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January 27, 2023

VIA ELECTRONIC FILING

The Honorable Chief Justice Patricia Guerrero
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: **Amicus Curiae Letter Supporting Review**
(Cal. Rules of Court, Rule 8.500(g))
Camp v. Home Depot USA, 84 Cal.App.5th 638 (Oct. 24, 2022).
Supreme Court Case No. S277518

Dear Chief Justice and Honorable Justices of the California Supreme Court:

On behalf of the California Employment Lawyers Association ("CELA"), we respectfully request that the Court grant review of the Sixth District Court of Appeal's decision in *Camp v. Home Depot USA* to decide, as an issue of first impression in this Court, whether California law permits an employer to underpay an individual employee based on rounding her time entries rather than paying her based on her actual time on the clock, provided that the employer's system functions neutrally *in the aggregate* when considering its impact on *other employees'* time.

Though this Court has in several opinions discussed rounding, which is permitted under the Fair Labor Standards Act ("FLSA") and endorsed by the California Division of Labor Standards Enforcement ("DLSE"), it has been careful to note that it has not directly addressed the propriety of that practice under California law. *Camp v. Home Depot USA* presents the Court the opportunity, at the express invitation of the Court of Appeal, to rule once and for all that an employee's time on the clock is presumed compensable time worked that cannot be subverted by rounded time entries or consideration of other employees' compensation. Such a ruling would be consistent with this Court's precedents in *Donohue, Troester, Augustus*, and other decisions affirming that employees are entitled to be paid all amounts due for all of their compensable working time, resolve a split among the District Courts of Appeal, and provide crucial guidance to the lower courts and federal courts applying California law.

I. CELA'S INTEREST

CELA is an organization of California attorneys whose members primarily

represent employees in a wide range of employment cases, including wage and hour class actions similar to *Camp*. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of public policies set forth in the California Labor Code, including by advocating for effective labor law enforcement procedures such as class actions in appropriate cases. CELA has taken a leading role in advancing and protecting the rights of California employees by, among other things, submitting amicus briefs and letters on issues affecting those rights in wage and hour cases, including Supreme Court amicus briefs in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58 (*Donohue*), *Troester v. Starbucks Corp*. (2018) 5 Cal.5th 829 (*Troester*), and others, as well as numerous requests for publication or depublication of opinions and amicus letters supporting or opposing review in wage and hour matters.

II. FACTS AND PROCEDUAL HISTORY

Plaintiff *Camp* brought a class action against Home Depot alleging underpayment of wages due to unlawful rounding of time entries. Home Depot moved for summary judgment on the basis that its rounding policy was neutral on its face, neutral as applied, and otherwise lawful under *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889 (*See's Candy*). Plaintiff opposed the Motion with proof she had lost 470 minutes over approximately four and a half years due to the rounding policy. The trial court granted the Motion, finding based on stipulated facts[1] that Home Depot's rounding system operated neutrally with regard to the aggregate workforce. The Court of Appeal reversed, finding Home Depot did not meet its burden to show that there was no triable issue of material fact regarding plaintiff Camp's claims for unpaid wages: "Under the guidance and direction of *Troester* and *Donohue*, which we must follow as an intermediate court (see *Auto Equity, supra*, 57 Cal.2d at p. 455), if an employer, as in this case, can capture and has captured the exact amount of time an employee has worked during a shift, the employer must pay the employee for "all the time" worked. (Cal. Code Regs., tit. 8, § 11070, subd. 2(G); see Cal. Code Regs., tit. 8, § 11070, subds. 3(A) & 4(A); Lab. Code, § 510, subd. (a); *Troester*, supra, 5 Cal.5th at p. 840.)" (*Camp*, 85 Cal.App.5th at p. 660.)

