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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

15 LAURO GONZALEZ-ARIAS, an
16 individual, on behalf of himself and on
17 behalf of all persons similarly situated,

18 Plaintiff,

19 vs.

20 MXB BATTERY OPERATIONS, LP, a
21 Limited Partnership; and DOES 1 through
22 50, inclusive,

23 Defendants.

Case No. CGC-21-595687

(Consolidated with Case No. CGC-21-595759)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF
CLASS SETTLEMENT**

Hearing Date: March 30, 2023
Hearing Time: 9:30 a.m.

Judge: Hon. Richard B. Ulmer
Dept: 302

Action Filed: October 1, 2021
Trial Date: Not Set

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1 **I. INTRODUCTION**

2 Plaintiff Lauro Gonzalez-Arias (“Plaintiffs”) respectfully submits this memorandum in support
3 of the unopposed motion for preliminary approval of the proposed class action settlement with
4 Defendant MXB Battery Operations, LP (“Defendant”), and seeks entry of an order: (1) preliminarily
5 approving the proposed settlement of this class action with Defendant; (2) for settlement purposes only,
6 conditionally certifying the Class, which is comprised of “all individuals who are or previously were
7 employed by Defendant MXB Battery Operations, LP in California who were classified as hourly,
8 non-exempt employees at any time during the Class Period” of October 1, 2017 through December 21,
9 2022; (3) provisionally appointing Plaintiff as the representatives of the Class; (4) provisionally
10 appointing Norman B. Blumenthal, Kyle R. Nordrehaug, and Aparajit Bhowmik of Blumenthal
11 Nordrehaug Bhowmik De Blouw LLP as Class Counsel for the Class; (5) approving the form and
12 method for providing class-wide notice; (6) directing that notice of the proposed settlement be given
13 to the class; (7) appointing ILYM Group as the Administrator, and (8) scheduling a final approval
14 hearing date to consider Plaintiff’s motion for final approval of the settlement and entry of the
15 Judgment, and Plaintiff’s motion for approval of attorneys’ fees and expenses. Plaintiff and Defendant
16 (collectively the “Parties”) have reached a full and final settlement of the above-captioned action, which
17 is embodied in the Class Action and PAGA Settlement Agreement ("Agreement") filed concurrently
18 with the Court.¹ A copy of the fully executed Agreement is attached as Exhibit #1 to the Declaration
19 of Kyle Nordrehaug (“Decl. Nordrehaug”), served and filed herewith.

20 As consideration for this Settlement, the Gross Settlement Amount is Nine Hundred Thirty-Five
21 Thousand Dollars (\$935,000) to be paid by Defendant, as set forth in the Agreement. The Gross
22 Settlement Amount will settle all issues pending in the Action between the Parties and will be made
23 in full and final settlement of the Released Class Claims. The Gross Settlement Amount includes all
24 payments of Individual Class Payments to the Participating Class Members, Administration Expenses
25 Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, Class
26 Representative Service Payment, and the PAGA Payment. The Gross Settlement Amount does not

27
28 ¹ Capitalized terms shall have the same meaning as defined in the Agreement.

1 include the employer's share of payroll taxes which will be separately paid by Defendant. The
2 Settlement is all-in with no reversion to Defendant and no need to submit a claim form. Decl.
3 Nordrehaug at ¶3.

4 The following is a table of the key financial terms of the Settlement and the proposed
5 deductions:

6 **\$935,000** (Gross Settlement Amount)

- 7 - \$10,000 (Plaintiff's proposed service award not to exceed \$10,000)
- 8 - \$20,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
- 9 - \$311,666 (Class Counsel Fees Payment - not to exceed amount)
- 10 - \$25,000 (PAGA Payment - 75% to LWDA / 25% to Aggrieved Employees)
- 11 - \$20,000 (Administration Expenses Payment - not to exceed amount)

12 **\$548,334** (Net Settlement Amount)

13 Based upon 591 Class Members who collectively worked 30,000 Workweeks, the Gross Settlement
14 Amount provides a value of \$1,582 per Class Member and \$31 per Workweek and the Net Settlement
15 Amount provides an average recovery of \$927 per Class Member and a recovery of \$18 per Workweek.
16 Decl. Nordrehaug at ¶6.

