clara Superior Court Case No.
8 19CV3448 has a rounding claim that would presumably be released by this settlement. The *Camp*
9 case is pending before the California Supreme Court on the issue of whether rounding is legal
10 where it does not harm employees in the aggregate, but individual employees are underpaid. *Camp*
11 *v. Home Depot USA Inc.*, Case No. S277518. By way of background, *Camp* was filed by attorney
12 Howard Scott Leviant Esquire who while working at Setareh Law Group represented Plaintiff
13 Utne and the Certified Hourly Employee and Lock-In Classes. After leaving Setareh Law Group,
14 Mr. Leviant filed *Camp*, which asserts the same rounding theory that Utne asserted in this case.
15 No motion for class certification has been filed and no class has been certified in *Camp*.

16 As this Court has previously observed: "Utne's rounding claim is not a distinct cause of
17 action, but rather one among several theories of liability, but rather one among several theories of
18 liability he has advanced in pursuit of his wage and hour claims. As such, the rounding claim is
19 intertwined with Utne's remaining claims and the facts on which they are based." January 31,
20 2018, Order Denying Motion for Entry of Final Judgment. Dkt. No. 85 at 2:2-5. While the Court
21 granted summary judgment on the rounding claim, that order would be subject to appeal following
22 any trial of this case.

23 Class counsel spoke with Camp's counsel on May 15, 2023 to advise them that the
24 settlement of this case includes rounding claims. Setareh Decl. ¶ 23. The inclusion of rounding
25 claims should have no bearing on the decision regarding approval. This case is the first-filed case
26 raising the rounding claim and it is appropriate to resolve it here. Mr. Camp of course can opt out
27 of this settlement if he wishes to obtain a ruling from the California Supreme Court on the legal
28 issue regarding rounding. And, if the California Supreme Court determines the issue to be

1 important enough, it can decide the appeal even if Mr. Camp settles his claims by not opting out.
2 *Berroterran v. Superior Court*, 12 Cal.5th 867, 976-877 (2022).

3 **5. The Proposed Allocation for the Settlement Fund**

4 The settlement fund allocation is described in section III. C. *supra*.

5 **6. Claim Form.**

6 Not applicable. The settlement contemplates mailing checks to settlement class members
7 without the necessity of a claim form.

8 **7. Reversion to Defendant.**

9 Not applicable. The settlement is non-reversionary. Uncashed checks will be sent to the
10 state controller's office to be held in the class member's name. The settlement also provides for a
11 reserve fund of \$10,000 to deal with disputed claims. Any residue of the reserve fund will go to cy
12 pres.

13 **B. Settlement Administration**

14 The parties obtained settlement administration quotes from five (5) settlement
15 administrators: (1) CPT Group, Inc. ("CPT"), (2) ILYM Group, Inc. ("ILYM"), (3) Rust
16 Consulting ("Rust"), (4) Kroll, LLC ("Kroll"), and (5) Kurtzman Carson Consultants, LLC
17 ("KCC") (collectively, the "Prospective Settlement Administrators"). Setareh Decl.¶ 27. The
18 parties are still evaluating the bids and will submit a supplemental declaration on this issue.

19 **C. Notice.**

20 The Notice of Settlement of PAGA and Class Action suit is attached to the Declaration of
21 Shaun Setareh as Exhibit 2. Consistent with section 3 of the Procedural Guidance, the Notice
22 provides contact information for Class Counsel (Exhibit 2 pp. 6, 7); a website address for
23 settlement class members to obtain further information and instructions on how to obtain further
24 information on PACER (*id* at 6); the date and time of the final approval hearing (*id.*); and instructs
25 class members to check the website or PACER to ensure the date and time of the final approval
26 hearing have not changed. (*Id.*)

27 The Notice also uses the proposed language suggested in the Procedural Guidance. *Id.* at 7.

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1 **D. Opt Outs.**

2 The Notice advises class members that they can opt out by sending a written request to the
3 administrator. It also advises them of the consequences of opting out, and sets forth information
4 required for identification purposes including name, address, the last four digits of the social
5 security number or full employee ID, and a signature. *Id.* at 7.