[1] "The parties stipulated to the analysis of certain time and pay records for purposes of Home Depot's summary judgment motion. Specifically, the agreed-upon records covered a total of 13,387 hourly employees; 4,282,517 shifts; and 516,193 pay periods. The records were analyzed to compare actual time worked with time rounded under Home Depot's rounding policy over work shifts and over pay periods. The results were, as follows: (1) 'For over 2.4 million shifts (56.6% [of the total]), employees were paid for the same or a greater number of minutes than [their] actual work time as a result of rounding[, and] employees lost minutes due to rounding on 43.4% of shifts'; (2) For shifts that gained minutes due to rounding, the average gain was 3.6 minutes, and on shifts that lost minutes, the average loss was 3.5 minutes; (3) 'Employees gained minutes in 254,210 (49.2%) pay periods, lost minutes in 242,966 (47.1%) pay periods, and were paid for actual work minutes[, meaning no gain or loss,] in 19,017 (3.7%) pay periods'; (4) For pay periods that gained minutes due to rounding, the average gain was 11.3 minutes, and for pay periods that lost minutes, the average loss was 10.4 minutes; and (5) 'In the aggregate, employees in the ten percent class sample analyzed were paid for 339,331 more minutes (5,656 hours) than if Home Depot did not round time.'" (*Camp,* 84 Cal.App.5th at p. 646.)

In other words, the Sixth District Court of Appeal refused to affirm a trial court decision docking *one* employee nearly a full day's pay on the basis that the employer's rounding system had a net neutral impact on the workforce *in the aggregate*. This decision creates a conflict among the district courts of appeal. (*Compare Camp with See's Candy* (approving rounding system that had an aggregate neutral impact on the workforce).)

Although CELA agrees with the Court of Appeal's decision in favor of plaintiff, we nevertheless urge the Court to grant review to settle the conflict among the Courts of Appeal and unequivocally hold that employees are entitled to full payment for all compensable time worked notwithstanding that an employer's rounding system may have a net neutral impact on the workforce as a whole.

III. ARGUMENT

In a rounding system, the employer adjusts employees' hours worked, either forward or back, typically to the nearest quarter or tenth of an hour. For example, time entries that begin less than seven minutes before the hour mark are rounded forward and employees lose compensation that time, while employees gain compensation if their time entries begin within the rounding window after the hour mark but before the demarcation. Rounding thus permits employers to use *some* employees' time that is added during rounding windows to offset *other* employees' time that is deducted. Some employees lose wages, some gain. That scheme is completely inconsistent with long-standing California law zealously protecting employees' wages and ensuring that an employee is paid for all hours worked.

See's Candy authorized this practice – justified as affording flexibility for workers, but in reality utilized for the employer's convenience – provided the rounding is neutral on its face (does not only round one way in favor the employer) and in impact (does not systematically underpay the employees as a group).

Although such rounding schemes are authorized under the FLSA, 29 C.F.R. § 785.48(b), there is no analogue to them in the California Labor Code or Industrial Welfare Commission Wage Orders. *See's Candy* grounded its decision on the FLSA rounding rules.[2] The court concluded that "the rule in California is that an employer is entitled to use the nearest-tenth rounding policy if the rounding policy is fair and neutral on its face and it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."

[2] *See's Candy* further relied on Sections 47.1 and 47.2 of the California Division of Labor Standards Enforcement, Enforcement Policies and Interpretations Manual, which incorporate the FLSA rounding regulations. *See's Candy*, 210 Cal.App.4th at p. 902. However, the DLSE Manual is not entitled to judicial deference. (*Alvarado v. Dart Container Corp. of Cal.* (2018) 4 Cal.5th 542, 559.)

(210 Cal.App.4th at p. 907.) In other words, rounding is permissible even if large groups of employees are underpaid for their time on the clock provided that the rounded-down time is counterbalanced by other instances where employees (which may the same employees, or different employees) are paid for time that is rounded up in their favor.

This system is rife with problems. First, an employee can lose compensation for time that she actually worked because a second employee receives pay for time when that second employee did not work. But under California law, an employee is entitled to be paid for all of her working time. Second, an employee who loses wages by operation of a rounding scheme cannot challenge the system based solely on her own pay records, but must mount a showing of non-neutrality based on aggregate time records for the entire workforce, a costly burden of proof for a single employee to shoulder (and a practical problem in discovery). Third, the "neutrality" of such a system may vary based on the time period, number of working locations, or number of positions examined.