17 On September 21, 2022, the Parties participated in an all-day mediation session presided over
18 by Jeffrey A. Ross, Esq., a respected and experienced mediator of wage and hour class actions.
19 Following this mediation, the Parties reached an agreement to settle the Action. Decl. Nordrehaug at
20 ¶5. The Settlement is fair, reasonable and adequate, and should be preliminarily approved because
21 there is a substantial monetary payment, and there are substantial litigation and class-certification risks.
22 Therefore, Plaintiffs respectfully request that this Court grant preliminary approval of the Agreement
23 and enter the proposed order submitted herewith.

24 **II. DESCRIPTION OF THE SETTLEMENT**

25 The Gross Settlement Amount is Nine Hundred Thirty-Five Thousand Dollars (\$935,000).
26 (Agreement at ¶ 1.21.) Under the Settlement, the Gross Settlement Amount consists of the following
27 elements: (1) payment of the Individual Class Payments to the Participating Class Members; (2) Class
28 Counsel Fees Payment and Class Counsel Litigation Expenses Payment; (3) Administration Expenses
Payment; (4) the Class Representative Service Payment to Plaintiff; and (5) the PAGA Penalties
payment. (Agreement at ¶ 1.21.) The Gross Settlement Amount does not include Defendant's share
of payroll taxes. (Agreement at ¶ 3.1.) The Gross Settlement Amount shall be all-in with no reversion

1 to Defendants. (Agreement at ¶ 3.1.) Decl. Nordrehaug at ¶15.

2 Within fifteen (15) days of the Effective Date, Defendant shall deposit the Gross Settlement
3 Amount with the Administrator. (Agreement at ¶ 4.3.) The distribution of Individual Class Payments
4 to Participating Class Members along with the other Court-approved distributions shall be made by the
5 Administrator within fourteen (14) days after Defendant funds the Gross Settlement Amount.
6 (Agreement at ¶ 5.1.) Decl. Nordrehaug at ¶16.

7 The amount remaining in the Gross Settlement Amount after the deduction of Court-approved
8 amounts for Individual PAGA Payments, the LWDA PAGA Payment, Class Representative Service
9 Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the
10 Administration Expenses Payment (called the "Net Settlement Amount") shall be allocated to Class
11 Members as their Individual Class Payments. (Agreement at ¶¶ 1.27 and 3.2.) From the Net Settlement
12 Amount, the Individual Class Payment for each Participating Class Member will be calculated by (a)
13 dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating
14 Class Members during the Class Period and (b) multiplying the result by each Participating Class
15 Member's Workweeks. (Agreement at ¶ 3.2(e).) Workweeks will be based on Defendant's records;
16 however, Class Members will have the right to challenge the number of Workweeks. Decl. Nordrehaug
17 at ¶17.

18 Class Members may choose to opt-out of the Settlement by following the directions in the Class
19 Notice. (Agreement at ¶ 8.5, Ex. A.) All Class Members who do not "opt out" will be deemed
20 Participating Class Members who will be bound by the Settlement and will be entitled to receive an
21 Individual Class Payment. (Agreement at ¶ 8.5(c).) All Aggrieved Employees, including those who
22 submit an opt-out request, will still be paid their allocation of the PAGA Penalties and will remain
23 subject to the release of the Released PAGA Claims regardless of their request for exclusion.
24 (Agreement at ¶¶ 6.3 and 8.5(d).) Finally, the Class Notice will advise the Class Members of their right
25 to object to the Settlement and/or dispute their Workweeks. (Agreement at ¶¶ 8.6 and 8.7, Ex. A.)
26 Decl. Nordrehaug at ¶18.

27 A Participating Class Member must cash his or her Individual Class Payment check within 180
28 days after it is mailed. (Agreement at ¶ 5.2.) Any settlement checks not cashed within 180 days will

1 be voided and any funds from such uncashed checks will be paid to the California Controller's
2 Unclaimed Property Fund in the name of the Class Member thereby leaving no "unpaid residue" subject
3 to the requirements of California Code of Civil Procedure Section 384, subd. (b), as the entire Net
4 Settlement Amount will be paid out to Participating Class Members or Aggrieved Employees, whether
5 or not they all cash their checks. (Agreement at ¶ 5.4.) Decl. Nordrehaug at ¶19.

6 Subject to Court approval, the Parties have agreed on ILYM Group to administer the settlement
7 in this action ("Administrator"). (Agreement at ¶ 1.2.) The Administrator will be paid for settlement
8 administration in an amount not to exceed \$20,000. (Agreement at ¶ 3.2(c).) Decl. Nordrehaug at ¶20.