6 **E. Objections.**

7 The Notice advises class members of the deadline to submit objections and provides that
8 objections are to be sent to the Court. *Id.* at 7. The Notice contains the language suggested in the
9 Procedural Guidance. *Id.* It also instructs class members to include their name, address, last four
10 digits of social security number, a statement of the reasons for objecting and to sign and date the
11 objection. *Id.*

12 **F. Attorney Fees and Costs.**

13 See discussion in section V C II *supra*.

14 **G. Service Awards.**

15 Plaintiffs seek an award of \$25,000 to be paid to the estate of Mr. Utne for the extensive
16 time and effort he contributed to this case, without which the \$72,500,000.00 Settlement would
17 not exist. Setareh Decl. ¶ 26. Mr. Utne attended deposition in this matter and personally attended
18 the first mediation. *Id.* Mr. Utne provided substantial assistance to Class Counsel in developing the
19 claims in this case, and provided relevant documents and also cell-phone video depicting the "lock
20 in" time. *Id.* Plaintiffs further seek a \$7,500 service award to be paid to Mr. Pinto for the time and
21 effort he dedicated to this case over the past year, which included, *inter alia*: (1) extensive
22 communications with Plaintiff's counsel, (2) responding to written discovery, (3) preparing for his
23 deposition, (4) traveling to and sitting for his deposition, and (5) discussing the pending settlement
24 with Plaintiff's counsel. Setareh Decl. ¶ 25.

25 **H. Cy Pres.**

26 Pursuant to the Settlement Agreement, uncashed checks are to be sent to the State of
27 California unclaimed property fund to be held in the class member's name. Any unused funds
28 from the \$10,000 Reserve Fund will go to the Homer Fund or another appropriate 501(c)(3) non-

1 profit agreed upon by the parties and approved by the Court.

2 **I. Timeline.**

3 A proposed timeline for the Settlement is included in the Proposed Order filed
4 concurrently herewith.

5 **J. Class Action Fairness Act (CAFA) and Similar Requirements.**

6 Defendant will comply with CAFA—under the parties’ Agreement, the Settlement
7 Administrator shall submit the required notice within 10 days of filing of this motion. On the date
8 of filing this motion, Class Counsel uploaded a copy of this motion and exhibits including the
9 Settlement Agreement to the LWDA website. Setareh Decl. ¶ 36.

10 **K. Comparable Outcomes.**

11 The most comparable settlement to the instant one is likely *Frlekin v. Apple*, 2021 WL
12 6126961 (N.D. Cal. 2021), which involved similar off-the-clock claims. However, that settlement
13 occurred after the district court had granted summary judgment to the plaintiff class on liability,
14 and the Ninth Circuit had affirmed that decision. Thus, *Frlekin* involved much less risk at the time
15 of settlement. The *Frlekin* settlement involved a total settlement fund of \$29.9 million for 14,683
16 class members. *Id.* at *2. However, there are few wage and hour class actions which have settled
17 for a class of this size or in an equivalent amount.

18 **L. Electronic Versions.**

19 Upon filing of this motion, Class Counsel will submit Word versions of the Proposed
20 Order and Settlement Notice.

21 **M. Overlapping Cases.**

22 Home Depot’s counsel represents that they will comply with this requirement.

23 **VII. THE PAGA ALLOCATION IS PROPER**

24 PAGA provides for a \$100 per employee per pay period penalty for the “initial” violation and
25 \$200 per employee per pay period for “subsequent” violations. Cal. Lab. Code § 2699(f)(2).

26 Theoretically, based on the Krosnick report, the PAGA penalties could be in excess of \$1
27 billion. However, it is well-settled that a PAGA penalty award should be proportionate to the
28 underlying damages. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1214 (2008): “The penalty

1 award which totaled less than one-third of plaintiff's \$804,783 damage award, was also proportional to
2 Cintas's misconduct." Plaintiff assumes that a court would award at most a 3.0 multiple of the Post-
3 Shift Claim wages, and a 0.5 multiple of the Pre-Shift Time and Rounding wages (given Home
4 Depot's legal justifications on those claims) meaning that the maximum PAGA penalties that would
5 realistically be awarded could be \$99,166,941.24.

