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Attorneys for Plaintiffs John Utne and Alfred Pinto, individually and on behalf of all others similarly situated and aggrieved

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

vs.

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

Defendants.

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

NOTICE OF MOTION AND MOTION FOR AWARD OF ATTORNEY FEES, LITIGATION EXPENSES AND CLASS REPRESENTATIVE SERVICE AWARDS; MEMORANDUM OF POINTS AND AUTHORITIES

[Filed Concurrently with Declaration of Shaun Setareh; Declaration of Cody R. Kennedy; Declaration of Karen Utne; Declaration of Alfred Pinto; Declaration of Bernella Osterlund]

Date: February 15, 2024
Time: 1:30pm
Courtroom: 3

Action Filed: March 8, 2016

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TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 15, 2024 at 1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 3 of this Court, located at 450 Golden Gate Avenue, 17th Floor, San Francisco, CA 94102, THE ESTATE OF JOHN UTNE THROUGH HIS SUCCESSOR IN INTEREST KAREN UTNE and ALFRED PINTO, on behalf of themselves and all others similarly situated and the general public ("Plaintiffs"), move for an award of attorney fees, litigation expenses, and class representative service awards.

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

Plaintiffs request the following relief:

1. An award of attorney fees in the amount of $ 24,166,66.66;
2. An award of litigation expenses in the amount of $3,184,159.45;
3. A service award of $25,000 to The Estate of John Utne through his successor in interest Karen Utne;
4. A service award of $7,500 to Alfred Pinto;
5. Any other relief that the Court deems just and equitable under the circumstances.

DATED: November 13, 2023

SETAREH LAW GROUP

/s/ Shaun Setareh
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Attorneys for Plaintiffs

DATED: November 13, 2023

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I. INTRODUCTION

After nearly seven (7) years of heavily contested litigation in this Court, Plaintiffs are pleased to seek final approval of the $72.5 million non-reversionary Settlement reached for the benefit of the class and, by way of this related motion; seeks approval of attorneys' fees, costs, and service awards.

Plaintiffs request approval of attorneys' fees in the amount of 1/3 of the common fund (i.e. $24,166,66.66), $3,184,159.45 in costs incurred by Class Counsel expended directly in furtherance of the case, and service awards to the representative Plaintiffs in the amount of $25,000 and $7,500 respectively. As will be discussed in detail herein, these requests are eminently reasonable especially given the unique facts and procedural posture of the case.

The instant Settlement provides a substantial and immediate recovery for the 287,872 Settlement Class Members, and serves as a prized outcome in the face of intense opposition by a major national retail corporation with nearly limitless resources at its disposal. Class Counsel, the Setareh Law Group and Marlin & Saltzman, have truly put their all into this case, devoting manpower and monetary resources far beyond what could reasonably be expected in a typical wage and hour class action. This has proven to be a very unique case in not one, but several respects, which required an unprecedented degree of skill and level of personal attention necessary to foster the results obtained. Further, Plaintiffs and their Counsel were forced to face nearly insurmountable challenges at almost every corner, yet they still ultimately prevailed on behalf of the Class. Among other things, Plaintiffs' Counsel were faced with:

- **Truly Novel Issues of Law:** At the time of filing, success on the claims asserted by Plaintiffs was highly contingent upon novel legal theories being resolved in their favor. This is illustrated by the fact that, not one, but two highly contested issues in this case were ultimately taken up for review by the California Supreme Court during the pendency of this action. First was the non-application of the federal de minimis doctrine, which was addressed in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 421 P.3d 1114 (2018) approximately 2.5 years after this case was filed. That decision, obtained by the same Class Counsel here, paved the way for the claims asserted in

this action which similarly involved regularly occurring unpaid work time in small incremental durations. Had *Troester* not been taken up and resolved in Plaintiffs' favor during the life of this case, there was a high likelihood that Plaintiffs would have needed to take *this* action to the Cal. Supreme Court prior to the claims being given any serious settlement value. Second, the question of whether Home Depot's time rounding practices comply with California law has now been granted review in the related case of *Camp v. Home Depot U.S.A.*, 523 P.3d 391 (Cal. 2023). As this Court may recall Class Counsel here were the first to advance the underlying legal arguments and theories regarding Home Depot's time-rounding policies eventually relied upon in *Camp*. Further, Class Counsel here had sought interlocutory appeal of the exact same issue, and ultimately succeeded in obtaining full value for the time-rounding claims as part of this instant settlement.

- **Extremely Complex Liability and Damages Models:** A combined total of eight highly respected experts were retained by the Parties. These experts tackled complex issues involving detailed surveys, statistical analysis, damage models, and review of retail practices. Notably, Plaintiffs' survey expert Dr. Krosnic alone drafted over 1600 pages in combined reports which were cited extensively by this Court in its decision to deny decertification.
- **Extraordinarily High Litigation Costs:** Class Counsel, comprised of only two boutique Plaintiff-side firms, willingly provided more than three million ($3,000,000) dollars towards litigation costs on behalf of the Class in this case. This alone is truly remarkable and evidences the sheer dedication and belief in this case held by Counsel, with absolutely no guarantee of return.
- **Highly Skilled Opponents:** Defendant is a major national retailer with nearly limitless resources, who has in-turn been represented by highly skilled and nationally recognized Defense firms throughout the entirety of this case. This has led to impassioned legal battles between the Parties over nearly every key issue in this action.

- **Lengthy Litigation:** As the Court is aware, this action has had a long and colorful history spanning nearly seven years. Over that time, Plaintiffs and their Counsel have deftly navigated through numerous discovery disputes, class certification, decertification, and summary judgement proceedings resulting in a docket fast-approaching 400 entries. The Parties reached the highly-prized settlement now presented for approval only after multiple mediation attempts and with the inherent risks of trial looming.

In spite of these and other challenges, Plaintiffs and Class Counsel succeeded in obtaining a prized settlement on behalf of the Class with objectively impressive recovery rates for the claims alleged. These remarkable results have since been underscored by an equally exceptional class member participation rate, with only one objection and fourteen (14) opt-outs to date, out of the nearly 300,000 workers who comprise the class.

For these reasons, and those discussed in more detail *infra*, the requested fee, cost, and service awards now sought in conjunction with the settlement are fully justified.

II. CLASS COUNSEL'S WORK ON BEHALF OF THE CLASS RESULTING IN A $72.5 MILLION NON-REVERSIONARY FUND.

A. Class Counsel File Complaint and Amend the Pleadings.

This action was filed on March 8, 2016, in the Superior Court for the State of California, County of Alameda. Plaintiff then filed a First Amended Complaint to add a cause of action for civil penalties under the California Labor Code Private Attorneys General Act ("PAGA") Setareh Decl. ¶ 2. Home Depot removed the action to this Court on April 8, 2016. *Id.* ¶ 3.

On November 30, 2016, Plaintiff filed a motion for leave to file a Second Amended Complaint raising allegations that Home Depot unfairly rounded employee time punches, which the Court granted on December 15, 2016. *Id.* ¶ 5.

On August 16, 2017, Plaintiff filed a motion for leave to file a Third Amended Complaint to assert causes of action based on Home Depot's alleged policy and practice of requiring off the clock activity when employees start their shift. The Court ordered the parties to meet and confer about the issue which resulted in a stipulation to file the TAC. *Id.* ¶ 6.

1 On March 31, 2022, Plaintiff sought leave to file a Fourth Amended Complaint ("4AC") to
2 address a prior order dismissing Plaintiff's PAGA claim. The Court granted Plaintiff's motion. *Id.*
3 *¶* 7.

4 On June 21, 2022, Plaintiff filed a motion for leave to file a Fifth Amended Complaint
5 Seeking to Add a new Plaintiff (Alfred Pinto) to, among other things, address concerns about
6 Plaintiff's failing health. The court granted the motion, and required Plaintiff Pinto to file a motion
7 to be appointed as class representative. *id.* ¶ 8. Plaintiff Pinto filed the motion which the court
8 granted. *id.* ¶ 9.

9 **B. Class Counsel Obtain Class Contact Information, Relevant Written**
10 **Policies and Timekeeping and Payroll Data.**

11 Plaintiff propounded written discovery consisting of three sets of interrogatories (including
12 seeking class contact information, information on Home Depot's payroll systems and time records,
13 Home Depot's policies regarding closing shifts, information on Home Depot's defenses on the
14 merits, and class certification) three sets of requests for production (including seeking production
15 of time and pay records, the relevant written policies, and video from Home Depot's
16 surveillance systems showing exits on closing shifts, and maps showing the layout of California
17 stores) and request for admission. Setareh Decl. ¶¶ 10-17.

18 The parties also negotiated for notice to be sent to a sampling of 5000 randomly putative
19 class members that their contact information would be sent to Class Counsel if they did not opt out.
20 Setareh Decl. ¶ 14. As a result, Plaintiff obtained contact information for thousands of employees.
21 *Id.*

22 Throughout the litigation, it is estimated that Home Depot produced more than 20,000 pages
23 of documents in addition to voluminous electronic records. Setareh Decl. ¶ 18.