9 Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not
10 to exceed one-third of the Gross Settlement Amount, as the Class Counsel Fees Payment. (Agreement
11 at ¶ 3.2(b).) Class Counsel will also be allowed to apply separately for an award of Class Counsel
12 Litigation Expenses Payment in an amount not to exceed \$20,000. (Agreement at ¶ 3.2(b).) Subject
13 to Court approval, the Agreement provides for a payment of no more than \$10,000 to the Plaintiff as
14 the Class Representative Service Payment. (Agreement at ¶ 3.2(a).) Decl. Nordrehaug at ¶21.

15 Subject to Court approval, Twenty-Five Thousand Dollars (\$25,000) will be paid from the
16 Gross Settlement Amount for PAGA penalties under the California Private Attorneys General Act, Cal.
17 Labor Code Section 2698, *et seq.* ("PAGA"). Pursuant to the express requirements of Labor Code §
18 2699(i), the PAGA Payment shall be allocated as follows: 75% (\$18,750) shall be allocated to the
19 Labor Workforce Development Agency ("LWDA") as its share of the civil penalties and and 25%
20 (\$6,250) allocated to the Individual PAGA Payments to be distributed to the Aggrieved Employees
21 based on the number of their respective PAGA Pay Periods. (Agreement at ¶ 3.2(d).) As set forth in the
22 accompany proof of service, the LWDA has been served with this motion and the Agreement. Decl.
23 Nordrehaug at ¶22.

24 **III. CASE BACKGROUND**

25 The description of the case and claims, along with the procedural history, is set forth in the
26 Declaration of Kyle Nordrehaug at ¶¶ 7-14. The Parties engaged in thorough investigation and the
27 exchange of documents and information in connection with the Action which permitted Class Counsel
28 to perform a thorough analysis of the claims. Decl. Nordrehaug, ¶¶ 10 and 14. The Parties participated

1 in mediation on September 21, 2022 with Jeffrey A. Ross, Esq., which after arm's length negotiations,
2 resulted in this Settlement. Decl. Nordrehaug, ¶12.

3 **IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO**
4 **GRANT PRELIMINARY APPROVAL**

5 When a proposed class-wide settlement is reached, the settlement must be submitted to the court
6 for approval. 2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41, p.11-87.
7 California "[p]ublic policy generally favors the compromise of complex class action litigation."
8 *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 581 (2010) quoting *Cellphone Termination Fee*
9 *Cases*, 180 Cal.App.4th 1110, 1117-18 (2009). Class action settlements are approved where the
10 proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
11 1801 (1996) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert.
12 denied, 459 U.S. 1217 (1983)).

13 Preliminary approval is the first of three steps that comprise the approval procedure for
14 settlements of class actions. The second step is the dissemination of notice of the settlement to all class
15 members. The third step is a final settlement approval hearing, at which evidence and argument
16 concerning the fairness, adequacy, and reasonableness of the settlement may be presented, and class
17 members may be heard regarding the settlement. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
18 1801 (1996); *Manual for Complex Litigation, Second* §30.44 (1993); Cal. Rules of Court, rule 3.769.

19 The primary question presented on an application for preliminary approval of a proposed class
20 action settlement is whether the proposed settlement is "within the range of possible approval."
21 *Manual for Complex Litigation, Second* §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th
22 Cir. 1982).² Preliminary approval is merely the prerequisite to giving notice so that "the proposed
23 settlement... may be submitted to members of the prospective Class for their acceptance or rejection."
24 *Sayaman v. Baxter Healthcare Corp.*, 2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010). There is

25
26 ² California courts look to federal authority on class actions. *Vasquez v. Superior Court*, 4 Cal.3d
27 800, 821 (1971). "It is well established that in the absence of relevant state precedents trial courts are
28 urged to follow the procedures prescribed in Rule 23 of the Federal Rules of Civil Procedure for
conducting class actions." *Frazier v. City of Richmond*, 184 Cal. App.3d 1491, 1499 (1986), citing
Green v. Obledo, 29 Cal.3d 126, 145-146 (1981).