6 The Agreement provides for a PAGA allocation of \$3,625,000, of which 75% will be paid to
7 the LWDA out of the gross settlement amount, and the remaining 25% will be distributed to PAGA
8 Group Members. (SA ¶¶ 47,55).

9 Admittedly, the PAGA allocation is a small percentage of the possible exposure (3.6% of
10 what realistically might be awarded). However, Plaintiff submits that is permissible in this case
11 because the settlement of the underlying wage and hour claims is robust, and that serves the deterrent
12 purpose of the PAGA statute. *O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135
13 (N.D. Cal. 2016): "By providing fair compensation to the class members as employees and
14 substantial monetary relief, a settlement not only vindicates the rights of class members as employees
15 but may have a deterrent effect upon the defendant employer and other employers, an objective of
16 PAGA."

17 Courts have routinely approved similar PAGA allocations. *Viceral v. Mistras Group, Inc.*,
18 2016 WL5907869 (N.D. Cal. 2016) (0.15%); *Saechao v. Landrys, Inc.*, 2016 WL 3227180, *3 (N.D.
19 Cal. June 11, 2016) (approving settlement of PAGA claim for \$12,000, or 1.3% of the estimated total
20 PAGA value of \$921,000, according to the plaintiff's expert).

21 This is because trial courts have broad discretion to reduce the amount of PAGA penalties if the
22 award would be: "unjust, arbitrary and oppressive or confiscatory." Cal. Lab. Code § 2699(e)(2). The
23 PAGA allocation should be approved.

24 **VIII. THE COURT SHOULD CERTIFY THREE SETTLEMENT CLASSES, AND**
25 **APPOINT PLAINTIFFS AND CLASS COUNSEL TO REPRESENT THEM**

26 **A. The Court's Previous Certification of the "Lock-In" and "Hourly" Classes**
27 **Should Be Affirmed.**

28 Where a class has been previously certified, the Court need not engage in a detailed
certification analysis for purposes of settlement. *See e.g., Harris v. Vector Marketing*, No. C-08-

1 5198, 2012 WL 381202 at *3 (N.D. Cal. Feb. 6, 2012) (“As a preliminary matter, the Court notes
2 that it previously certified . . . a Rule 23(b)(3) class . . . [and thus] need not analyze whether the
3 requirements for certification have been met and may focus instead on whether the proposed
4 settlement is fair, adequate, and reasonable.”);.

5 On March 30, 2018, the Court certified the “Lock-In Class” which “encompasses “[a]ll
6 individuals employed by Home Depot in hourly-paid or non-exempt positions in Home Depot
7 stores in California at any time since March 8, 2012, and who worked at least one shift ending
8 after the time that the Home Depot store was scheduled to close to the public for the evening” and
9 the “Hourly Employee Class” which encompasses “[a]ll individuals employed by Home Depot in
10 hourly-paid or non-exempt positions in California at any time since March 8, 2012.” *Utne v. Home*
11 *Depot U.S.A., Inc.*, No. 16-CV-01854-RS, 2018 WL 1989499, at *1 (N.D. Cal. Mar. 30, 2018).

12 The instant Settlement Agreement incorporates both of these previously-certified classes
13 with only three minor, non-material, changes: 1) the class period has been updated to encompass
14 workers employed by Defendant up to the date of preliminary approval (versus the date of original
15 certification); 2) the Settlement Agreement uses the term “Post-Shift Class” in lieu of the previous
16 term “Lock-In Class”; and 3) the Hourly Employee Class definition was amended to clarify that it
17 includes only retail employees. See Settlement Agreement at ¶¶ 40, 60, 72. Because these
18 previously-certified classes have not materially changed, the certification of the Post-Shift and
19 Hourly Classes should be affirmed for purposes of this settlement.