24 **C. Class Counsel Depose Home Depot's Rule 30(b)(6) Designees Obtaining**
25 **Critical Admissions That Established the Predicate for Class**
Certification

26 On July 18, 2017, Class Counsel travelled to Atlanta, Georgia to take the depositions of
27 Home Depot's Rule 30(b)(6) designees Barbara Pennington and Christine Barnaby. Setareh Decl.
28 ¶ 19.

These depositions resulted in admissions that were critical for obtaining class certification. For example, Home Depot's Rule 30(b)(6) designee Pennington admitted that Home Depot requires associates to go to the back of the store, don the apron, and then clock in. ECF No. 70 at 6:6-18. Pennington also gave critical testimony regarding the policies on closing shifts, including that only managers and supervisors can open the locked doors, and that employees will page the manager or supervisor to be let out of the store. *Id.* at 8:6-9:3.

D. Class Counsel Oppose Home Depot's Motion for Summary Judgment as to Rounding on a Theory Ultimately Adopted by the California Court of Appeal in a Different Case Against Home Depot.

On August 9, 2017, Home Depot filed a Motion for Partial Summary Judgment on the claim involving rounding practices. Setareh Decl. ¶ 89. Home Depot refiled the motion after the filing of Plaintiff's Third Amended Complaint, Plaintiff opposed the motion, Home Depot filed a reply brief, and the Court granted the motion on December 4, 2017. Setareh Decl. ¶¶ 91-93. On December 29, 2017, Plaintiff filed a motion for entry of judgment under Rule 54(b) and requested that the Court sever the rounding claim for immediate appeal, which the Court denied on January 31, 2018. Setareh Decl. ¶ 94.

In opposing the motion, Class Counsel argued that any employee underpaid due to rounding should be entitled to recover the underpaid wages. ECF No. 68 at 17:12-18:7. Class Counsel in seeking an interlocutory appeal under Rule 54(b) also argued that the California Supreme Court's grant of review in the *Troester* case likely signaled the death knell for rounding. ECF No. 83 at1:25-2:3. These arguments were later accepted by the California Court of Appeal in *Camp v. Home Depot USA, Inc.,* 84 Cal.App.4th 538 (2022) and *Woodworth v. Loma Linda University Medical Center,* 93 Cal.App.4th 1038 (2023) although the California Supreme Court has now granted review in both cases.

E. Class Counsel's Successful Motion for Class Certification.

Prior to filing the motion for class certification, Class Counsel interviewed 64 Home Depot employees about their experience related to the issues in this case. Setareh Decl. ¶ 63.

On November 14, 2017, Plaintiff filed the motion for class certification, supported by 67 declarations from putative class members (47 obtained by Class Counsel and 20 obtained by Home

Depot and produced in discovery) as well as an expert declaration and counsel declaration. Setareh Decl. ¶ 64. On March 20, 2018, the Court issued an order certifying two classes, the "Lock in Class" and the "Hourly Employee Class." Setareh Decl. ¶ 65.

F. Class Counsel Successfully Oppose Home Depot's Rule 23(f) Petition.

On April 13, 2018, Home Depot filed a Petition for Permission to Appeal this Court's Order granting Plaintiff's Motion For Class Certification, which Class Counsel opposed, and which the Ninth Circuit denied on June 28, 2018. Setareh Decl.¶¶ 67-69.

G. Class Counsel Ensure that Notice is Sent to the Class.

On April 19, 2018, Plaintiff filed a motion to approve class notice, which the Court initially denied without prejudice pending Home Depot's Rule 23(f) Petition, but which the Court subsequently granted on August 21, 2018. Setareh Decl. ¶¶ 71,77.

H. Class Counsel Defend the Depositions of Named Plaintiffs and 25 Putative Class Members.

On December 13, 2018, Class Counsel defended the deposition of class representative John Utne in San Francisco. Setareh Decl.¶ 21.

Between January 4, 2019, and February 26, 2019, Class Counsel defended the depositions of 25 putative class members. Setareh Decl. ¶¶ 21-43.

On August 31, 2022, Class Counsel defended the deposition of class representative Alfred Pinto. Setareh Decl.¶ 44.

I. Class Counsel Defeat Home Depot's Motion for Summary Judgment as to the Walk Time Claim.

On November 7, 2019, Plaintiff filed a motion for partial summary judgment for the certified classes as to the First Cause of Action for failure to pay hourly wages, seeking a liability determination on the lock in and walk time claims, including 81 declarations and exhibits in support. Setareh Decl. ¶ 95. Home Depot opposed the motion on March 28, 2019. Setareh Decl.¶ 96. Plaintiff filed a reply brief on April 25, 2019. Setareh Decl. ¶ 98.

On March 28, 2019, Home Depot filed its own motion for partial summary judgment seeking a liability determination in its favor as to the walk time claim, as well as a motion to strike class member declarations filed with Plaintiff's motion. On April 15, 2019, Plaintiff opposed the motion,

1 and Home Depot filed a reply on May 9, 2019. Setareh Decl. ¶¶ 97-98.

2 On May 23, 2019, the Court heard argument on the cross-motions for summary judgment, 3 and on July 11, 2019, the Court entered an order denying the motions, except that the Court granted 4 Home Depot's motion as to Labor Code section 226 and 203 penalties for the "walk time" Hourly 5 Employee Class claim. Setareh Decl. ¶ 100.

6 On January 6, 2020 Home Depot filed a motion for partial summary judgment as to the 7 Labor Code section 203 and 226 penalties for the "Lock In" claim. Class Counsel emailed Home 8 Depot's counsel and requested that the motion be taken off calendar since it had been filed without 9 leave of court. Home Depot took the motion off calendar and filed a motion for leave to file it, which 10 Plaintiff opposed. On January 21, 2020, the Court denied Home Depot's motion for leave to file the 11 summary judgment motion. Setareh Decl. ¶¶ 101-104.

12 **J. Class Counsel Obtain an Adverse Inference Jury Instruction Due to Home Depot's Failure to Preserve Video.**

13 On December 14, 2019, the parties submitted a joint discovery letter to Magistrate Judge 14 Kim seeking to exclude Home Depot's video study because Home Depot had failed to preserve or 15 produce video surveillance from its stores. Magistrate Judge Kim issued a recommendation that the 16 study not be excluded, but that there be an adverse inference jury instruction. Both parties objected, 17 and the Court affirmed Judge Kim's recommendation but reserved discretion over the substance of 18 any jury instruction. Setareh Decl. ¶¶ 54-56.

19 **K. Class Counsel Retained and Advanced Millions of Dollars in Expert** 20 **Costs Who Were Critical in Defeating Decertification and Establishing a Baseline for Settlement.**

21 Class Counsel retained four expert witnesses: 1) Dr. Krosnick as a survey expert (who also 22 retained survey company SSRS); 2) damages expert James Toney; 3) statistical expert Dr. Brian 23 Kriegler; and 4) retail practice expert Gary White. Dr. Krosnick using nationally known survey 24 company SSRS (which among other things polls Presidential races for CNN) performed a 25 comprehensive survey regarding the existence and prevalence of the Labor Code violations at issue. 26 Dr. Krosnick provided three reports, with the first being 597 pages, the second being 214 pages, and 27 the final report being 816 pages. Setareh Decl.¶ 109.

28 Home Depot also retained four expert witnesses: 1) Robert Crandall, a damages and survey

expert; 2) Dr. Edward Anderson, a damages expert; 3) Stephen Smith, a survey expert, and 4) Timothy Trujillo, a retail practices expert. Setareh Decl. ¶ 109.

The reports of the experts retained by Class Counsel were critical in defeating decertification. In its order denying decertification, this Court cited to the Krosnick report as showing that "97% of the lock in class experienced an off-the-clock wait to be let out of the warehouse." ECF No. 272 at 12:26-27. The Court also cited Dr. Krosnick's finding that only 6% of the Closing Shift class were told that they could be paid for the time waiting to be let out of the store. *Id.* at 13:27-14:2.

The Krosnick and Toney reports also provided a realistic quantification of unpaid wages and potential penalties which was used as a baseline for negotiating the settlement.

L. Class Counsel Take the Depositions of Home Depot's Experts Obtaining Admissions that are Critical to Defeating Decertification.

Expert depositions occurred between January 18, 2022, and February 4, 2022. Setareh Decl ¶¶ 44-51. Class Counsel took the depositions of Home Depot's video survey and damages expert Robert Crandall, damages expert Dr. Ted Anderson, survey expert Stephen Smith, and retail practices expert Timothy Trujillo. *Id*

Class Counsel also took a second deposition of Home Depot's expert Robert Crandall on August 23, 2022 as ordered by Magistrate Judge Kim as a result of Home Depot's failure to produce a pilot study that Mr. Crandall had conducted prior to his disclosed report. Setareh Decl. ¶ 52.

These depositions resulted in a number of admissions that were critical in defeating decertification. For example, Mr. Crandall admitted that his survey could not determine the frequency with which class members were locked in the store, off-the-clock, and that therefore by implication, the Krosnick survey was the only evidence of this. ECF No. 231 at 13:3-12. As to the walk time claim, Home Depot's human resources consultant admitted that Home Depot would have to do a "cost benefit analysis" before it could move the timeclocks to the front of the store to avoid the walk time, given that the front of the store is an important area for storing merchandise. ECF No. 231 at 19:8-17. Home Depot's survey expert, Mr. Smith admitted that he had formed his opinion about the Krosnick survey without reading Dr. Krosnick's rebuttal report, and that if he read it he might have to withdraw his criticisms. ECF No. 231 at 20:3-5.

