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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

KENNETH CHRISTIE, an individual, on behalf
of himself and all others similarly situated,

Plaintiff,

vs.

AVOCADO GREEN BRANDS, INC., a
Corporation, and DOES 1 through 100,

Defendants.

Case No.: 21STCV22426

*[Assigned for all purposes to Hon. Maren
Nelson, Dept.: SSC-17]*

**PLAINTIFF'S UNOPPOSED NOTICE
OF MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: December 1, 2022
Time: 9:00 a.m.
Dept.: SSC-17

Complaint Filed: June 14, 2021
Trial Date: None Set

1 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court,
2 on December 1, 2022, at 9:00 a.m., or as soon thereafter as the matter may be heard in Department
3 17 of the above-entitled Court, located at 312 N. Spring Street, Los Angeles, California 90012,
4 Plaintiff Kenneth Christie (“Plaintiff”), individually and on behalf of a class of similarly-situated
5 individuals, hereby moves this Court for:

- 6 1. Preliminary approval of the proposed class settlement of this lawsuit;
- 7 2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional
8 certification of the Settlement Class defined as follows:

9 All current and former hourly-paid or non-exempt employees who
10 worked for Defendant within the State of California at any time from
11 June 14, 2017, to the date of Preliminary Approval.

- 12 3. Preliminary appointment of Plaintiff Kenneth Christie as Class Representative;
- 13 4. Preliminary appointment of Christopher L. Burrows of Burrows Law Firm, as Class
14 Counsel;
- 15 5. The scheduling of a hearing to consider whether the class settlement should be finally
16 approved and to award an amount for a service award to the Class Representative,
17 and attorneys’ fees and costs to Class Counsel;
- 18 6. Appointment of CPT Group, Inc., as the third-party settlement administrator; and
- 19 7. Approval of the proposed Class Notice, and an order that it be disseminated to the
20 proposed Settlement Class as provided in the Settlement Agreement.

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1 This Motion is based on this notice of motion; the attached memorandum of points and
2 authorities; the declarations of Christopher L. Burrows, and exhibits attached thereto;
3 declaration(s) of Nicole Naleway Defense Counsel and Defendant, the declaration of Julie Green
4 on behalf of CPT Group, Inc., and exhibits attached thereto; the declaration of Plaintiff Kenneth
5 Christie; the pleadings and other papers filed in this action; and on any further oral or
6 documentary evidence or argument presented at the time of hearing.

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9 Dated: August 10, 2022

Respectfully Submitted,
BURROWS LAW FIRM

10 By: 

11 Christopher L. Burrows
12 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Kenneth Christie (“Plaintiff”) brought this action on behalf of all non-exempt
4 employees of Defendant Avocado Green Brands LLC, (“Defendant” or “Avocado Green”) for
5 various wage and hour violations. Plaintiff alleges that Defendant: failed to pay all overtime
6 wages; failed to pay all earned minimum wages; failed to provide all meal periods as required by
7 law; and failed to authorize and permit rest periods as required by law. Based on these alleged
8 violations, Plaintiff also brought allegedly associated penalty claims for failure to furnish
9 accurate and itemized wage statements, failure to pay all final wages owed upon separation of
10 employment, and for civil penalties under the Labor Code Private Attorneys General Act
11 (“PAGA”).

12 Plaintiff respectfully requests that this Court preliminarily approve this non-reversionary,
13 common-fund class action settlement,¹ in which Defendant has agreed to pay \$280,000 on behalf
14 of approximately 947 members of the following Settlement Class:

15 All non-exempt employees in California who have been employed by
16 Defendant, from June 14, 2017, to the date of Preliminary Approval by the
17 Court.

18 The Settlement was reached after the parties engaged in mediation with Louis Marlin, a
19 respected wage and hour class action mediator. In connection with mediation, Avocado Green
20 produced extensive discovery and information, including payroll and timekeeping data and
21 records for the class period, and documents reflecting its relevant wage and hour policies and
22 practices in effect during the relevant time period. After significant legal research and analysis,
23 including a detailed analysis of Defendant’s potential exposure made with the assistance of
24 Plaintiff’s retained damages expert, a full-day mediation was held on March 18, 2022, at which
25 the Parties (with the assistance of a Mediator’s Proposal) reached a class-wide resolution of
26 Plaintiff’s claims. Over the course of the following months the parties negotiated the finer points
27 of the settlement, ultimately resulting in the Settlement Agreement now before the Court.

28 ¹ The Class Action and PAGA Settlement Agreement and Class Notice (the “Settlement Agreement”) is
attached as Exhibit 1 to the Declaration of Christopher L. Burrows filed herewith. The redlined Settlement
Agreement is separately attached to the Burrows Declaration.

1 Settlement Class members do not need to file a claim to reap the financial benefits of the
2 Settlement. Individual settlement payments will be distributed to all Settlement Class members
3 who do not opt out of the Settlement, and separate PAGA release and PAGA payments will be
4 distributed to all eligible aggrieved class members whether or not they opt-out. After deductions
5 for proposed settlement administration costs, attorneys' fees and verified costs, Plaintiff's service
6 award, and the Labor & Workforce Development Agency's ("LWDA") share of PAGA civil
7 penalties, the average Settlement Payment is estimated to be \$136.67. Accordingly, and for the
8 reasons stated herein, Plaintiff respectfully requests that the Court grant preliminary approval of
9 the settlement.