20 **B. The “Rounding Class” Should Also Be Conditionally Certified For Purposes**
21 **of Settlement**

22 **1. Standard for Conditional Class Certification Upon Settlement**

23 Parties seeking class certification for settlement purposes must still generally satisfy the
24 requirements of Federal Rule of Civil Procedure 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S.
25 591, 620 (1997). To maintain a class action under Rule 23(a), a plaintiff must demonstrate: (1)
26 numerosity: the class is so numerous that joinder of all members is impracticable, (2) adequacy of
27 representation: the representative parties will fairly and adequately protect the interests of the
28 class, (3) typicality: the claims or defenses of the representative parties are typical of the claims or
defenses of the class, and (4) commonality: there are questions of law or fact common to the class.

1 In addition to these requirements, a plaintiff must satisfy one of the Rule 23(b) prongs to maintain
2 a class action. Under Rule 23(b)(3), the plaintiff must prove: “the questions of law or fact common
3 to class members predominate over any questions affecting only individual members, and that a
4 class action is superior to other available methods for fairly and efficiently adjudicating the
5 controversy.” However, in the context of settlement, the Court “need not inquire whether the case,
6 if tried, would present intractable management problems . . . for the proposal is that there be no
7 trial.” *Amchem supra* at 620.

8 The rounding claim was first asserted in Plaintiff’s Second Amended Complaint. Summary
9 judgment was granted in Defendant’s favor but Plaintiffs continue to maintain the right to appeal
10 the Court’s prior dismissal. The rounding class is defined as “all individuals employed by Home
11 Depot who worked one or more shifts in retail stores in hourly-paid or non-exempt positions in
12 California during the Class Period and who were paid less than their actual clock-in and clock-out
13 time for his or her total hours worked during the Class Period as a result of Home Depot’s practice
14 of rounding time to the nearest quarter hour, including persons hired after notice of class
15 certification.” SA ¶ 72.

16 **2. Numerosity**

17 To satisfy the numerosity requirement under Rule 23(a)(1), the class must be “so numerous
18 that joinder of all members is impracticable”. *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580,
19 588 (C.D. Cal. 2008). Here, approximately 149,551 members of the rounding class have been
20 identified.

21 **3. Adequacy of Representation**

22 Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the
23 interests of the class.” Here, just as with the previously certified claims, the parties agree that
24 Plaintiffs and their counsel have no conflicts of interest with other class members and have and
25 will prosecute the action vigorously on behalf of the class.

26 **4. Typicality**

27 Rule 23(a) likewise requires that “the claims or defenses of the representative parties are
28 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3).

1 Here, Plaintiffs, as class representatives, share with all other class members that they were
2 employed by Defendants during the relevant time period, they were subject to the same rounding
3 practices being challenged by this litigation, and they allege that they were in fact negatively
4 affected by those practices. Accordingly, the typicality requirement is satisfied.

5 **5. Commonality**

6 The final requirement under Rule 23(a) is that “there are questions of law or fact common
7 to the class.” Fed. R. Civ. P. 23(a)(2). Here, common questions of fact predating the rounding
8 claim (i.e. Defendant’s rounding policies) are largely undisputed; further, the class members share
9 the following common questions of law: (1) did Defendant’s rounding practices result in the
10 underpayment of hours worked to the rounding class; and (2) could Defendant assert a “de
11 minimis” defense following the Cal. Supreme Court’s ruling in *Troester*?

12 **6. Predominance and Superiority**

13 For settlement purposes common issues regarding the legality of Home Depot’s rounding
14 practices predominate over any individualized issues. And, given the small size of any individual
15 claims, class treatment is plainly superior to individual adjudication.

16 **IX. CONCLUSION**

17 The Settlement is an excellent one, arrived at with more than enough litigation and
18 discovery for the parties to accurately value the claims. Preliminary approval should be granted.

19 DATED: June 22, 2023

SETAREH LAW GROUP

20 /s/ Shaun Setareh

21 SHAUN SETAREH

22 THOMAS SEGAL

23 FARRAH GRANT

TYSON GIBBS

Attorneys for Plaintiffs

24 DATED: June 22, 2023

MARLIN & SALTZMAN LLP

25 /s/ Cody R. Kennedy

26 ALAN LAZAR

CODY KENNEDY

27 Attorneys for Plaintiffs