M. Class Counsel Defend the Depositions of Plaintiff's Experts.

Class Counsel defended the depositions of experts Dr. Jon Krosnick, Gary White, James Toney and Brian Kriegler. Setareh Decl ¶¶ 47-51.

N. Class Counsel File a Motion and Obtain Production of the Pilot Study Performed by Home Depot's Expert Crandall.

On April 4, 2022, Plaintiff filed a motion seeking terminating sanctions due to alleged misstatements by Home Depot's former counsel that a Pilot Study referenced in Mr. Crandall's invoices did not in fact exist. Setareh Decl. ¶ 57. Magistrate Judge Kim issued an Order which denied terminating sanctions but ordered Home Depot to produce the Pilot Study and related documents and data and ordered Mr. Crandall to appear again for deposition. Setareh Decl. ¶ 58.

On December 12, 2019, the parties submitted a Joint Discovery Letter to the Magistrate Judge in which Home Depot sought the identity of the respondents to Dr. Krosnick's survey. Judge Kim recommended that the identities be disclosed subject to certain protections, and the Court affirmed the recommendation. Setareh Decl. ¶ 59.

O. Class Counsel Work with Experts to Collect and Analyze Timekeeping and Payroll Data.

Home Depot's original production of timekeeping and payroll data occurred on October 15, 2018. Plaintiff's expert Dr. Krosnick identified various omissions and discrepancies which resulted in supplemental productions in 2018, August 2019, September 2019, March 2020, June 2020, October 2020, December 2020, February 2021, October 2021, and November 2021. Setareh Decl. ¶¶ 60-61.

In addition to the disclosed experts, Class Counsel also retained two Kronos consultants to advise on issues related to the timekeeping and payroll data. Setareh Decl. ¶ 62.

P. Class Counsel Successfully Oppose Home Depot's Motion to Decertify.

On October 16, 2019, Home Depot filed a motion to decertify the class, supported by the declaration of expert Robert Crandall. Setareh Decl. ¶ 78. The deadline to oppose the motion was extended numerous times initially due to the volume of data produced by Mr. Crandall including 30 hard drives with video used in his study, then due to the Covid 19 travel restrictions, then due to the various issues regarding the class time-keeping and payroll data. Setareh Decl. ¶¶ 79.

On June 30, 2020, Home Depot filed an administrative motion to supplement its prior briefing on decertification with additional evidence. While the Court initially granted the motion, after receipt of Plaintiff's Opposition, the Court referred the matter to the Magistrate Judge who denied the motion. Setareh Decl. ¶ 80.

On August 31, 2021, Home Depot filed a motion to file supplemental briefing in order to address new authority. Plaintiff opposed the motion, but the Court granted it on November 23, 2021. Setareh Decl. ¶¶ 84-86.

After the close of expert discovery, Plaintiff filed an opposition to the motion to decertify on March 14, 2022, and Home Depot filed a reply on April 14, 2022. After holding a hearing on May 5, 2022, the Court entered an order denying the motion on May 6, 2022. Setareh Decl. ¶ 88.

Q. Home Depot Obtains Dismissal of the UCL Claim, But Plaintiff Refiles in State Court.

On March 24, 2022, Home Depot filed a motion for judgment on the pleadings, asserting that Plaintiff's claim for Unfair Competition under California Business & Professions Code § 17200 should be dismissed because Plaintiff has an adequate remedy at law. Plaintiff opposed the motion, but on May 6, 2022, the Court entered an order granting the motion, but without prejudice to Plaintiff refiling the claim in state court. Setareh Decl. ¶¶ 105-107. On May 17, 2022, Plaintiff filed a Complaint with a single cause of action under the UCL in the Superior Court for the State of California, County of Alameda. Setareh Decl. ¶ 108. This kept the UCL claim alive meaning an extra year of wages could be recovered for the class.

R. Class Counsel File and Oppose Motions in Limine and *Daubert* Motions.

Plaintiff filed motions in limine to exclude or limit experts Crandall, Smith and Trujillo. Home Depot filed motions to exclude or limit the testimony of Dr. Krosnick, Gary White and James Toney. Setareh Decl ¶ 110.

On October 14, 2022 the Court issued an order requesting supplemental briefing as to how a trial would proceed as to classwide damages. On October 18, 2022 the parties submitted supplemental briefing on the issue. *Id.* On November 10, 2022, the Court issued an order which excluded in part the reports of Dr. Krosnick and Mr. Toney, excluded the report of Mr. White, and excluded in part the report of Mr. Crandall. *Id.*

S. Class Counsel Obtain Stay of Overlapping *White* Case and Agreement that the Claims in This Case Would not be Settled in *Barragan.*

Class Counsel throughout the litigation periodically monitored other litigation involving Home Depot that could affect the certified claims in this action. As a result, Class Counsel became aware of a series consolidated actions pending in the Southern District of California Depot including the lead *case Barragan v. Home Depot,* Case No. 19-cv- 01766-AJB-AGS and *White v. Home Depot USA Inc.*, Case No. 2:21-cv-08753-GW-JEM. The *White* case involved some of the same claims at issue here, including a rounding claim and a "Lock In" claim. Setareh Decl. ¶¶ 111-112.

Moreover, filings in the consolidated cases indicated that Home Depot might be intending to settle the White claims (and by extension the Utne claims) in a pending mediation in *Barragan.* Setareh Decl ¶ 113. Therefore, Class Counsel met and conferred with Home Depot's counsel and the *Barragan* and *White* counsel and filed a motion to intervene in *Barragan/ White* and to stay or transfer the cases. On July 6, 2022, the Honorable Anthony Battaglia of the Southern District denied the motion to intervene but granted the motion to stay as to the White case. Setareh Decl ¶ 116.

Class Counsel also negotiated with Home Depot's counsel that any settlement in Barragan would exclude the claims in Utne. Setareh Decl. ¶ 117.

T. Pretrial Investigation of Home Depot's Current Closing Shift Practices.

In May of 2022 in preparation for trial, Class Counsel retained a private investigative firm to conduct surveillance of Home Depot's stores to determine the extent to which the issue of employees being locked in the stores was still occurring. Setareh Decl. ¶ 118.

U. Class Counsel Negotiate for the Class in Two Mediations, the Second Resulting in the Instant Non-Reversionary $72.5 Million Settlement.

There were two mediations in this case. The first mediation occurred on November 19, 2019, in person in San Francisco with Antonio Piazza. The second mediation, which was remote, occurred on November 29, 2022, with Hunter Hughes. After the mediation, the parties continued negotiations with the mediator's assistance, including Class Counsel submitting a supplemental brief to the mediator and Home Depot on a specific issue. Setareh Decl. ¶ 119. On January 26, 2023 Mr. Hughes made a mediator's proposal which both parties accepted by the deadline of February 9, 2023. Setareh Decl. ¶ 120.

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V. Class Counsel Negotiate the Settlement Agreement, Obtain Preliminary Approval, Notice is Sent to the Class, and Class Counsel Respond to Settlement Class Member Inquiries.

After the parties accepted the mediator's proposal, Class Counsel drafted a memorandum of understanding. However, the parties opted to proceed directly to a Long Form Settlement Agreement, which Home Depot's counsel drafted, and Class Counsel edited. Setareh Decl. ¶ 121.

Plaintiff filed a motion for preliminary approval on June 22, 2023, which the Court granted on July 28, 2023. Setareh Decl. ¶ 122.

The administrator KCC sent notice to the class on September 27, 2023. Osterlund Declaration ¶ 6. Since that time, Class Counsel Setareh Law Group has received dozens of phone calls from absent class members, all of which have been handled by attorneys. Setareh Decl. ¶ 123.

To date the class has responded very favorably to the settlement. There are 14 requests for exclusion (which is 0.004% of the Settlement Class) and 1 objection (which is 0.0003% of the Settlement Class). Osterlund Decl. ¶¶ 10-11.

III. THE REQUEST FOR ATTORNEY FEES SHOULD BE GRANTED

Pursuant to Rule 23(h) the Court should determine whether the requested fee is reasonable. Where the settlement results in a common fund, a district court can use either the percentage of recovery method or the lodestar method and may use a lodestar cross-check to confirm that the percentage of recovery method results in a reasonable fee. *In re Optical Disk Drive Prods. Antitrust Litig*., 959 F.3d 922, 929-30 (9th Cir. 2020). Where a "case involves a common settlement fund with an easily quantifiable benefit to the class" the percentage of fund method is preferred. *Arredondo v. Delano Farms Co.*, No. 1:09-CV-01247-MJS, 2017 WL 4340204, at *4 (E.D. Cal. Sept. 29, 2017)

A. The Fee Is Reasonable Under the *Vizcaino* Factors

The factors a district court looks at to evaluate the reasonableness of a fee include: 1) whether the results achieved for the class are exceptional; 2) the risk class counsel undertook in litigating the case, 3) the range of fee awards out of common funds of comparable size; 4) the burdens class counsel took in litigating the case, and whether those burdens were contingent; 5) any benefits conferred beyond the settlement fund. *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1048-1050 (9th

1 Cir. 2002). In addition, district courts applying *Vizcaino* have looked to an additional factor of the
2 complexity of the case, the skill required, and the quality of work performed by plaintiff's counsel.
3 *Rodriguez v. Nike Retail Services, Inc.,* 2022 WL 254349 *5 (N.D. Cal. 2022).