10 **II. SUMMARY OF THE LITIGATION**

11 **A. FACTUAL AND PROCEDURAL BACKGROUND**

12 Avocado Green Brands, LLC, is a mattress and furniture manufacturer. Plaintiff was
13 employed by Defendant as a non-exempt employee with job responsibilities that included, but
14 were not limited to, engaging in and supporting Defendants' mattress/furniture manufacturing
15 and sales-related business from in or about May 2020, to February 2021. Declaration of
16 Christopher L. Burrows ("Burrows Decl."), ¶ 14. Plaintiff and Settlement Class members include
17 all non-exempt employees in California who have been employed by Defendant from June 14,
18 2017, to the date of Preliminary Approval by the Court. *Id.*

19 On June 14, 2021, Plaintiff Kenneth Christie filed the instant action in this Court alleging
20 class claims for failure to pay overtime and minimum wages, meal and rest period violations,
21 waiting time penalties, wage statement penalties, unfair competition and for penalties under
22 PAGA. Burrows Decl., ¶ 15.

23 **B. PLAINTIFF'S CLAIMS AND DEFENDANT'S DEFENSES**

24 **1. Claim for Unpaid Overtime Based on Regular Rate Miscalculation**

25 Plaintiff alleges that Avocado Green failed to include non-discretionary bonuses and/or
26 other compensation into the "regular rate" of pay. Burrows Decl., ¶ 16. Plaintiff alleges this extra
27 pay included bonuses and other periodic incentive compensation programs earned by achieving
28 pre-determined goals. *Id.* Plaintiff alleges that this miscalculation resulted in underpaid overtime

wages. *See* 29 C.F.R. § 778.200 (under FLSA, “regular rate” includes all forms of remuneration except for eight enumerated exceptions); *see also Prachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal.4th 217, 242, n.14 (“California follows the federal standard” for calculating regular rate); Burrows Decl., ¶ 16.

Avocado Green contends that any bonuses paid to putative class members during the relevant time period, *if any*, were discretionary, and therefore, did not need to be included in the regular rate of pay for overtime purposes or were already properly calculated into the regular rate of pay. *See*, 29 C.F.R. §§ 778.208, 778.211 (excluding “discretionary” bonuses from the regular rate); *see also* DLSE Manual § 49.1.2.4(3) (bonuses are discretionary, and therefore excludable, if “both the fact that payment is to be made and the amount of the payment” are discretionary); Burrows Decl., ¶ 17. Defendant also maintains that if putative class members received any bonuses throughout the relevant time period, they were different and unique, creating substantive differences among the putative class members with respect to the bonuses received as well as the expectations regarding those bonuses, making class certification unlikely. *Id.*

2. Minimum Wage Claims

Plaintiff alleges that putative class members were not paid for all hours because Defendant maintained a policy that required Plaintiff and members of the Classes to work off-the clock, and punch-in for the beginning of their shift no more than seven (7) minutes before the scheduled start time, and to punch-out from their shift no more than seven (7) minutes after the scheduled end time. Burrows Decl., ¶ 18. Hand-in-hand with this policy is Defendant’s policy on tardiness, whereby non-exempt employees are subject to disciplinary action for being late to work, whether it be 1 minute, 5 minutes, or more. *Id.*

Defendant asserts numerous defenses to Plaintiff’s time-rounding claim, with the foremost being that it in-fact paid for all hours worked, that as a driver Plaintiff is not similarly situated to non-driver employees, and any discrepancy is *de-minimis*. Burrows Decl., ¶ 19. Avocado Green also maintains that it compensated putative class members for all hours worked and contends that Plaintiff would be unable to certify this claim given the individualized inquiries as to whether putative class members were actually paid more (or less) than time recorded, in

each individual circumstance. *Id.*, ¶ 19.

3. Meal Period Claims

Plaintiff alleges that from a practical standpoint, Avocado Green did not pay meal period premiums at the regular rate of pay, as California law and their own written policies required. Burrows Decl., ¶ 20. Defendant points to its facially compliant written policies, however, the existence of a facially compliant *written policy* is not sufficient to defeat class certification where an employer has a *practice* of failing to provide all meal periods. *See, e.g., Alberts v. Aurora Behavioral Health Care*, 241 Cal.App.4th 388 (2015) (holding that class certification was proper where it was shown that employer’s practices or procedures resulted in the denial of lawful meal and rest breaks, even though the employer’s written meal and rest break policy was facially legal, and even if employees could not prove a “universal practice” on the part of management to deny employees breaks); *see also* Cal. Labor Code § 512; *Brinker v. Superior Court*, 53 Cal.4th 1004, 1041-49 (2012) (discussing meal period requirements for employers).

Avocado Green asserts that it has always provided putative class members with legally-compliant meal periods and any meal periods that did not meet that standard were solely the result of employee choice. Burrows Decl., ¶ 21. Avocado Green points out that under *Brinker* it is only required to “provide” the opportunity to take meal periods, not “ensure” meal periods are taken – which Defendant contends it has always done. *Brinker, supra*, 53 Cal.4th at 1038 (rejecting “ensure” standard); Burrows Decl., ¶ 21. Finally, Defendant maintains Plaintiff’s meal period claims are not suited for class certification, since individual inquiries would be required to assess which employees received non-compliant meal periods (or missed second meal periods), how many meal periods were non-compliant or missed, and the reasons why a particular employee took a non-compliant meal period or missed a meal period on a particular shift. *Id.*

4. Rest Period Claim

Despite Defendant’s facially lawful written policy, Plaintiff contends that in practice, employees did not receive a rest period for every four hours worked, or major fraction thereof, particularly due the inherent needs of the demands of superiors, particularly when working shifts

1 in excess of 10.0 hours (when they would be entitled to three rest periods). *Id.* at ¶ 22.