Camp offers this Court an opportunity to bring needed clarification and correction to this area of law. This Court's decision in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, which outlawed the practice of rounding 30-minute meal periods, provides the basis for the Court to rule in *Camp*. The Court ruled that an employer that fails to provide compliant meal periods cannot offset that non-compliance based on instances where employees received proper meal periods. Relevant to the rounding issue, the Court also found that employer time records showing missed, late, or short meal periods raise a rebuttable presumption of liability. *Donohue* observed that rounding was developed as a means of efficiently calculating hours worked and wages owed to employees, useful in some industries, particularly where time clocks are used. "But as technology continues to evolve, the practical advantages of rounding policies may diminish further." (*Donohue*, 11 Cal.5th at p. 73.)

Holding that the federal de minimis rule did not apply to California wage and hour claims seeking small amounts of unpaid wages – a defense often asserted by employers in justifying rounding schemes – the California Supreme Court in *Troester v. Starbucks* (2018) 5 Cal.5th 829, 848 had previously noted that "technological advances may help with tracking small amounts of time."

Camp is the first published California decision to directly criticize rounding. Relying on language from *Donohue* and *Troester*, *Camp* noted that efficiencies previously claimed for rounding time no longer apply in most instances since employers can record time to the exact minute. Remarkably, the *Camp* panel explicitly invited the California Supreme Court to "review the issue of neutral time rounding by employers and to provide guidance on the propriety of time rounding by employers, especially in view of the 'technological advances' that now exist which 'help employers to track time more precisely.'" (84 Cal.App.5th at p. 661 [citations omitted]; see, also, Wilson, J., concurring, "I conclude that California's long-standing interest in protecting employees and ensuring that they are paid for all time worked cannot be overcome by reading

inaction by the California Supreme Court and the Legislature as implied approval of *See's Candy* and the DLSE's adoption of time rounding at least where, as here, that rounding practice leads to a loss of wages payable to an employee. 84 Cal.App.5th at p. 669.)

Following the reasoning of *Camp*, one federal court has already ruled Oregon law does not authorize rounding. (*Eisele v. Home Depot U.S.A., Inc*., 2022 U.S. Dist. LEXIS 216588 (D. Or. Nov. 29, 2022).)

Following *Troester* and *Donohue*, the next step is for this Court to expressly hold that rounding schemes violate California law. Technological timekeeping advances, established differences between California law and the FLSA, and California's public policy protecting employees' wages, hours, and working conditions warrant it.

In so doing, the Court can declare that the *Donohue* rule – that time records showing meal period violations raise a rebuttable presumption of liability – applies similarly to time worked, establish an analogous presumption that time shown on the clock was working time. (See also *Brinker Restaurants, Inc. v. Superior Court* (2012) 53 Cal.4th 1004, 1053 (Werdegar, J., conc.) ("If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided.").) California law requires employers to maintain reliable records to ensure the accurate payment of wages, and for enforcement of workplace violations, payroll taxes, workers compensation premiums, and more. There is no reason employees should not also be able to rely on the record of their actual daily time as correctly reflecting the amount of wages they have earned and are due.

Based on the foregoing, CELA respectfully requests the Court grant review in *Camp.*

Respectfully submitted,
COHELAN KHOURY & SINGER
CALIFORNIA EMPLOYMENT
LAWYERS ASSOCIATION ("CELA")

Michael D. Singer, Esq.

cc: All counsel (see attached service list)

PROOF OF SERVICE

Camp v. Home Depot USA, Inc.
Supreme Court Case No. S277518

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan Khoury & Singer, 605 C Street, Suite 200, San Diego, California 92101.

On January 27, 2023, I served the foregoing document(s) described as **AMICUS CURIAE LETTER SUPPORTING REVIEW** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[XX] Via TrueFiling: I filed and served such document(s) via TrueFiling, thus sending an electronic copy of the filing and effecting service.

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

Executed January 27, 2023 at San Diego, California.

Amber Worden

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Camp v. Home Depot USA, Inc.
Supreme Court Case No. S277518

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