4 Pursuant to *Vizcaino,* a district court uses a 25% benchmark to determine attorney fees, with
5 the Vizcaino factors used to determine whether there should be an upward or downward departure
6 from that benchmark. *Vizcaino supra* at 1048-1052.; *In re Omnivision Techs, Inc.,* 559 F.Supp.2d
7 1036, 1046 (N.D. Cal. 2008). As will be delineated herein below; there is substantial justification
8 for this Court to award an upward adjustment of the attorney fees and award 1/3 of the common
9 fund recovery.

10 When upward adjustment from the benchmark is warranted, fee awards of up to 33 1/3%
11 presumptively fall within the "typical range of acceptable attorneys' fees in the Ninth Circuit";
12 however, the decision ultimately rests within the sound discretion of the Court. *Tapia v. Frontwave*
13 *Credit Union*, No. 20CV1950-MMA-JLB, 2021 WL 3400990, at *6 (S.D. Cal. Aug. 3, 2021)
14 ("[F]ederal [c]ourts in California routinely award attorneys' fees representing 1/3 of the common
15 fund as requested herein."); *Vedachalam v. Tata Consultancy Servs., Ltd.*, No. C 06-0963 CW, 2013
16 WL 3941319, at *2 (N.D. Cal. July 18, 2013) (noting that "many cases in this circuit that have
17 granted fee awards of 30% or more" and collecting cases with fee awards in the range of 30-33%);
18 *Morales v. Stevco, Inc.,* No. 1:09-CV-00704 AWI, 2011 WL 5511767, at *12 (E.D. Cal. Nov. 10,
19 2011) ("The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of
20 the total settlement value, with 25% considered the benchmark."), quoting *Powers v. Eichen*, 229
21 F.3d 1249, 1256 (9th Cir. 2000).

22 **1. The Results Achieved for the Class are Exceptional.**

23 "Foremost" among the "considerations" in calculating a fee is "the benefit obtained for the
24 class," *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011), and
25 "[e]xceptional results are a relevant circumstance." *Vizcaino*, 290 F.3d at 1048; see also *Lowery v.*
26 *Rhapsody International, Inc.,* 75 F.4th 985, 988 (9th Cir. 2023) ("The touchstone for determining the
27 reasonableness of attorneys' fees in a class is the benefit to the class.").
28 / / /

1 This settlement provides for a $72.5 million non-reversionary common fund. No class
2 member will have to make a claim and no money will revert to the Defendant.
3 A detailed exposure analysis was submitted in support of Preliminary Approval, outlining
4 the relevant recovery rates for each claim. (Doc. 363, pp. 14-18). As discussed in that analysis,
5 pursuant to the report of Dr. Krosnick, the unpaid wages owed on the closing shift claim through
6 June 1, 2021 claim are $14,905,918. Extrapolating through the time of preliminary approval, the
7 unpaid wages owed on this claim would be $23,252,728.08. Thus, taking the 50% allocated to this
8 claim under the settlement ($36,250,000 of the Gross Settlement Amount), the allocation ***exceeds***
9 the potentially-recoverable unpaid wages for this claim.
10 The estimated exposure on the rounding claim is $4,450,720 exclusive of interest and
11 liquidated damages. The Settlement agreement allocates 9% to the rounding claim—$6,525,000
12 based on the Gross Settlement Amount—which likewise ***exceeds*** the alleged unpaid wages for that
13 claim. (Doc. 363, p.18)
14 The extrapolated exposure for wages on the pre-shift claim was estimated to be $54,366,994.
15 (Doc. 363, p. 17) The Settlement allocation of 41%--$29,725,000 based on the Gross Settlement
16 Amount—to the pre-shift claim equals a 54.67% recovery.
17 It is highly unlikely that wage statement and waiting time penalties would have been
18 awarded, as the Court dismissed those penalties as to the Hourly Employee Class due to the legal
19 uncertainty as to the compensability of the time. As to the Closing Shift Class, once the waiting time
20 penalties and wage statement penalties are discounted pursuant to appropriate risk factors, the
21 amount at issue including all wages and a reasonable value of the penalties is $95,102,427.25. The
22 $38,250,000 allocated under the settlement is 38% of this amount. (Doc. 363, pp. 16). However, a
23 district court evaluating a settlement need not consider penalties in addition to damages. *Rodriguez*
24 *v. West Publishing*, 563 F.3d 948, 964 (9th Cir. 2009).
25 The percentages of recovery resulting from this settlement are objectively considered to be
26 "highly favorable terms for class members" which "strongly support an upward departure from the
27 benchmark". *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1021–22 (E.D. Cal. 2019). As
28 discussed by the court in *Carlin*, this sentiment has been recognized and echoed by California

district courts in numerous analogous cases:

> The Court here has made effort to demonstrate what it sees as the highly favorable terms for class members […] The Court […] finds that analogous cases strongly support an upward departure from the benchmark, and support Counsel's request for a 33.3% award from the common fund. See, e.g., *Syed v. M-I, L.L.C.*, 2017 WL 3190341, at *4, 6-8 (E.D. Cal. July 26, 2017) (awarding one-third in fees when the common fund represents 35% of damages); *Millan v. Cascade Water Servs.*, 2016 WL 3077710, at *11 (E.D. Cal. May 31, 2016) (awarding 33% in fees when the common fund was at least 35% of the maximum damages); [*Richardson v. THD At-Home Servs., Inc.*, 2016 WL 1366952 (E.D. Cal. Apr. 6, 2016)](awarding 30% of the gross fund amount as attorneys' fees where the per-class member award was substantial); *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804, at *9-12 (C.D. Cal. Nov. 18, 2014) (awarding one-third in fees when the common fund represents 36% of damages); *Moreyra v. Fresenius Med. Care Holdings, Inc.*, 2013 WL 12248139, at *3-4 (C.D. Cal. Aug. 7, 2013) (awarding one-third in fees when the common fund represents 32% of damages); [*Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 450] (E.D. Cal. 2013)(collecting cases in this district that have granted approximately 33% of the gross fund). The same holds true for California cases of similar complexity. See *Smith v. CRST Van Expedited, Inc.*, 2013 WL 163293, at *5 (S.D. Cal. Jan. 14, 2013) ("Under the percentage method, California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent.") (citing *In re Consumer Privacy Cases*, 175 Cal.App.4th 545, 556 n. 13, 96 Cal.Rptr.3d 127 (2009)).
>
> Thus, these and other cases cited above support an award of 33% of the fund, and an upward departure from a Ninth Circuit's 25% benchmark.

Carlin, *supra*, 380 F. Supp. 3d at 1021–22 (Awarding one third attorneys' fees on a $40 million settlement).

Notably, the respective percentage of recovery for each claim at issue here is higher than virtually all of those collected and analyzed by the *Carlin* court, easily supporting the 33 1/3% award now sought by Counsel.

2. The Significant Risks that Class Counsel Undertook By Expending over Three Million Dollars in Hard Costs and Thousands of Hours of Time on Claims that Were Fragile when the Complaint was filed, Warrants a 1/3 Fee Award.

Where Class Counsel is working on a contingency with no guarantee of payment and advancing all costs: "Risk is a relevant circumstance." *Vizcaino supra* at 1048.

This lawsuit was filed in 2016, years before *Troester v. Starbucks Corp.,* 2014 WL 1004098, at *3 (C.D. Cal. Mar. 7, 2014), rev'd and remanded, 738 F. App'x 562 (9th Cir. 2018) (recognizing that at that time "numerous courts [had] held that daily periods of approximately 10 minutes are de minimis"). Plaintiff's Counsel litigated this action for more than three years, at great risk of

1 summary judgment, until the California Supreme Court issued their seminal ruling in *Troester*.
2 *Troester v. Starbucks Corp*., 5 Cal. 5th 829, 844 (2018), as modified on denial of reh'g (Aug. 29,
3 2018). Notably, the highly advantageous *Troester* ruling, which cemented the viability of this action,
4 was obtained by the same Class Counsel present in this case. Thus, Class Counsel simultaneously
5 shaped the controlling law, and significantly shifted the legal landscape, in a way that greatly
6 benefitted the class while this litigation was pending. That undertaking alone posed an
7 unprecedented risk, with an equally unprecedented – favorable – result, which cannot be
8 understated.

9 Furthermore, as to the Closing Shift Claim, Home Depot defeated a materially identical
10 claim in a Washington State class action. RJN Exh. 1. And, district courts have denied class
11 certification in similar "lock in" or "closing shift" cases. *Sanchez v. Sams West, Inc.,* 2023 WL
12 4155357 (C.D. Cal. 2023) (denying certification of class of employees locked in store during closing
13 shifts); *Rough v. Costco Wholesale Corporation*, 2021 WL 4443255 (E.D. Cal. 2021) (denying
14 certification of claim based on closing shift procedures where employees had to wait for bag check
15 and be cleared by manager to leave).