2 Avocado Green maintains that it authorized and permitted all legally-required rest periods
3 to putative class members, including employing a compliant written policy. *Id.*, ¶ 23. Avocado
4 Green also argues that Plaintiff’s rest period claim would not be amenable to class treatment,
5 since individual inquiries would be required to determine which delivery-employees (such as
6 Plaintiff) failed to take rest periods, how many rest periods each employee failed to take, and the
7 reasons why each employee failed to take a rest period on a particular shift. *Id.* Defendant asserts
8 that these manageability concerns are especially present with respect to rest period claims given
9 that, unlike meal periods, rest periods are not recorded. *Id.*

10 **5. Claims Under Cal. Labor Code §§ 203, 226, and the PAGA**

11 As a result of these alleged wage and hour violations, Plaintiff asserts that Defendant
12 failed to comply with its final payment and wage statement obligations (Cal. Labor Code §§ 203
13 and 226, respectively). Burrows Decl., ¶¶ 24-25. Plaintiff also seeks civil penalties under the
14 PAGA based on the aforementioned claims. *Id.*, ¶ 26.

15 Defendant asserts it has strong defenses to the waiting time claim because of the good-
16 faith disputes as to Plaintiff’s underlying claims, precluding imposition of penalties. *See* 8 Cal.
17 Code Regs. § 13520 (a “good faith dispute that any wages are due will preclude imposition of
18 waiting time penalties”); *Kao v. Joy Holiday*, 12 Cal.App.5th 947, 963 (2017) (holding that “good
19 faith dispute” over whether employee was exempt precluded imposition of waiting time penalties
20 over contested wages owed); Burrows Decl., ¶ 24. Avocado Green contends that Plaintiff’s meal
21 and rest period claims cannot support a claim for waiting time penalties after *Kirby v. Immoos*
22 *Fire Protection, Inc.*, 53 Cal.4th 1244 (2012), which held meal and rest period claims are not
23 actions for “nonpayment of wages,” a view adopted in *Ling v. P.F. Chang’s China Bistro, Inc.*,
24 245 Cal.App.4th 1242, 1261 (2016) (“Following *Kirby*, section 226.7 cannot support a section
25 203 penalty”). Burrows Decl., ¶ 24.

26 With respect to wage statement penalties, Defendant argues that, as with waiting time
27 penalties, meal and rest period claims cannot support a claim for wage statement penalties after
28 *Kirby* (*see, e.g., Jones v. Spherion Staffing*, No. LA-CV-11-06462-JAK(JCx), 2012 WL 3264081

1 at **8-9 (C.D. Cal. 2012). Avocado Green further argues that its alleged wage statement
2 violations could not be shown to be “knowing and intentional,” and that Plaintiff cannot show
3 that he or any other putative class member “suffer[ed] injury” as a result of the alleged wage
4 statement violations, as required by Lab. Code § 226(e) for imposition of penalties. Burrows
5 Decl., ¶ 25.

6 Lastly, Defendant asserts that Plaintiff’s PAGA claim fails because the underlying claims
7 are without merit. *See, e.g., Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011)
8 (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail.”).
9 Avocado Green claims that given its good-faith defenses to Plaintiff’s claims, the Court would
10 utilize its discretion to substantially reduce any potential penalties. Burrows Decl., ¶ 26; *see also*
11 Labor Code § 2699(e)(2) (authorizing reduction in PAGA penalties in trial court’s discretion);
12 *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming
13 reduction of PAGA penalties); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK(OPx), 2011
14 WL 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties from \$2.8 million to
15 \$500,000).

16 **C. DISCOVERY AND MEDIATION**

17 In preparation for mediation, the parties engaged in extensive informal discovery,
18 including production of Defendant’s relevant written wage and hour policies, electronic and hard
19 copy time and payroll data for the class period and documents reflecting Defendant’s relevant
20 wage and hour policies and practices in effect during the relevant time period. Burrows Decl., ¶
21 28. Plaintiff hired a labor economist to conduct a comprehensive analysis of the data produced
22 by Defendant. *Id.*

23 The parties attended a full-day mediation on March 18, 2022, with Louis Marlin, a well-
24 respected wage and hour class action mediator. Burrows Decl., ¶ 29. During mediation, the
25 parties vigorously debated their opposing legal positions, the likelihood of certification of
26 Plaintiff’s claims, and the legal bases for the claims and defenses. *Id.* At the conclusion of
27 mediation, the parties were able to come to a class-wide resolution with the help of a mediator’s
28 proposal. *Id.* In the months that followed, the parties finalized the terms of settlement and

executed the Settlement Agreement currently presented to the Court for approval. *Id.*

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

Upon approval, Defendant will pay a non-reversionary “Gross Settlement Amount” of \$280,000. No Settlement Class member will be required to file a claim form in order to reap financial benefit from the Settlement. All Settlement Class members will automatically receive a Settlement Payment unless they affirmatively opt-out. The monetary terms of the settlement are summarized as follows:

Gross Settlement Amount:	\$280,000.00
Court-approved attorneys’ fees (up to):	\$93,333.00
Court-approved verified costs (up to):	\$15,000.00
Court-approved service award:	\$2,500.00
LWDA’s share of PAGA civil penalties:	\$18,750.00
Settlement administration costs:	\$13,750.00
Net Settlement Amount:	\$136,667.00

1. The Settlement Provides for Reasonable Monetary Payments

As demonstrated above, after deducting amounts for attorneys’ fees (\$93,333), reasonable attorneys’ fees and verified costs (up to \$15,000), Plaintiff’s service award (\$2,500), the LWDA’s share of PAGA civil penalties (\$18,750), and settlement administration costs (\$13,750), the Settlement requires Defendant to pay approximately \$136,667.00 to all members of the Settlement Class who do not timely opt-out. *See* Settlement Agreement, § 1.28. According to Defendant, there are approximately 1,000 potential Settlement Class members. Thus, the average Settlement Payment is projected to be \$136.67.² Settlement Class members will have 60 days from the mailing of the Notice to opt-out, providing ample time for review without unduly delaying the Settlement. *See* Settlement Agreement, § 1.43.