1 "a presumption of fairness . . . where . . . [a] settlement is reached through arms-length bargaining."
2 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001) (citation omitted); see also *Cho v.*
3 *Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-45 (2009) (upholding trial court's
4 determination that settlement was "fair, reasonable and adequate" where the settlement "provided
5 valuable benefits to the class . . . that were 'particularly valuable in light of the risks plaintiff would have
6 faced if she proceeded to litigate her case.'"); *Newberg*, 3d Ed., §11.41, p.11-88. However, the ultimate
7 question of whether the proposed settlement is fair, reasonable and adequate is made after notice of the
8 settlement is given to the class members and a final settlement hearing is held by the Court.

9 **A. The Role Of The Court In Preliminary Approval Of A Class Action Settlement**

10 The approval of a proposed settlement of a class action suit is a matter within the broad
11 discretion of the trial court. *Wershba, supra*, 91 Cal.App.4th at 234-235; *Dunk*, 48 Cal.App.4th 1794.
12 Preliminary approval does not require the trial court to answer the ultimate question of whether a
13 proposed settlement is fair, reasonable and adequate. That final determination is made only after notice
14 of the settlement has been given to the class members and after they have been given an opportunity
15 to voice their views of the settlement or to be excluded from the settlement. 3B J. Moore, *Moore's*
16 *Federal Practice* §§23.80 - 23.85 (2003).

17 In considering a potential settlement for preliminary approval purposes, the trial court does not
18 have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the
19 dispute, and need not engage in a trial on the merits. *Wershba, supra*, 91 Cal.App.4th at 239-40; *Dunk*,
20 *supra*, 48 Cal.App. 4th at 1807. The Ninth Circuit explains, "the very essence of a settlement is
21 compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688
22 F.2d at 624. The question whether a proposed settlement is fair, reasonable and adequate necessarily
23 requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "the
24 terms of the compromise with the likely rewards of litigation.'" *Weinberger v. Kendrick*, 698 F.2d 61,
25 73 (2d Cir. 1982), *cert. denied* 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders*
26 *of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). Thus, when analyzing the
27 settlement, the amount is "not to be judged against a hypothetical or speculative measure of what might
28 have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625, 628.

1 With regard to class action settlements, the opinions of counsel should be given considerable
2 weight both because of counsel's familiarity with this litigation and previous experience with cases
3 such as these. *Officers for Justice*, 688 F.2d at 625; *In re Wash. Public Power Supply System Sec.*
4 *Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal.
5 1988); *Weinberger*, 698 F.2d at 74. "The recommendations of plaintiffs' counsel should be given a
6 presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979). As
7 a result, courts hold that the recommendation of counsel is entitled to significant weight. *Nat'l Rural*
8 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

9 **B. Factors To Be Considered In Granting Preliminary Approval**

10 A number of factors are to be considered in evaluating a settlement for purposes of preliminary
11 approval. In determining whether to grant preliminary approval, the court considers whether the "(1)
12 the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, (2)
13 has no obvious deficiencies, (3) does not improperly grant preferential treatment to class representatives
14 or segments of the class, and (4) falls within the range of possible approval." *In re Tableware Antitrust*
15 *Litig.*, 484 F.Supp. 2d 1078, 1079 (N.D. Cal. 2007). No one factor should be determinative, but rather
16 all factors should be considered. The analysis has been summarized as follows:

17 If the proposed settlement appears to be the product of serious, informed, noncollusive
18 negotiations, has no obvious deficiencies, does not improperly grant preferential
19 treatment to class representatives or segments of the class, and falls within the range of
20 possible approval, then the court should direct that notice be given to the class members
of a formal fairness hearing, at which evidence may be presented in support of and in
opposition to the settlement.

21 *Manual of Complex Litigation, Second* § 30.44, at 229.

22 Here, the Settlement meets all of these criteria for preliminary approval.

23 **1. The Settlement is the Product of Serious, Informed and
24 Arm's Length Negotiations by Experienced Counsel**

25 This settlement is the result of extensive and hard-fought litigation as well as negotiations
26 before an experienced and well-respected mediator. Defendant has expressly denied and continues to
27 deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiff and
28 Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released

1 Class Claims of the Class in accordance with this Settlement.³

2 Class Counsel are experienced and qualified to evaluate the class claims, the defenses asserted,
3 and the risks and benefits of trial and settlement, and Class Counsel are particularly experienced in
4 wage and hour employment class actions, as Class Counsel has previously litigated and certified similar
5 claims against other employers. Decl. Nordrehaug at ¶31. The view of qualified and well-informed
6 counsel that a class action settlement is fair, adequate, and reasonable is entitled to significant weight.
7 *See Kullar v. Foot Locker*, 168 Cal. App. 4th 116, 133 (2008) (the trial court "undoubtedly should
8 continue to place reliance on the competence and integrity of counsel, the involvement of a qualified
9 mediator, and the paucity of objectors to the settlement."); *Dunk*, 48 Cal. App. 4th at 1802.