16 There were also risks created by Home Depot's defenses which Class Counsel was able to
17 successfully navigate. For example, Home Depot argued as to the Closing Shift claim that
18 employees could submit time change forms to be paid for the closing shift time. But Plaintiff's
19 expert Mr. Toney conducted an analysis showing that it was exceedingly rare that employees ever
20 had their time on closing shifts increased. Similarly, the Krosnick report showed that only 6% of
21 employees were told they could ask to be paid for the time waiting to be let out of the store.

22 There were other developments in the case law that created risk for the litigation. For
23 example, there is the still evolving issue of the effect on class certification of uninjured class
24 members. In the original opinion (later reversed *en banc*) in *Olean Wholesale Grocery Cooperative*
25 *v. Bumble Bee Foods LLC,* 993 F.3d 774, 792 (9th Cir. 2021) the Ninth Circuit held that a class can
26 only be certified if it contains a "de minimis" number of uninjured class members. Parenthetically,
27 this issue made the expensive and time-consuming "battle of the experts" in the case including the
28 reports of Dr. Krosnick absolutely critical. And, it was not until after the close of expert discovery,

and the filing of Plaintiff's opposition to decertification, that the Ninth Circuit issued its *en banc* ruling rejecting a per se rule that a class may only contain a de minimis amount of uninjured class members. *Olean Wholesale Grocery Cooperative v. Bumble Bee Foods LLC,* 31 F.4th 651, 699 (9th Cir. 2022).

The walk time claim was risky for the additional reason that it is a legally novel claim. On July 11, 2019, this Court expressed doubt as to the viability of such claims. See Dkt. 148. In granting summary adjudication in favor of Home Depot on Plaintiffs' Labor Code section 203 and 226 claims tied to the Hourly Employee Class, this Court noted "…there is a material dispute regarding whether members of the Hourly Employee Class were in fact subject to Home Depot's control from the time they entered the store to the time they clocked in." Dkt. 148, at 9:12-16

And the rounding claim also carried great risk. This Court granted Home Depot's motion for summary judgment based on what was then the only California controlling authority on the legality of rounding, *See's Candy Shops, Inc. v. Superior Court,* 210 Cal.App.4th 889 (2012). The legal landscape on this claim did not change until the California Court of Appeal accepted the same theory that Class Counsel advocated for in this case in *Camp v. Home Depot U.S.A., Inc*., 84 Cal. App. 5th 638 (2022). And, that issue is now before the California Supreme Court.

There was also great risk arising from the possibility that even assuming a verdict of liability, a jury would award an amount far less than sought, for example, if the jury found that the Krosnick report was not credible as to the duration and frequency of violations.

Additionally, at the time of settlement, it was unclear exactly how a case would have been tried, and any class award distributed. Home Depot would have advocated for distribution through a claims process, which would have made it much more difficult for class members to recover and might have required expensive and time-consuming cross-examination of individual class members.

It is also fair to say that any substantial verdict in favor of the classes would have been appealed by Home Depot. While Plaintiffs strongly believe the case is distinguishable, it is possible that the classes could have met with the same fate as those in *Bowerman v. Field Asset Services, Inc.*, 60 F.4th 459 (9th Cir. 2023) where after a victory at trial, the Ninth Circuit ordered the case to be decertified.

Adding to the risks is the fact that throughout the litigation, Home Depot was represented by highly skilled counsel. Home Depot was first represented by the venerable law firm of Akin Gump LLP. Home Depot then retained Quinn Emanuel which is one of the preeminent business litigation trial firms in the country and in fact routinely leads a list of the law firms most feared by corporate general counsel. Further, multiple Quinn Emanuel partners worked on the case including Shon Morgan who is the chair of that firm's National Class Action Practice Group, William Price the co-chair of that firm's National Trial Practice Group (known for winning defense verdicts for Elon Musk in high profile libel and civil securities fraud trials), former federal prosecutor Duane Lyons (known for the successful federal civil rights prosecution of the police officers in the Rodney King case), Jack Baumann and Joseph Sarles.

And, of course, Home Depot had vast resources at its disposal to defend the action. This further heightened the risk of the litigation. *Vizcaino v. Microsoft Corp*., 142 F.Supp.2d 1299, 1303 (W.D. Wa. 2001): "Class counsel's risk was even greater, and their work made more difficult, because Microsoft is one of the nation's largest and most formidable companies, and it and several law firms defended the case vigorously for several years." See, e.g., *In re Nat'l Collegiate Athletic Assn. etc. Antitrust Litig*., 2017 WL 6040065, *3 (N.D. Cal. Dec. 6, 2017): "Plaintiffs' counsel achieved these exceptional raw-dollar, percentage, and per capita results despite facing off against some of the best, and most well-resourced, defense lawyers in the country."); *In re Heritage Bond*, 2005 WL 1594403 (C.D. Cal. 2005) *20 (noting defense counsel's "local and nationwide reputations for vigorous advocacy in the defense of their clients" in approving one-third fee to plaintiffs' counsel).

And the aggressive litigation approach of Home Depot and its counsel further increased the time and money that Class Counsel had to expend to prosecute the litigation. This supports the requested fee award.

3. The Range of Fee Awards in Cases of Comparable Size

This case involved certified wage and hour claims involving novel and complex issues. As noted above, this case involved a certified class claim concerning issues of first impression. In other wage-and-hour cases resulting in a sizable settlement for the benefit of the class, class counsel were

1 awarded one third of the common fund. For example, in *Lafitte*, the California Supreme Court
2 affirmed a one-third award in a related wage and hour class actions that, like this case, involved
3 extensive discovery, contentious law and motion practice, motions for summary judgment, a class
4 certification motion, several experts, and even mediation. *Lafitte*, 1 Cal.5th at 506 (awarding one
5 third attorneys' fees on a $19 million settlement); *Beaver v. Tarsadia Hotels*, 2017 WL 4310707
6 (S.D. Cal. 2017) (in a consumer class action involving novel issues awarding one-third attorneys'
7 fees on a $51 million settlement); *Taylor v. Shippers Transport Express, Inc.*, 2015 WL 12658458
8 at *14 (awarding one third attorneys' fees on an $11 million settlement in a wage-and-hour case
9 where a class was certified and survived summary judgment); *McGrath v. Wyndham Resort*
10 *Development Corporation*, 2018 WL 637858 (S.D. Cal. 2018) (awarding one-third of attorneys'
11 fees on a $7,250,000 settlement (where the parties completed exhaustive discovery, fully briefed
12 motions for summary judgment and class certification, and participated in a full-day mediation).
13 Similarly, in *Senne v. Kansas City Royals Baseball Corp*., 2023 WL 2699972 *14 (N.D. Cal. 2023)
14 the district court awarded 30% of the $185 million common fund in a wage and hour case explaining
15 that: "In complex or lengthy cases, courts have frequently awarded more than the benchmark of 25
16 percent and awards of 30 to 33 percent are common in such cases", and in *Frelkin v. Apple Inc.,* No.
17 3:13-cv-03451-WHA (ECF No. 475) (N.D. Cal. Aug. 13, 2022) the district court awarded 30% of
18 the $29 million common fund in a wage and hour case.

19 Although wage and hour settlements of this size are ultimately very rare, a testament to the
20 dedication and perseverance of Class Counsel in this case, analogous fee percentages have also been
21 awarded in in other types of class actions with similarly sized total settlement funds. *In re Apollo*
22 *Grp. Inc. Sec. Litig*., No. 04-2147, 2012 WL 1378677, at *7 (D. Ariz. Apr. 20, 2012) (awarding
23 33.3% of $145 million settlement fund); *Carlin*, *supra*, 380 F. Supp. 3d at 1021–22 (Awarding
24 33.3% of $40 million settlement fund); *Schulein, et al. v. Petroleum Development Corp.*, et al., No.
25 11-CV-01891, Doc. No. 265 (C.D. Cal. Mar. 16, 2015) (awarding 30% of $37.5 million settlement
26 fund*); In re Buspirone Antitrust Litig.*, Civ.A.No. 01–MD–1410 (S.D.N.Y. Apr. 11, 2003)
27 (awarding 33.3% of a $220 million dollar fund); *In re Cardizem CD Antitrust Litig*., Civ.A.No. 99–
28 MD–1278 (E.D.Mich. Nov. 26, 2002) (awarding 30% of a $110 million fund*); In re Vitamins*

1 *Antitrust Litig.*, Civ.A.No. 99–197, MDL No. 1285, 2001 WL 34312839, at *10 (D.D.C. July 16,
2 2001) (awarding about 34% of an approximately $360 million fund).