Settlement Payments will be calculated based on the number of eligible workweeks worked by Settlement Class members during the relevant time periods. Settlement Class

² At the March 18, 2022 mediation, there were approximately 947 Class Members working a total of 71,599 workweeks. If the number of workweeks increases by more than 20% through the class period, then the amount of the settlement will increase proportionately per class workweek added. *Agreement*, § 8.

members who do not opt out of the Settlement will be bound by its terms, and will be releasing Defendant from all claims that were pled in Plaintiff's operative Complaint (or which could have been pled based on the allegations therein). *See* Settlement Agreement, § 5.2. Plaintiff agreed to a general release of all claims (known or unknown). *Id.*, § 5.1.

2. Attorneys' Fees and Costs, Service Awards and the PAGA Amounts

Should the Court grant preliminary approval, Plaintiff's counsel will, at the time of seeking final approval, request an attorneys' fees award of one-third of the Gross Settlement Amount (estimated at \$93,333), and up to \$15,000 in verified cost reimbursement. *See* Settlement Agreement, §§ 3.2.2-3.2.3. Plaintiff submits that the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a purely contingent basis. Plaintiff's counsel has incurred substantial attorneys' fees conducting pre-filing investigation, analyzing Plaintiff's claims, conducting legal research, reviewing documents and data produced, performing data analysis of employee timekeeping and other data, preparing for and attending mediation, negotiating and preparing the Settlement Agreement, preparing this Motion for Preliminary Approval, and otherwise prosecuting the case. Burrows Decl., ¶ 30. Plaintiff's counsel also anticipates incurring additional attorneys' fees in appearing at the hearing on this Motion, supervising the Notice process, preparing the Final Approval motion, and appearing at the Final Approval Hearing. *Id.*

It is appropriate to award attorneys' fees in class actions as a percentage of the "common fund" created as a result of a settlement. *See Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480 (2016) (holding "the percentage of fund method survives in California class action cases"). Counsel's request for fees of one-third of the Gross Settlement Amount is well within the range of reasonableness and is typical for common fund settlements. *See Newberg on Class Actions* § 14.6 (4th Ed. 2013) (historically, courts have awarded percentage fees in the range of 20% to 50%). Plaintiff's counsel submits the request for fees as reasonable when viewed as an overall percentage of the settlement, and in light of the substantial risks and significant work undertaken, the positive results obtained for the Settlement Class, and the efficiency with which Plaintiff's counsel conducted the litigation. *See id.*

1 As part of the Settlement, Plaintiff will separately apply for a service award at final
2 approval in the amount of \$2,500 for his service to the Settlement Class. Burrows Decl., ¶ 31;
3 *see also* Settlement Agreement, § 3.2.1. “[I]ncentive awards are fairly typical in class action cases
4 ... and are intended to compensate class representatives for work done on behalf of the class
5 [and] to make up for financial or reputational risk undertaken in bringing the action.” *In re*
6 *Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully
7 briefed at the time of final approval, Plaintiff’s requested service award is intended to recognize
8 the substantial time and effort that Plaintiff expended on behalf of the Settlement Class, including
9 providing substantial factual information and documents to Plaintiff’s counsel, identifying
10 potential witnesses, attending in-person and telephonic meetings with Plaintiff’s counsel to
11 discuss the claims and theories at issue in the litigation, and otherwise actively participating in
12 the prosecution of the claims. Burrows Decl., ¶ 31; Declaration of Plaintiff Kenneth Christie
13 (“Christie Decl.”), ¶ 4. Plaintiff respectfully submits that the requested service award is well
14 within the range of approval and in line with service awards approved in similar class action
15 settlements. *See, e.g., Alvarado v. Nederend*, No. 1:08-cv-01099-OWW-DLB, 2011 WL 90228
16 (E.D. Cal. Jan. 11, 2011) (approving \$7,500 incentive award to each of five named plaintiffs out
17 of \$505,058.60 settlement).

18 The parties agreed to designate \$25,000 of the Gross Settlement Amount as PAGA
19 penalties, of which \$18,750 will be paid to the LWDA for their 75% share, and the remaining
20 \$6,250 distributed to the Settlement Class as described above. *See* Settlement, § 1.34. Plaintiff
21 submits that this allocation of PAGA civil penalties is appropriate in light of other settlements
22 allocating penalties to the LWDA. *See, e.g., Chu v. Wells Fargo Inv., LLC*, No. C-05-4526-MHP,
23 2011 WL 672645 (N.D. Cal. Feb. 16, 2011) (approving PAGA payment of \$7,500 to LWDA out
24 of \$6.9 million settlement).

25 **IV. ARGUMENT**

26 **A. PRELIMINARY APPROVAL IS WARRANTED**

27 California Rule of Court 3.769 conditions the settlement of a class action on court
28 approval, which is generally evaluated under the federal standards applicable under Rule 23 of

1 the Federal Rules of Civil Procedure. *See Reed v. United Teachers Los Angeles*, 208 Cal.App.4th
2 322, 337 (2012) (stating that Rule 3.769 requires the trial court to determine “that the settlement
3 is fair, reasonable and adequate to all concerned”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
4 1026 (9th Cir. 1998) (stating that Rule 23(e) requires the trial court to determine “whether a
5 proposed settlement is fundamentally fair, adequate, and reasonable”). Settlement is the preferred
6 means of dispute resolution, particularly in complex class action litigation. *See In re Syncor*
7 *ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The Court’s role in evaluating a proposed
8 settlement is limited to ensuring that the agreement taken as a whole is fair and is within the
9 range of reasonableness. *See, e.g., Hanlon, supra*, 150 F.3d at 1027. There is an initial
10 presumption of fairness when the settlement agreement was negotiated at arm’s length by class
11 counsel. *See, e.g., Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

12 **1. Standard for Preliminary Approval**

13 To make a fairness determination, the Court should consider several factors, including:
14 “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further
15 litigation, the risk of maintaining class action status through trial, the amount offered in
16 settlement, the extent of discovery completed and the stage of the proceedings, [and] the
17 experience and views of counsel.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).
18 “The list of factors is not exclusive and the Court is free to engage in a balancing and weighing
19 of the factors depending on the circumstances of each case.” *Wershba v. Apple Computer, Inc.*,
20 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed settlement is fair, adequate,
21 and reasonable in light of the overall balance of factors in this case.