10 The Parties attended an arms-length mediation session with Jeffrey A. Ross, a respected and
11 experienced mediator of wage and hour class actions, in order to reach this Settlement. In preparation
12 for the mediation, Defendant provided Class Counsel with necessary information for the members of
13 the Class, including time data, payroll data and data concerning the composition of the Class. Plaintiff
14 analyzed the data with the assistance of damages expert, Berger Consulting, and prepared and submitted
15 a mediation brief and damage valuation to the Mediator. Following this all-day mediation, the Parties
16 agreed to this Settlement. The final settlement terms were negotiated and set forth in the Agreement
17 now presented for this Court's approval. Decl. Nordrehaug at ¶ 5. Importantly, Plaintiff and Class
18 Counsel believe that this Settlement is fair, reasonable and adequate.

19 As consideration for this Settlement, the Gross Settlement Amount to be paid by Defendant is
20 Nine Hundred Thirty-Five Thousand Dollars (\$935,000.00). The Settlement is all-in with no reversion
21 to Defendant and no need to submit a claim form. Decl. Nordrehaug at ¶ 3.

22 Class Counsel has conducted a thorough investigation into the facts of the class action. Over
23 the course of more than a year, Class Counsel diligently evaluated the Class Members' claims against

24
25 ³ The release applicable to the Class is tethered to allegations in the Action and the "Released Class
26 Claims" are "all class claims pled or that could have been pled based on the factual allegations
27 contained in the Operative Complaint which occurred during the Class Period. Except as expressly set
28 forth in this Agreement, Participating Class Members do not release any other claims, including claims
for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act,
unemployment insurance, disability, social security, workers' compensation, or claims based on facts
occurring outside the Class Period." (Agreement at ¶¶ 1.38 and 6.2.)

1 Defendant. Prior to the settlement negotiations, counsel for Defendant provided Class Counsel with
2 access to necessary information for the Class. In addition, Class Counsel previously negotiated
3 settlements with other employers in actions involving nearly identical issues and analogous defenses.
4 Based on the foregoing data and their own independent investigation, evaluation and experience, Class
5 Counsel believes that the settlement with Defendant on the terms set forth in the Agreement is fair,
6 reasonable, and adequate and is in the best interest of the Class in light of all known facts and
7 circumstances, including the risk of significant delay, defenses asserted by Defendant, and potential
8 appellate issues. Decl. Nordrehaug at ¶ 14.

9 Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and trying
10 this Action against Defendant and then litigating possible appeals which could take several years. Class
11 Counsel has also taken into account the uncertain outcome and risk of litigation, especially in complex
12 class actions such as these Action. Class Counsel is also mindful of and recognizes the inherent
13 problems of proof under, and alleged defenses to, the claims asserted in the Action. Based upon their
14 evaluation, Plaintiff and Class Counsel have determined that the Settlement set forth in the Agreement
15 is in the best interest of the Class Members. Decl. Nordrehaug, ¶ 23.

16 Here, there can be no dispute that the litigation has been hard-fought with aggressive and
17 capable advocacy on both sides. The Parties were represented by experienced and capable counsel who
18 zealously advocated their positions. Accordingly, “[t]here is likewise every reason to conclude that
19 settlement negotiations were vigorously conducted at arms’ length and without any suggestion of undue
20 influence.” *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. at 1392.

21 **2. The Settlement Has No "Obvious Deficiencies" and Falls Well Within** 22 **the Range for Approval**

23 The proposed Settlement herein has no "obvious deficiencies" and is well within the range of
24 possible approval. All Class Members will receive an opportunity to participate in the Settlement and
25 receive payment according to the same formula. (Agreement at ¶ III(41)(b).) For the 591 Class
26 members who worked 30,000 work weeks, the Gross Settlement Amount provides an average value
27 of \$1,582 per Class Member and \$31 per work week, and after deductions, the Net Settlement Amount
28 provides an average recovery of \$927 per Class Member and \$18 per work week. Decl. Nordrehaug,

¶6.