3 **4. The Burdens Class Counsel Took on Warrant the Requested Fee Award.**

4 An upward adjustment from the benchmark is certainly warranted when Class Counsel has
5 undertaken the work on a contingent basis incurring thousands of hours of attorney time and and
6 advances over three-million dollars in expenses on . *In re Omnivision Technologies, Inc.,* 559
7 F.Supp.2d 1036, 1047 (N.D. Cal. 2008): "This substantial outlay, when there is a risk that none of
8 it will be recovered, further supports the award of the requested fee."; *Vizcaino,* 290 F.3d at 1050.
9 "Given the unique reliance of our legal system on private litigants to enforce substantive provisions
10 of law through class and derivative actions, attorneys providing the essential enforcement services
11 must be provided incentives roughly comparable to those negotiated in the private bargaining that
12 takes place in the legal marketplace, as it will otherwise be economic for defendants to increase
13 injurious behavior." *Lealao v. Beneficial California, Inc.,* 82 Cal. App. 4th 19, 47-48 (2000). Such
14 premiums over "normal hourly rates for winning contingency cases" "mirror[] the established
15 practice in the private legal market." *Vizcaino,* 290 F.3d at 1051; *see also Graham v.*
16 *DaimlerChrysler Corp.,* 34 Cal. 4th 553, 580 (2004) ("'A contingent fee must be higher than a fee
17 for the same legal services paid as they are performed. The contingent fee compensates the lawyer
18 not only for the legal services he renders but for the loan of those services.'") (quoting *Ketchum v.*
19 *Moses*, 24 Cal.4th 1122, 1132 (2001)); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d
20 1291, 1299 (9th Cir. 1994) ("contingent fees that may far exceed the market value of the services if
21 rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of
22 assuring competent representation for plaintiffs who could not afford to pay on an hourly basis
23 regardless of whether they win or lose").

24 Here, Class Counsel pursued the litigation on a purely contingency basis for almost ***seven***
25 ***years*** in the face of significant setbacks, expending ***thousands*** of hours in professional time and
26 advancing ***millions*** of dollars in expenses with absolutely no guarantee of repayment. It is well
27 recognized that, where class litigation spans the length of years, the risks and burdens borne by
28 Counsel are multiplied exponentially. Thus, the length and complexity of the action supports a

heightened fee award:

> Based on the Court's experience with this case, the seven years of history, and the unique and favorable settlement on behalf of Plaintiffs, the Court finds a fee award of 33.33% more than reasonable in this case. An upward departure from the 25% benchmark figure is warranted in this case because an exceptional result was achieved and it was extremely risky for Class Counsel to pursue this case through seven years of litigation.

In re Apollo Grp. Inc. Sec. Litig., No. CV 04-2147-PHX-JAT, 2012 WL 1378677, at *7 (D. Ariz. Apr. 20, 2012); See also *Ridgeway v. Wal-Mart Stores Inc.*, 269 F. Supp. 3d 975, 996–97 (N.D. Cal. 2017) ([T]he contingent risk in this case, by contrast, was significant. Wal–Mart vigorously defended this case over the course of nearly nine years")

Further, the sheer amount of non-refundable costs expended in furtherance of this case, nearly all of which related to complex expert analysis, surveys, and reports deemed absolutely necessary by class counsel to prove the class claims and associated damages at trial, is magnitudes beyond the amount of risk generally borne by counsel in a typical wage and hour class action. This is very important because very few plaintiff-side firms would have both the ability and willingness to expend such a massive amount of resources in support of a single case. Class Counsel did so here, at great personal risk and with massive opportunity costs, for one reason… their true belief in this case. This was thankfully reflected in the results obtained; however, there was no guarantee.

In total the two firms incurred $3,184,159.45 in costs. Setareh Decl. ¶125; Kennedy Decl. ¶14. Notably, Class Counsel Setareh Law Group paid $2,326,864.68 to experts on the case, including Dr. Krosnick (and Strategy Team and SSRS who performed work for Dr. Krosnick), Brian Kriegler (listed on the itemized costs as Econ One), Gary White, James Toney (listed on the invoice as JTC Corp), and undisclosed Kronos expert Veronica Lee McDaniels. Setareh Decl ¶¶124-130. Of the $2,326,864.68 amount, SLG paid $599,804 to Dr. Krosnick, $279,986.00 to SSRS, $1,131,487.78 to The Strategy Team, $58,662.50 to JTC Corporation, $50,985.00 to Gary White, and $4,894.40 to Econ One. *Id.*

Class Counsel Marlin & Saltzman likewise paid a total of $718,220.51 in costs, including $690,447.04 in expert fees (i.e. $225,742 paid to Dr. Krosnick, $457,970.02 to The Strategy Team, and $6,735.02 to Econ One.) Kennedy Decl. ¶14.

Additionally, SLG paid claims administrator CPT Group Inc. $6,209.28 for the notice

advising putative class members that their contact information would be disclosed to Class Counsel if they did not opt out, and $64660.46 to claims administrator KCC for the notice of class certification. Setareh Decl ¶¶124-130.

SLG also paid $14,091.21 in travel costs, and $54,185.31 in other costs, such as Westlaw, court reporters and court running services including $12,000 to mediator Antonio Piazza, and $10,000 to mediator Hunter Hughes. *Id.* ¶¶ 129-130.

There are many cases awarding a third in fees of a substantial common fund, where the financial burden borne by class counsel was far less than here. *Beaver supra* at *13-14 (awarding one third of a $51 million settlement fund where class counsel incurred $195,098 in costs); *Frelkin v. Apple Inc.,* No. 3:13-cv-03451-WHA (ECF No. 475) (N.D. Cal. Aug. 13, 2022) (awarding 30% of $29 million settlement fund where class counsel incurred $380,223.43 in costs); *Perez v. Rash Curtis & Associates, Inc.,* 2020 WL 1905433 *21 (N.D. Cal. 2020) (awarding one third of $267,348,000 common fund where counsel incurred $277,416.28 in costs); *Krakauer v. Dish Network LLC,* 2018 WL 6305785 (M.D.N.C. 2018) (awarding one third of $61 million common fund where class counsel had incurred $500,000 in costs); *In re Urethane Antitrust Litig*., 2016 WL 4060156 *6 (D. Kan. 2016) (awarding one third of $835 million where expenses borne by counsel were $1,545,827.58 noting that:" [class counsel] toiled at great expense for many years, at a great expense to themselves with a very real risk that they would not recover anything from this defendant."); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 395-396 (S.D.N.Y. 1999) (Recognizing that costs borne by counsel in the amount of 1.9 Mil constituted an "enormous outlay[] of expenses" supporting their requested fee award).

Additionally, the amount of time required to prosecute the case required Class Counsel to turn away other cases. Setareh Decl. ¶ 131. Therefore, the financial burden shouldered by Class Counsel supports an upward departure from the benchmark and the requested fee award.

5. The Skill Required, the Complexity of the Case, and the Quality of Work.

"The prosecution and management of a complex national class action requires unique legal skills and abilities . . . Thus, if counsel has represented intimate knowledge of the case, and applied

their unique skills to obtain favorable results, this factor should weigh in favor of an increase in the benchmark rate." *Carlin v. Dairy America, Inc.,* 380 F.Supp.3d 998, 1021 (E.D. Cal. 2019).

There is no doubt that this case is much more complex than the average wage and hour class action. At the time of its initial filing, class counsel moved forward knowing that, in order for the claims to be viable, Plaintiffs would need to prevail on several novel legal theories which had not yet been analyzed nor addressed by our higher courts for there to be any recovery at all in this case. Specifically; all of the off the clock claims (i.e. the lock in claim and the walk time claim) could have been dismissed but for the California Supreme Court's ruling in Troester v Starbucks. Moreover, this Court dismissed the rounding claim; and the Defendant's chose to resolve that claim pending the California Supreme Court's ruling in *Camp v Home Depot*.

The first novel issue was the non-application of the federal "de minimis" test to the types of regularly occurring work activities at issue here, which Class Counsel (The Setareh Law Group and Marlin & Saltzman) eventually prevailed upon in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018) approximately two and a half years *after* this case was filed. Through Class Counsel's efforts, the seminal *Troester* decision served as a major victory for all California employees and became binding authority upon this action. The second novel issue was the legality of Home Depot's time rounding policies in the wake of *Troester*, which was recently taken up in the related *Camp v. Home Depot U.S.A.* case. It should be noted that, Plaintiffs here deftly recognized and preserved their right of appeal on the exact same issue now before the Cal. Supreme Court in *Camp*, and had raised many of the exact same arguments that were later raised by Plaintiffs' Counsel in *Camp.* Doc. 85.

Further, it bears recognition that this was not an early settlement; rather, the case was prosecuted to the eve of trial with a defendant with ample resources and motivation to fight aggressively. As a district court explained in applying this factor: "Given the contentious nature of the action, the Court finds that the result achieved in this matter would have been unlikely if entrusted to counsel of lesser experience or quality." *Zepeda v. PayPal Inc.,* 2017 WL 1113293 *20 (N.D. Cal. 2017). This case involved the multitude of complexities inherent in class certification, a decertification motion, cross-motions for summary judgment, expert discovery involving prominent and experienced experts on both sides, use of surveys to establish liability and damages, a

voluminous record indicated by the 375 docket entries, as well as a vast amount of testimonial and documentary evidence.

The fact that Class Counsel obtained certification, defeated summary judgment as to liability, and successfully opposed decertification is "some testament to counsel's skill." *In re Nexus GP Prods. Liability Litig*., 2019 WL 6622842 *12 (N.D. Cal. 2019) (finding an upward adjustment to the benchmark warranted where counsel had successfully opposed motions to dismiss.) Ultimately these repeated legal victories obtained by Plaintiff throughout the life of this case proved absolutely necessary in achieving a settlement of the current magnitude. Further, the fact that this result was obtained against an extremely well-funded corporate defendant represented by skilled and respected counsel bears on the quality of work and skill demonstrated by Class Counsel. *In re Apple Inc. Performance Device Litig.*, 2021 WL 1022866 *6 (N.D. Cal. 2021): "Courts also consider the quality of opposing counsel as a measure of the skill required to litigate the case successfully."