22 **a. The Strength of Plaintiff’s Case**

23 Although Plaintiff maintains his claims are meritorious, he acknowledges there were
24 substantial risks and uncertainty in proceeding with class certification and eventual trial on the
25 merits. As described in section II.B., *supra*, Avocado Green presented multiple defenses to
26 Plaintiff’s claims, both on the merits and to class certification. While Plaintiff was prepared to
27 litigate these claims through class certification and ultimately trial, success was far from certain.
28

1 **b. Risk, Expense, Complexity, and Duration of Further Litigation**

2 Although the parties engaged in significant, targeted and meaningful informal discovery
3 in advance of mediation, formal written and deposition discovery had not yet begun, which would
4 have required the expenditure of substantial time and resources. *See* Burrows Decl., ¶ 32.
5 Moreover, Plaintiff still had to file for class certification, and faced the prospect of appeal in the
6 wake of a disputed class certification and/or adverse summary judgment ruling. Even if the
7 classes sought to be certified by Plaintiff were in fact certified, the parties would incur
8 considerably higher attorneys’ fees and costs through a possible decertification motion, trial, and
9 possible appeal. This settlement avoids those risks and the accompanying expense. Thus, this
10 factor supports preliminary approval.

11 **c. Risk of Maintaining Class Action Status**

12 Absent settlement, there was a risk that no class would be certified at the time of trial, or
13 if there were, it would consist of a significantly smaller group of employees than the proposed
14 Settlement Class, with the corresponding expected recovery significantly reduced. Thus, this
15 factor supports preliminary approval.

16 **d. Amount Offered in Settlement Given Realistic Value of Claims**

17 This proposed settlement provides a fair and reasonable monetary recovery for the
18 Settlement Class in the face of disputed claims. With the assistance of a retained expert
19 economist, Plaintiff conducted an analysis of unpaid wages and penalties due to Defendant’s
20 allegedly unlawful policies/practices. Plaintiff’s analysis of the realistic expected recoveries for
21 each of the theories of liability pled is set forth below:

22 Unpaid Wages due to Regular Rate Miscalculation: \$12,275.00

23 Plaintiff alleges that Avocado Green failed to include non-discretionary bonuses³ in the
24 “regular rate” of pay. These bonuses and extra pay included periodic incentive bonus programs
25 and/or commission earned by achieving pre-determined goals. Burrows Decl., ¶ 16. Assuming
26 that Plaintiff would be able to prove that each of the bonuses should have been included when
27 calculating the overtime rate of pay, the putative class was underpaid a total of \$12,275 in

28

³ Classwide data produced identified approximately 472 employees who worked overtime and received incentive pay in the same pay period.

overtime wages. Plaintiff did not discount Defendant's maximum exposure (to account for risk of non-certification or failure on the merits) to arrive at an estimated exposure of \$12,275, which assumes a 100% chance of success on the merits. *See* Burrows Decl., ¶ 16. Avocado Green maintains that the bonuses, if any, were discretionary both as to payment and as to amount, and therefore were not required to be included in the "regular rate" for overtime purposes and that Plaintiff's calculations are not accurate. *See id.* at ¶ 17.

Minimum Wage Violations: \$19,500.00

Plaintiff alleges that putative class members were not paid for all hours because Defendant encouraged employees to work off-the-clock and, separately, maintained a time rounding practice that required Plaintiff and members of the Classes to punch-in for the beginning of their shift no more than seven (7) minutes before the scheduled start time, and to punch-out from their shift no more than seven (7) minutes after the scheduled end time. Hand-in-hand with this policy is Defendant's policy on tardiness, whereby non-exempt employees are subject to disciplinary action for being late to work, whether it be 1 minute, 5 minutes, or more. Plaintiff also alleges a unilateral auto-deduct policy. Burrows Decl., ¶ 18. Plaintiff's analysis indicated that approximately 52% of shifts were negatively affected by Defendant's timekeeping system. *Id.* However, Avocado Green asserts that it forbade employees from working off-the-clock, denies an auto-deduct mechanism and sets forth multiple defenses to Plaintiff's rounding claim, with the foremost being that it in-fact paid for all hours worked and any discrepancy is *de-minimis*. *Id.*, ¶ 19. Avocado Green also maintains that certification of a rounding class would be unlikely. Finally, Defendant argues that it compensated putative class members for all hours worked and contends that Plaintiff would be unable to certify this claim given the individualized inquiries as to whether putative class members were actually paid more (or less) than time recorded, in each individual circumstance. *Id.* For these reasons, Plaintiff estimated Defendant's exposure as \$19,500.00. *Id.*, ¶ 19.

Meal Period Violations: \$22,518.00

Plaintiff alleges that from a practical standpoint, Defendant did not pay meal period premiums at the regular rate of pay, as California law and their own written policies required.