The calculations to compensate for the amount due to the Class Members at the time this Settlement was negotiated were calculated by Plaintiff's expert, Berger Consulting, in advance of mediation. Class Counsel analyzed the data for putative class members and determined the potential maximum damages for the class claims. For the Class, the maximum value of the claim for unpaid wages due to off the clock work was potentially \$113,098, the maximum value of the unpaid wages due to the alleged miscalculation of the regular rate was \$1,447, the maximum potential damages for unpaid meal premiums and sick pay were estimated to be \$24,687, the maximum potential rest period damages were estimated to be \$235,429, and the maximum potential damages for failure to provide expense reimbursement were calculated to be \$234,630. In total, the damages for the Class were calculated to have a maximum potential total value of \$609,290. In addition, Plaintiffs calculated that the maximum value of the potential waiting time penalties were \$1,601,924, and the maximum value of the potential wage statement penalties were between \$85,000 and \$483,850 depending on the predicate violation.⁴

Decl. Nordrehaug, ¶6.

Consequently, the Gross Settlement Amount represents more than the value of the potential maximum damages at issue for the Class in this case and more than 34% of the maximum combination of damages and statutory penalties, assuming these amounts could all be proven in full at trial.⁵ The above maximum calculations should then be adjusted in consideration for both the risk of class certification and the risk of establishing class-wide liability on all claims. Given the amount of the Settlement as compared to the potential value of the claims, the Settlement is most certainly fair and

⁴ While Plaintiff alleged claims for statutory penalties pursuant to Labor Code Sections 203 and 226, at mediation Plaintiff recognized that these claims were subject to additional, separate defenses asserted by Defendants, including, a good faith dispute defense as to whether any premium wages for meal or rest periods or other wages were owed given Defendant's position that Plaintiff were properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether and when the wages were due.").

⁵ Because the PAGA claim does not provide a recovery to the Class, Plaintiffs have not included the PAGA claim in this discussion of the class claim valuation. The PAGA claim is addressed in the Decl. Nordrehaug at ¶ 33.

1 reasonable.⁶ Clearly, the goal of this litigation has been met. Decl. Nordrehaug, ¶6.

2 Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v.*
3 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by
4 Defendant present serious threats to the claims of the Plaintiff and the other Class Members. Defendant
5 asserted that Defendant's practices complied with all applicable Labor laws. Defendant argued that all
6 work time was properly paid for and that there was no miscalculation of the regular rate. Defendant
7 contended that its meal and rest period policies fully complied with California law and that Defendant's
8 timekeeping system recorded meal periods, paid for missed meal periods, and was not required to
9 record rest periods. Defendant established that meal period premiums were paid for the potential
10 violations observed in the time records. As to expenses reimbursement, Defendant contended that it
11 did not fail to provide reimbursement for necessary business expenses and that there were no such
12 expenses that had not already been reimbursed or that claimed expenses were incurred voluntarily
13 and/or for the convenience of employees and therefore not required reimbursement. Defendant argued
14 that the decisions in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), *Lockheed Martin Corp. v.*
15 *Superior Ct.*, 29 Cal. 4th 1096, 1108 (2003), and *Salazar v. See's Candy Shops Inc.*, 64 Cal.App.5th 85
16 (2021), weakened Plaintiff's claims, on liability, value, and class certifiability as to the meal and rest
17 period claims. Defendant also argues that based on its facially lawful practices, they acted in good faith
18 and without willfulness, which if accepted would negate the claims for waiting time penalties and/or
19 inaccurate wage statements. If successful, Defendant's defenses could eliminate or substantially reduce
20 any recovery to the Class. While Plaintiff believe that these defenses could be overcome, Defendant
21 maintains these defenses have merit and therefore present a serious risk to recovery by the Class. Decl.
22 Nordrehaug, ¶ 24.

23
24 ⁶ See *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000)
25 approving settlement which represented "roughly one-sixth of the potential recovery"); *Stovall-Gusman*
26 *v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval
27 where "the proposed Total Settlement Amount represents approximately 10% of what class might have
28 been awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D.
Cal. 2016) (approving wage and hour class action settlement amounting to 8.1% of full verdict value);
Ma v. Covidien Holding, Inc., 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class
action settlement worth "somewhere between 9% and 18%" of full verdict value).