6. Benefits Conferred Beyond the Settlement Fund.

In addition to the substantial monetary benefits conferred by this settlement, it is Class Counsel's understanding and belief that during the course of this action (i.e. January of 2023) Defendant voluntarily ceased the exact time rounding practices complained of. Kennedy Dec., ¶ 21, Ex. 2. Notably, this policy change extended not only to Defendant's California workers, but also nationwide. *Id.*

It is well established that policy and practice changes which may reasonably construed to be in response to pending litigation are properly considered in relation to attorney fee awards:

> [I]n addition to the monetary benefits to the Class, Defendant has also agreed to change its policies in a manner that will benefit members of the Class who remain employed with Defendant. […] Defendant will be "ending its rounding practice," […] Such changes support an award of attorney's fees under a "catalyst theory," pursuant to which "attorney fees may be awarded […] if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation.

Gutierrez v. Stericycle, Inc., No. LACV1508187JAKJEMX, 2019 WL 12470143, at *7 (C.D. Cal. Mar. 22, 2019)

As discussed *supra*, this was the first action to raise the novel issue challenging the legality of Home Depot's time rounding policies, and although that claim was dismissed, Plaintiffs sought

interlocutory review and continued to retain their right of appeal had the instant settlement not been reached. Further, this case advanced the same arguments and served as the direct predecessor to the related *Camp v. Home Depot* case, which is currently pending before the Cal. Supreme Court on an identical rounding issue. As this Court may already be aware, the *Camp* action is currently being spearheaded by former Class Counsel in this case, Scott Leviant, alongside his new employer the Moon Law Group. Accordingly, there is no doubt that this action, as the originating case, served as a substantial impetus in bringing about Defendants recent policy changes.

As discussed in the Preliminary Approval Motion, the instant settlement allocates $6,525,000 in value to the rounding claim in this action. (Doc. 363, pp. 17-18). That allocation covers the past violations throughout the class period, and an equal value may be ascribed to the future claims which have now been mooted due to the beneficial policy changes spurred by this action. Accordingly, when taking into consideration the value of the non-monetary relief *for just Defendant's California workers*, the total settlement value of $72.5 million can be reasonably increased to $79,025,000.

Based upon that reasonable valuation, Class Counsel's request for approx. $24.16 million in fees equates to only a 30.5% request when non-monetary factors are considered. Further, the above valuation does address the fact that Defendants' policy change has been applied nationwide, which increases the value of the settlement exponentially, and further drives down the fee request percentage in relation to the combined monetary and non-monetary value.

B. The Fee Is Reasonable Under the Percentage of Recovery Method.

The United States Supreme Court has recognized that "a litigant or lawyer who recovers a fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Company v. Van Gemert,* 444 U.S. 472, 478 (1980); *see Mills v. Auto Lite Co.,* 396 U.S. 375, 392-93 (1970). The purpose of the common fund doctrine is to avoid unjust enrichment: "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Public Power Supply Sys. Sec. Litig.,* 19 F.3d 1291, 1300 (9th Cir. 1994); *see also Laffitte v. Robert Half Int'l., Inc.,* 1 Cal.5th 480, 489-90 (2016) (California courts recognize the common fund doctrine). When, as here, the claims

arise under California law, California law governs the calculation and award of attorneys' fees. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (citing *Mangold v. Calif. Public Utilities Comm'n,* 67 F.3d 1470, 1478 (9th Cir. 1995)).

The percentage-of-recovery method is most appropriate where, as here, the settlement results in a true common fund. *Laguna v. Coverall North America Corp.*, 753 F.3d 918, 922 (9th Cir. 2014). The "'recognized advantages of the percentage method'" include "'relative ease of calculation," which reduces the burden on the court, "alignment of incentives between counsel and the class," and "a better approximation of [private] market conditions'" in contingency-fee litigation. *Kang v. Wells Fargo Bank, N.A.,* No. 17-cv-06220-BLF, 2021 WL 5826230, *16 (N.D. Cal. Dec. 8, 2021) (quoting *Laffitte*, 1 Cal.5th at 503, 505). The percentage method has long been the "dominant" method of determining fees in cases like this one, in which counsel's efforts generated a non-reversionary cash settlement fund in a fixed amount for the benefit of the class. *In re Omnivision Techs*., 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2007) (citing *Vizcaino,* 290 F.3d at 1046*; Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311; *Paul, Johnson, Alston, & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir. 1989)). Although the Ninth Circuit has established a "benchmark" fee of 25% for common fund cases, which a district court may increase or decrease if warranted in a particular case, *Six Mexican Workers*, 904 F.2d at 1311 (9th Cir. 1990), there is no such benchmark under California law. 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); *Laffitte*, 1 Cal.5th at 486-88 (affirming 33-1/3% fee); In re Pacific Enters. Sec. Litig., 47 F.3d 373, 378-79 (9th Cir. 1995) (same); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 456, 463 (9th Cir. 2000) (same).

C. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award.

A lodestar cross-check also confirms the reasonableness of the fee award. The two firms' combined lodestar in this case is $8,992,451.50. Setareh Dec. ¶149; Kennedy Dec. ¶11.

As the Court is well-aware, this action was nearing the precipice of trial before the instant settlement was ultimately reached. Accordingly, there was substantial work done on the case

1 including briefing class certification, opposing Home Depot's Rule 23(f) petition to the Ninth
2 Circuit, deposition of each of Defendant's designated Rule 30(b)(6) corporate witnesses, 25
3 depositions of class members, depositions of Plaintiffs Utne and Pinto, cross summary judgment
4 motions, motions for leave to amend the pleading, opposing motions for judgment on the pleadings,
5 discovery motions, work with Plaintiffs' experts Dr. Krosnick, Dr. Kriegler, Mr. White and Mr.
6 Toney, expert discovery including depositions and voluminous reports, moving to intervene in the
7 Barragan and White cases and obtaining a stay of the White case, trial preparation, Daubert motions
8 and motions in limine, two mediations, negotiating the settlement agreement, moving for
9 preliminary approval, responding to inquiries from class members both once the notice of class
10 certification went out, and then again when the notice of class settlement went out, and drafting the
11 instant attorney fee motion. Class counsel will incur more time drafting the motion for final
12 approval, attending the hearing, responding to class member inquiries, and monitoring the
13 settlement distribution.

14 In calculating the lodestar, class counsel's billing rates remained consistent with the market
15 for attorneys of comparable skill in the Northern District. *E.g., Hefler v. Wells Fargo & Co.,* No.
16 16-cv-05479-JST, 2018 U.S. Dist. LEXIS 213045, at *39 (N.D. Cal. Dec. 18, 2018) (finding $650-
17 $1,250 for partners or senior counsel and $400-$650 for associates were reasonable rates); *In re*
18 *Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 15-cv-2672-CRB,
19 2017 U.S. Dist. LEXIS 39115, at *732 (N.D. Cal. Mar. 17, 2017) (billing rates ranging from $275-
20 $1,600 for partners, $150-$790 for associates, and $80-$490 for paralegals reasonable "given the
21 complexities of th[e] case and the extraordinary result achieved")); *Superior Consulting Servs., Inc.*
22 *v. Steeves-Kiss*, No. 17-cv-6059-EMC, 2018 U.S. Dist. LEXIS 80261, at *13 (N.D. Cal. May 11,
23 2018) ("[R]ates of $475-$975 per hour for partners and $300-$490 per hour for associates are
24 reasonable."); *Gutierrez v. Wells Fargo Bank, N.A.*, No. 07-cv-05923-WHA, 2015 U.S. Dist. LEXIS
25 67298, at *14-15 (N.D. Cal. May 21, 2015) (approving rates in 2015 for Bay Area attorneys of $475-
26 $975 for partners and $300-$490 for associates).

27 In determining whether to apply a positive or negative multiplier to the lodestar, a district
28 court considers one or more of the following factors including: "quality of representation, the benefit

obtained for the class, the complexity and nature of the issues presented, and the risk of nonpayment." *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 941-942 (9th Cir. 2011). However, the benefit obtained for the class is "foremost amongst these considerations." *Id.*

Here, for the reasons discussed *supra*, all factors support an upward adjustment of the lodestar. Perhaps most importantly, the results achieved for the class are excellent and Closing Shift and Rounding Settlement Class Members will receive all or nearly all the wages owed. Further, the results were obtained against highly skilled opposition, reflecting the quality of the representation, and supporting the request fee award. Additionally, Class Counsel have demonstrably exhibited a devotion to this case – and the class – far above and beyond what would normally be expected in a wage and hour class action, and that was duly reflected in the outstanding results achieved. Class Counsel remained unwavering in their prosecution of the claims alleged, keeping pressure on Defendants with virtually no respite. Further, Class Counsel spared no expense in furtherance of advancing the class claims, providing both thousands of attorney man hours and millions of dollars in hard costs, the vast majority of which were directly related to extremely complex and detailed expert analysis necessary to prove the claims and damages asserted in a way that ensured the case remained manageable for trial. It bears repeating that this was not an insignificant endeavor for two boutique plaintiffs' firms, regardless of how established and experienced Class Counsel may be.