1 However, in the class period Defendant paid \$186,49.93 in meal period premiums. Burrows
2 Decl., ¶ 20. Plaintiff anticipates that Avocado Green will point to its facially compliant written
3 policies, however, the existence of a facially complaint written policy is not sufficient to defeat
4 class certification where an employer has a practice of failing to provide all meal periods. *See*,
5 *e.g., Alberts v. Aurora Behavioral Health Care*, 241 Cal.App.4th 388 (2015) (holding that class
6 certification was proper where it was shown that employer’s practices or procedures resulted in
7 the denial of lawful meal and rest breaks, even though the employer’s written meal and rest break
8 policy was facially legal, and even if employees could not prove a “universal practice” on the
9 part of management to deny employees breaks). *See*, Burrows Decl., ¶¶ 20-21. Avocado Green
10 disputes these allegations. *Id.* Based on Plaintiff’s expert’s analysis of the timekeeping records
11 produced in connection with mediation, Plaintiff determined that there were approximately 1,416
12 qualifying shifts with a late, short or otherwise non-compliant meal period for which no premium
13 was paid. As such, Plaintiff has evaluated Defendant’s meal period exposure as follows: 1,416
14 violations * \$19.63 premium (average hourly rate) = \$27,800.00. Plaintiff discounted this
15 calculated exposure for risk of non-certification by 10%, and another 10% for a risk of being
16 unsuccessful on the merits, to arrive at an estimated exposure of **\$22,518.00**. *Id.*, ¶ 21.

17 **Rest Period Premium Wages: \$34,340.00**

18 Despite Avocado Green’s facially lawful written rest period policies, Plaintiff contends
19 that in practice, employees did not receive a rest period for every four hours worked, or major
20 fraction thereof, particularly due the inherent needs of the industry and demands of superiors.
21 Contrary to policy, Plaintiff alleges that employees were discouraged from taking all duty-free
22 rest breaks. *See* Burrows Decl., ¶ 22. As an anecdotal baseline measure, Plaintiff alleges that
23 putative class members were regularly denied one (or more) rest periods every two pay periods,
24 particularly when working shifts in excess of 10.0 hours. *Id.*

25 Avocado Green contends it authorized employees to take all required rest periods, and
26 that it did not do anything to discourage or impede employees from taking their rest periods in
27 practice. *See id.*, ¶ 23. Defendant further argues that Plaintiff’s rest period claim is inherently
28 unsuited for class treatment as it would require individualized inquiries to determine whether a

1 certain rest period was denied on a given shift, and whether a missed rest period was the result
2 of individual employee choice, which would devolve into an unmanageable series of mini-trials,
3 particularly since rest periods were not recorded and there was no other common evidence of
4 when rest periods were taken. *Id.* Based on documentary and anecdotal evidence, Plaintiff
5 assessed an estimated the maximum damages on this claim at \$70,080.00 (3,570 independent
6 violations x \$19.63 average hourly rate). Accordingly, Plaintiff discounted Defendant's
7 calculated exposure by 30% for risk of non-certification, including the lack of common evidence,
8 and an additional 30% for risk of being unsuccessful on the merits, to arrive at an estimated
9 exposure of \$34,340.00. *Id.*, ¶ 22.

10 **Waiting Time Penalties: \$36,182.00**

11 Based on data provided by Defendant, there are approximately 383 putative class
12 members who have separated their employment in the relevant time period. Plaintiff's expert
13 calculated waiting time penalties for all 383 employees (i.e., 240 hours of pay at the average
14 hourly rate of pay @ \$19.63) at \$1,804,390. Burrows Decl., ¶ 24. However, as noted, there was
15 *significant* risk of non-certification and non-recovery on this claim due to Defendant's good-faith
16 defenses to the underlying claims and contention that waiting time penalties are not available for
17 meal or rest period claims (which form the bulk of Defendant's underlying liability). *Id.*, ¶ 24.
18 Thus, Plaintiff discounted 383 class numbers by 50% (to 192), and discounted the *maximum*
19 exposure by 80% for risk of non-certification and by an additional, separate, 80% for risk of
20 being unsuccessful on the merits, to arrive at an estimated total of \$36,182.00. *Id.*, ¶ 24.

21 **Wage Statement Penalties: \$29,110.00**

22 Plaintiff's expert analysis of the data reflected that there are approximately 12,937
23 qualifying wage statements issued to putative class members during pay periods in the relevant
24 time period. Burrows Decl., ¶ 25. Plaintiff therefore calculated a total of \$51,750 in maximum
25 potential wage statement penalties.⁴ *Id.* Avocado Green maintains that no underlying violations
26 occurred which would give rise to derivative wage statement liability, and that its wage
27 statements followed Labor Code § 226(a)'s requirement to list the name of the employer on the

28 ⁴ Wage statement penalties were calculated at \$100 per pay period.

1 wage statement. Defendant further maintains that, even if there were any alleged violations, they
2 were not “knowing and intentional” to meet the standards set in Labor Code § 226(e) for a wage
3 statement penalty. *Id.* Avocado Green further asserts that meal and rest period claims cannot
4 support wage statement penalties after *Kirby*. Plaintiff therefore discounted the calculated
5 exposure by 25% for risk of non-certification, and an additional, separate 25% for risk of being
6 unsuccessful on the merits, to arrive at an estimated total of \$29,110.00. Burrows Decl., ¶ 25.

7 **PAGA Penalties: \$25,000.00**

8 Plaintiff’s expert identified approximately 481 employees potentially qualified for PAGA
9 penalties, *assuming* that at least one labor code violation could be proven in each of the 40
10 qualifying pay periods. PAGA penalties (calculated for pay periods on or after 6/14/20) were
11 calculated at \$100 for the first pay period and \$200 for subsequent pay periods. Plaintiff
12 calculated the *maximum* PAGA penalties for all 481 employees was approximately \$1,924,000.
13 Burrows Decl., ¶ 26; *see also Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157. However,
14 these penalties derive from the underlying violations discussed herein, each of which Defendant
15 vigorously disputes.⁵ *See, e.g., Green v. Lawrence Service Co.*, No. LA-CV-12-6155-
16 JAK(VBKx), 2013 WL 3907506 at *5, fn. 5 (C.D. Cal. July 23, 2013) (explaining that PAGA
17 claim’s success is determined by merits of underlying claims). PAGA also specifically grants
18 courts the discretion to reduce penalties (Labor Code § 2699(e)(2)), and Defendant argues that
19 the Court would reduce penalties significantly given the good-faith defenses. Burrows Decl., ¶
20 26. Accordingly, Plaintiff discounted that maximal figure by 89% for a risk of losing on the
21 merits and by an additional, separate, 89 % for the risk of this Court reducing penalties, to arrive
22 at an estimated total of \$25,000.00 (\$23,280). Burrows Decl., ¶ 26; *see also Thurman, supra*,
23 203 Cal.App.4th at 1135-36 (affirming reduction of PAGA penalties); *Fleming, supra*, 2011 WL
24 7563047 at *4 (justifying the significant reduction of PAGA penalties).