1 There was also a significant risk that, if the Actions were not settled, Plaintiff would be unable
2 to obtain class certification and thereby not recover on behalf of any employees other than himself.
3 Defendant argued that the individual experience of each putative class member varied with respect to
4 the claims. Defendant could also contest class certification by arguing injury and good faith were case-
5 by-case determinations that precluded class certification. Plaintiff is aware of other cases where class
6 certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885
7 (2019) (denying certification of rest break claims). Defendant also contended that it would be able to
8 establish that Plaintiff was not an adequate class representative as to some, if not all, of his claims.
9 Finally, even if class certification was successful, as demonstrated by the California Supreme Court
10 decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to
11 overcome for a class wide recovery even where the class has been certified. While other cases have
12 approved class certification in wage and hour claims, class certification in this action would have been
13 hotly disputed and was by no means a foregone conclusion. Decl. Nordrehaug, ¶ 25.

14 After arm's length negotiations between experienced and informed counsel, the Parties
15 recognized the potential risks and agreed on the Settlement with a Gross Settlement Amount of
16 \$935,000.00. As the Court held in *Glass*, where the parties faced uncertainties similar to those here:

17 In light of the above-referenced uncertainty in the law, the risk, expense, complexity,
18 and likely duration of further litigation likewise favors the settlement. Regardless of
19 how this Court might have ruled on the merits of the legal issues, the losing party likely
20 would have appealed, and the parties would have faced the expense and uncertainty of
21 litigating an appeal. 'The expense and possible duration of the litigation should be
22 considered in evaluating the reasonableness of [a] settlement.'

23 2007 WL 221862, at *4 (quoting *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458
24 (9th Cir. 2000)).

25 3. **The Settlement Does Not Improperly Grant Preferential Treatment To** 26 **Class Representatives or Segments of The Class**

27 The relief provided in the Settlement will benefit all members of the Class. The Settlement does
28 not grant preferential treatment to Plaintiff or segments of the Class in any way. Payments to the Class
Members are all determined under a neutral methodology. Each Participating Class Member will
receive the same opportunity to participate in and receive payment through a neutral formula that is
based upon the weeks worked by that individual. Decl. Nordrehaug, ¶4.

1 Plaintiff will apply to the Court for Class Representative Service Payment in consideration for
2 his service and for the risks undertaken on behalf of the class. (Agreement at ¶ 3.2(a).) Plaintiff
3 performed his duties admirably by working with Class Counsel. Decl. Nordrehaug at ¶27. Plaintiff
4 will present a detailed declaration addressing his work and service at the time of final approval. For
5 purposes of this preliminary approval stage, the requested service award of \$10,000 is well within the
6 accepted range of awards for purposes of preliminary approval. *See e.g. Mathein v. Pier 1 Imps. (U.S.),*
7 *Inc.*, 2018 U.S. Dist. LEXIS 71386 (E.D. Cal. 2018) (awarding \$12,500 where average class member
8 payment was \$351); *Holman v. Experian Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D.
9 Cal. 2014) (approving \$10,000 service award where class member recovery was \$375); *Louie v. Kaiser*
10 *Foundation Health Plan, Inc.*, 2008 WL 4473183, *7 (S.D.Cal. 2008) (awarding \$25,000 service
11 award to each of six plaintiffs in overtime class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862,
12 *16-17 (N.D.Cal. 2007) (awarding \$25,000 service award in overtime class action and a pool of
13 \$100,000 in enhancements). As explained in *Glass*, service awards are routinely awarded to class
14 representatives to compensate the employees for the time and effort expended on the case, for the risk
15 of litigation, for the fear of suing an employer and retaliation therefrom, and to serve as an incentive
16 to vindicate the statutory rights of all employees. 2007 WL 221862 at *16-17.

17 **4. The Stage Of The Proceedings Are Sufficiently Advanced To Permit**
18 **Preliminary Approval Of The Settlement**

19 The stage of the proceedings at which this Settlement was reached also militates in favor of
20 preliminary approval and ultimately, final approval of the Settlement. Class Counsel has conducted
21 a thorough investigation into the facts of the class action. Class Counsel began investigating the Class
22 Members' claims before the Action was filed. Class Counsel engaged in an investigation of the claims
23 and conducted a review and analysis of the relevant documents and data. Class Counsel was also
24 experienced with the claims at issue here, as Class Counsel previously litigated and settled similar
25 claims in other actions. Accordingly, the agreement to settle did not occur until Class Counsel
26 possessed sufficient information to make an informed judgment regarding the likelihood of success on
27 the merits and the results that could be obtained through further litigation. Decl. Nordrehaug at ¶28.