Courts applying a discretionary lodestar crosscheck commonly approve fees reflecting significant multipliers ranging up to 9 and, in appropriate cases, considerably higher. See, e.g., *Steiner v. Am. Broadcasting Co.*, 248 Fed. App'x 780, 783 (9th Cir. 2007) (cross-check multiplier of 6.85 was "well within the range of multipliers the courts have allowed"); *Vizcaino*, 290 F.3d at 1051 (cross-check multiplier of 3.65 in the face of an approximate $97 million dollar fund); id. at 1052 (collecting large-fund cases with cross-check multipliers from 0.6-19.6); *In re Wells Fargo & Co. Shareholder Deriv. Litig.*, __ Fed. App'x __, 2021 WL 1511501 (9th Cir. Apr. 16, 2021) (affirming 22% fee from $240 million settlement fund, for 3.8 multiplier); NCAA, 2017 WL 6040065, at *9 (collecting cases with multipliers of 3.41-9.3); *Craft v. Cnty. of San Bernardino,* 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (approving cross-check multiplier of 5.2; collecting cases with multipliers from 4.5 to 19.6*); In re Rite Aid Corp. Sec. Litig.*, 362 F.Supp.2d 587, 589-90 (E.D.

1 Pa. 2005) (awarding 25% fee from $126 million settlement fund for 6.96 multiplier); *Xcel Energy,*
2 364 F.Supp.2d at 999 (approving $20 million fee with 4.7 multiplier); *Stop & Shop Supermarket*
3 *Co. v. SmithKline Beecham Corp*., 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (awarding
4 20% of $100 million settlement fund, for 15.6 multiplier); *Asare v. Change Grp. New York, Inc.*,
5 No. 12 Civ. 3371 (CM), 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013) (McMahon, C.J.)
6 ("Typically, courts use multipliers of 2 to 6 times the lodestar."); *Beckman v. KeyBank, N.A.*, 293
7 F.R.D. 467, 481-82 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight
8 times the lodestar, and in some cases, even higher multipliers."); *Credit Default Swaps*, 2016 WL
9 2731524, at *17 (approving fees constituting a "multiple of just over 6" times the lodestar with $1.9
10 billion settlement fund); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., 991
11 F. Supp. 2d 437, 448 (E.D.N.Y. 2014) (multiplier of 3.41 with $5.7 billion fund); *In re NASDAQ*
12 *Mkt.-Makers Antitrust Litig*., 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding fees representing a
13 3.97 multiplier of $36,191,751 lodestar, noting that "multipliers of between 3 and 4.5 have become
14 common."); *In re Beverly Hills Fire Litig.*, 639 F.Supp. 915, 924 (E.D.Ky.1986) (5 times multiplier);
15 *In re Sumitomo Copper Litig*., 74 F. Supp. 2d 393, 399–400 (S.D.N.Y. 1999) ("Reference may be
16 made also to the record-breaking employment discrimination settlement with Texaco. In that
17 situation, a multiplier was utilized of 5.5 times lodestar.")

18 The facts and circumstances of this case – including the novel issues of law, extreme risks
19 to Counsel, and the exceptional results discussed *supra* - easily justify a lodestar multiplier above
20 that commonly awarded; however, the multiplier requested by Counsel of 2.68 falls well within the
21 "typical" range accepted by our courts.

22 **D. Preliminary Responses of the Class to the Settlement.**

23 "The reaction of the class may also be a determining factor in determining the fee award."
24 *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2008), citing *In re Heritage*
25 *Bond Litiq., No. 02–ML–1475–DT, 2005 WL 1594389, at *15 (C.D.Cal. June 10, 2005)* (Approving
26 1/3 attorney fee request in the face of one opt-out and one objection out of 6,000 class members).
27 "It is established that the absence of a large number of objections to a proposed class action
28 settlement raises a strong presumption that the terms of a proposed class settlement action are

favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D.Cal.2004).

At the time of this filing, out of the 287,897 class members mailed notice, there has been only one objection and 15 opt-outs from the proposed settlement. Osterlund Dec. ¶¶ 10-11. This represents a **99.999%** participation rate. Notably, even the single objection lodged with the Court does not take issue with the noticed fees and costs requested by Class Counsel or any particular terms of the settlement; instead, it appears to be a simple dispute regarding the hours used to calculate that class member's specific individual share of recovery. Doc. 375.

In similar circumstances our courts have found that settlements involving even smaller class sizes and many more objections than those at issue here constitute a strong endorsement of the proposed terms, including the noticed attorney fees. As discussed by the court in I*n re Heritage Bond Litig.*:

> [T]he Court finds that the number of persons who have manifested any objection to the request for attorneys' fees-either by opting out of the class or filing an objection with this Court-is remarkably small given the wide dissemination of notice. Accordingly, the Court concludes that the lack of significant objections to the requested fees justifies an award of one-third of the Settlement Fund.

In re Heritage Bond Litig., No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at *16 (C.D. Cal. June 10, 2005) (Recognizing one objection out of a class of approx. 67,000 strongly supported the requested 1/3 attorney fee award); See also, *Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir.2004) (affirming settlement with 45 objections out of 90,000 notices sent); *Nichols v. SmithKline Beecham Corp.*, No. CIV.A.00-6222, 2005 WL 950616, at *21 (E.D. Pa. Apr. 22, 2005)(Six objections out of a class of 37,671 weighed in favor of approval of counsel's attorney fee request in the amount of 30%)

In fact, the Third District Court of Appeals has specifically found a nearly identical objection rate amongst a similarly-sized class to be a "rare phenomenon" specifically worthy of praise. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 304 (3d Cir. 2005), as amended (Feb. 25, 2005) (Notice of the fee request and the terms of the settlement were mailed to 300,000 class members, and only two objected. We agree with the District Court such a low level of objection is a "**rare phenomenon**."), emphasis added. In that case, the Court of Appeals ultimately deemed that the "District Court did

not abuse its discretion in finding the absence of substantial objections by class members to the fee requests weighed in favor of approving the fee request". *Id.*

IV. THE REQUEST FOR LITIGATION COSTS SHOULD BE GRANTED

In a common fund settlement, Class Counsel are entitled to recover the reasonable expenses incurred in prosecuting the litigation. Fed. R. Civ. P. 23(h); *Omnivision*, 559 F.Supp.2d at 1047. As discussed *supra* in Section III(A)(4), Class Counsel's costs in this action equal $3,184,159.45, the vast majority of which were expended on various experts deemed necessary by Class Counsel to support the claims and damages alleged at the time of trial, with other significant costs being class notice and mediation fees. See Setareh Dec. ¶ 125; Kennedy Dec. ¶ 14. All of the costs submitted were reasonably incurred in the prosecution of this matter over the past seven years, benefitted the class, and would have been charged to a paying client had this been a non-contingency case. The costs are therefore reimbursable, and the Court is respectfully asked to award them. *Kang v. Wells Fargo Bank, N.A.*, No. 17-CV-06220-BLF, 2021 WL 5826230, at *16 (N.D. Cal. Dec. 8, 2021) ("The principal expenses include plaintiffs' expert damages consultants […], plaintiffs' share of the mediator's fees for two mediations, and the class notices"); *In re LendingClub Sec. Litig.*, No. C 16-02627 WHA, 2018 WL 4586669, at *3 (N.D. Cal. Sept. 24, 2018); *Omnivision*, 559 F. Supp. 2d at 1047.

V. THE CLASS REPRESENTATIVE SERVICE AWARD SHOULD BE GRANTED

As discussed in the Preliminary Approval Motion, Plaintiffs seek an award of $25,000 to be paid to the estate of Mr. Utne for the extensive time and effort he contributed to this case. Doc 363 (Setareh Decl. ISO Preliminary Approval) ¶ 26; Utne Dec. ¶ 8. Mr. Utne attended deposition in this matter and personally attended the first mediation. *Id*. Mr. Utne provided substantial assistance to Class Counsel in developing the claims in this case, and provided relevant documents and also cell-phone video depicting the "lock in" time. *Id.* Plaintiffs further seek a $7,500 service award to be paid to Mr. Pinto for the time and effort he dedicated to this case over the past year, which included, *inter alia*: (1) extensive communications with Plaintiff's counsel, (2) responding to written discovery, (3) preparing for his deposition, (4) traveling to and sitting for his deposition, and (5)

discussing the pending settlement with Plaintiff's counsel. Doc 363 ¶ 25; Pinto Dec. ¶ 7.

This Court has already recognized that the requested service awards are reasonable, especially in light of the length of the case. Doc. 370, at 9, citing *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1026 (E.D. Cal. 2019) (approving $45,000 service awards for four named plaintiffs). It should also be noted that the combined service award requested constitute less than 1/100 of a single percent of the total settlement fund, and will have virtually no impact on the recovery of any given class member. All class members have been given notice of the proposed award and the opportunity to opt-out or object to the settlement, and both Mr. Pinto and Mr. Utne (through his successor in interest) have submitted declarations in support of their requested award. See Utne Dec., generally; See Pinto Dec., generally. The overwhelmingly positive reaction of the class in favor of the settlement only strengthens this Courts prior finding that these requested awards are fair and reasonable.

DATED: November 13, 2023

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