25 Using these estimated figures for each of the claims described above, Plaintiff predicted
26 the realistic potential total recovery for the Settlement Class would be approximately

27 _____
28 ⁵ Defendant asserted a similar argument with respect to Plaintiff’s unfair competition claim. *See, e.g., Lazar v. Hertz Corp.*, 69 Cal.App.4th 1494, 1505-06 (1999) (underlying misconduct must be unlawful in order to state a valid claim for relief under the UCL).

1 \$178,925.00. Burrows Decl., ¶ 27. The proposed settlement of \$280,000, minus Court approved
2 deductions adequately represents over 75% of Plaintiff's reasonably forecasted recovery and
3 provides a class-wide recovery that would likely be precluded absent settlement. *Id.* This
4 recovery is significant, particularly considering the barriers to maintain this case as a
5 class/collective action, and supports preliminary approval as appropriate because the settlement
6 will provide meaningful monetary relief to the Settlement Class.⁶ *Id.*

7 **e. The Experience and Views of Counsel.**

8 “Parties represented by competent counsel are better positioned than courts to produce a
9 settlement that fairly reflects each party's expected outcome in litigation.” *In re Pacific*
10 *Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiff is represented
11 by competent and experienced counsel who possess extensive experience litigating wage and
12 hour class actions from both the plaintiff and defense side and has been appointed as class counsel
13 in numerous cases alleging similar claims. *See* Burrows Decl., ¶¶ 6-12. Plaintiff's counsel
14 conducted an in-depth review of Avocado Green's policies as well as employee payroll and
15 timekeeping records along with other relevant data and drew on extensive experience in similar
16 cases to assess the strengths and weaknesses of Plaintiff's case. Burrows Decl., ¶¶ 5, 28. The
17 settlement was reached with the assistance of Louis Marlin, an experienced and well respected
18 neutral wage and hour class action mediator, who ultimately presented the Parties with a
19 mediator's proposal to which both sides agreed. *Id.*, ¶ 29. This factor strongly supports
20 preliminary approval. *See Kullar, supra*, 168 Cal.App.4th at 130.

21 **2. The Preliminary Approval Standard Is Met.**

22 The Court can grant preliminary approval of the proposed settlement and direct that notice
23 be given if the settlement: (1) falls within the range of possible approval; (2) appears to be the
24 product of serious, informed negotiations; and (3) has no obvious deficiencies. *See Manual for*
25 *Complex Litig.*, § 30.41 (3rd Ed. 1995); *Newberg on Class Actions*, §§ 11:24-25 (4th Ed. 2013).

26
27
28 ⁶ At mediation, in addition to claims asserted in the operative complaint, Defendant produced data re: split-shift premium pay, failure to indemnify/failure to provide safety equipment, all of which resulted in nominal value to be included in the proposed Settlement before the Court.

1 **a. The Settlement Is Within the Range of Possible Approval**

2 The proposed settlement directly reflects the estimated recovery that the Settlement Class
3 could reasonably expect considering the significant litigation risks, and will provide tangible,
4 monetary compensation for hotly disputed wage claims on a class-wide basis. Plaintiff submits
5 the settlement is within the range of possible approval, such that notice should be provided to the
6 Settlement Class so that they may consider the settlement. The Court will again assess the
7 reasonableness of the settlement after the Settlement Class has had the opportunity to opt-out
8 and/or object.

9 **b. The Settlement Resulted from Serious, Informed Negotiations**

10 This proposed class wide settlement is the result of the exchange of substantial class wide
11 information, arm's-length negotiations by counsel, a full-day mediation before an experienced
12 wage and hour class action mediator, and additional months of negotiating the Settlement
13 Agreement. Thus, the proposed settlement is entitled to an initial presumption of fairness. *See*
14 *Kullar, supra*, 168 Cal.App.4th at 130. Plaintiff carefully vetted the claims at issue, reviewed
15 extensive data and information, and conducted a detailed statistical analysis of the data with the
16 help of a retained expert economist to arrive at the estimated class-wide damages figures. *See*
17 *Burrows Decl.*, ¶ 28. Thus, this factor also supports preliminary approval.

18 **c. The Settlement Is Devoid of Obvious Deficiencies**

19 Preliminary approval of the proposed settlement is also warranted because there are no
20 obvious deficiencies. This settlement will provide tangible monetary relief to the Settlement
21 Class members, and the amounts proposed for attorneys' fees and costs, the service award to
22 Plaintiff, the settlement administration expenses, and the PAGA set-aside are all reasonable and
23 appropriate based on the facts of this case. Because the proposed settlement is devoid of obvious
24 deficiencies, this final factor supports preliminary approval.

25 **B. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS**

26 The proposed Settlement Class satisfies the criteria for certification of a settlement class
27 under California law because: (1) the individuals in the Settlement Class are ascertainable and
28 numerous; (2) common questions of law and fact predominate; (3) Plaintiff's claims are typical

of the claims of absent Settlement Class members; and (4) Plaintiff and Plaintiff's counsel will fairly and adequately represent the interests of the Settlement Class. Cal. Code Civ. Proc. § 382.

1. The Proposed Class Is Ascertainable and Numerous

A class is "ascertainable" where members "may be readily identified without unreasonable expense or time by reference to official [or business] records." *Sevidal v. Target Corp.*, 189 Cal.App.4th 905, 919 (2010) (alterations in original). The Settlement Class is defined as all non-exempt employees in California who have been employed by Defendant, from June 14, 2017, to the date of Preliminary Approval by the Court. Thus, Settlement Class members can be identified from Defendant's employment records. Avocado Green represents there are approximately 1,000 potential Settlement Class members, rendering it impracticable to bring all class members before the Court. Thus, the Settlement Class satisfies the numerosity requirement. *See, Collins v. Rocha*, 7 Cal.3d 232, 234 (1972) (class of 44 farm workers sufficiently numerous).

2. Common Issues of Law and Fact Predominate

The focus on certification is not on the merits of the case, but rather on what types of questions, "common or individual," are likely to arise in the action. *See Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Here, Plaintiff's claims are predicated on Avocado Green's allegedly unlawful regular rate calculation, timekeeping policies, as well as meal and rest period policies/practices. These claims are commonly held to be proper for class certification. *See, e.g., Williams v. Sup. Ct.*, 221 Cal.App.4th 1353, 1371 (2013) (certifying class based on uncompensated work time); *Faulkinbury v. Boyd & Assoc., Inc.*, 216 Cal.App.4th 220, 240 (2013) (certifying regular rate miscalculation claim); *Bradley v. Networkers Int'l, LLC*, 211 Cal.App.4th 1129, 1150 (2012) (certifying meal period claim).

3. The Claims of the Named Plaintiff Are Typical

The typicality requirement is satisfied where a class representative has claims that are typical of those of the rest of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiff's claims are typical of those held by Settlement Class members. Plaintiff was employed by Defendant as a non-exempt employee in California during the Class Period and was subject to Defendant's wage and hour policies at issue in this

lawsuit. *See* Christie Decl., ¶ 2. Plaintiff was also allegedly injured by the same challenged policies that injured the Settlement Class as a whole, including an underpayment of wages and failure to provide meal and rest periods. *Id.* Typicality is satisfied because Plaintiff has suffered the same injuries as other Settlement Class members.

4. Plaintiff and Class Counsel Will Adequately Represent the Class

The adequacy of representation requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Svcs.*, 155 Cal.App.4th 676, 697 (2007). Plaintiff and his counsel will adequately represent the class, as there are no conflicts⁷ between Plaintiff and the class he seeks to represent. *See McGhee v. Bank of America*, 60 Cal.App.3d 442, 450 (1976) (finding adequacy satisfied where there was no indication that plaintiff’s counsel was not qualified, and the named plaintiff had no interests antagonistic to those of the proposed class). Plaintiff’s counsel also has extensive experience in wage and hour class action litigation. *See* Burrows Decl., ¶¶ 2-11.

C. THE COURT SHOULD ORDER DISTRIBUTION OF THE PROPOSED CLASS NOTICE

This Court should order distribution to the Settlement Class of the proposed notice by U.S. Mail, in English and Spanish, postage prepaid, using last known mailing address information provided by Defendant. *See* Settlement Agreement, § 4. This manner of giving notice is the “best notice practicable” under the circumstances as it provides “individual notice to all members who can be identified through reasonable effort.” *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiff proposes that the settlement be administered by CPT Group, Inc., an experienced class action settlement administrator. *See* Declaration of Julie Green (“Green Decl.”) and attached exhibits. Settlement Class members’ addresses will be ascertainable through Defendant’s employment records. Burrows Decl., ¶ 33. To the extent the addresses of former employees have changed, CPT Group, Inc., will run all the addresses provided through the U.S. Postal Service National Change of Address database and/or perform “skip traces” to obtain

⁷ Plaintiff Christie entered into a confidential individual settlement agreement for employment related non-wage claims with Defendant, through Separate Counsel, for which a Right to Sue letter was issued February 14, 2022. At the Court’s behest, the Parties will provide information on this settlement, but would prefer to do so in camera.

1 current address information. *See* Green Decl.; *see also* Settlement, § 4.4.2.

2 The content of the proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises
3 class members in of the nature of the claims, the basic contentions and denials of the parties and
4 the key terms of the settlement, the uniform 60-day deadline to opt-out of the settlement and the
5 procedures by which to do so, explains the recovery formula and expected recovery amount for
6 each class member, and advises them that they will be bound by the terms of the settlement if
7 they do not request exclusion, and identifies the designated *cy pres* recipient should checks not
8 be timely cashed. *See generally* Notice. The proposed Notice will also notify Settlement Class
9 members of the final approval hearing date and time and provides contact information for Class
10 Counsel and advises Settlement Class members that they may enter an appearance through
11 counsel if they wish. In accordance with Cal. Rules of Court, rule 3.771(b), Final Judgment will
12 be posted on the claims administrator's website for 30 days after entry. This Notice satisfies Cal.
13 Rule of Court 3.766(e) as the most reliable and cost-effective method of reaching Settlement
14 Class members.

15 **D. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

16 Finally, the Court should set a hearing for final approval of the settlement on a date
17 appropriately scheduled to follow the deadline and procedure by which Settlement Class
18 members must file objections to the settlement or opt-out. *See* Cal. Rule of Court 3.769.

19 **V. CONCLUSION**

20 For the foregoing reasons, Plaintiff respectfully requests that the Court preliminarily
21 approve the proposed settlement, provisionally certify the Settlement Class, and enter the
22 Proposed Order submitted concurrently herewith.

23
24 Dated: August 10, 2022

Respectfully submitted,
BURROWS LAW FIRM

25
26 By:



Christopher L. Burrows
Attorneys for Plaintiff