28 Based on the foregoing data and their own independent investigation and evaluation, Class

1 Counsel is of the opinion that the Settlement with Defendant for the consideration and on the terms set
2 forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light
3 of all known facts and circumstances, including the risk of significant delay, defenses asserted by
4 Defendant, and numerous potential appellate issues. There can be no doubt that Counsel for both
5 parties possessed sufficient information to make an informed judgment regarding the likelihood of
6 success on the merits and the results that could be obtained through further litigation. Decl.
7 Nordrehaug at ¶29.

8 In *Glass*, the Northern District of California granted final approval of an overtime wage action
9 although in *Glass* no formal discovery had been conducted prior to the settlement:

10 Here, no formal discovery took place prior to settlement. As the Ninth Circuit has
11 observed, however, '[i]n the context of class action settlements, 'formal discovery is not
12 a necessary ticket to the bargaining table' where the parties have sufficient information
13 to make an informed decision about settlement.'"

14 *Glass*, 2007 U.S. Dist. LEXIS 8476 at *14 (quoting *In re Mego Financial Corp. Securities Litigation*,
15 213 F.3d at 459).

16 Here, Class Counsel was in a better position to evaluate the fairness of this Settlement because
17 Class Counsel performed informal formal discovery and received all necessary information which was
18 evaluated with the assistance of an expert, and also performed independent investigations and due
19 diligence to confirm the accuracy of the information supplied by Defendant.

20 **V. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES ONLY**

21 Plaintiff contends that the proposed settlement meets all of the requirements for class
22 certification under California Code of Civil Procedure § 382 as demonstrated below, and therefore, the
23 Court may appropriately approve the Class as defined in the Agreement. This Court should
24 conditionally certify the Class for settlement purposes only, defined as follows:

25 All individuals who are or previously were employed by Defendant MXB Battery
26 Operations, LP in California who were classified as hourly, non-exempt employees at
27 any time during the Class Period.

28 (Agreement at ¶ 1.5.)

The "Class Period" is from October 1, 2017 through December 21, 2022. (Agreement at ¶ 1.12.)

A. California Code of Civil Procedure § 382

1 Plaintiff seeks certification of this Class for settlement purposes under California Code of Civil
2 Procedure § 382. The California Supreme Court has summarized the standard for determining whether
3 class certification is appropriate as follows:

4 Code of Civil Procedure Section 382 authorizes class actions “when the question is one
5 of a common or general interest, of many persons, or when the parties are numerous,
6 and it is impracticable to bring them all before the court....” The party seeking
7 certification has the burden to establish the existence of both an ascertainable class and
8 a well-defined community of interest among class members. (*citations omitted*). The
“community of interest” requirement embodies three factors: (1) predominant common
questions of law or fact; (2) class representatives with claims or defenses typical of the
class; and (3) class representatives who can adequately represent the class.

9 *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004).

10 While Defendant reserves all rights to dispute that the Plaintiff can satisfy these requirements,
11 the Parties agree that Defendant will not dispute that these requirements may be satisfied in this case
12 for purposes of settlement only and therefore, the proposed Class should be certified for purposes of
13 this settlement only. (Agreement at ¶ 2.8.)

14 **B. The Proposed Class Is Ascertainable and Numerous**

15 Plaintiff brings this Action on behalf of a Class of individuals during the applicable Class
16 Period. Plaintiff asserts that all of these individuals are ascertainable because the class members can
17 readily be determined through examination of Defendant’s files. Given that the Class consists of
18 approximately 591 members, Plaintiffs maintain that numerosity is clearly satisfied. *See Bowles v.*
19 *Superior Court*, 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of*
20 *Hayward*, 126 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.)
21 Here, Plaintiff asserts that the 591 current and former employees that comprise the Class can be
22 identified based on Defendant’s records and are sufficiently numerous for class certification. Decl.
23 Nordrehaug at ¶30.

24 **C. Common Issues of Law and Fact Predominate**

25 Predominance of common issues of law or fact does not require that the common issues be
26 dispositive of the entire controversy or even that they be dispositive of all liability issues. 1 *Newberg*
27 *on Class Actions*, Section 4.25 at 4-82, 4-83 (1992). “Predominance is a comparative concept, and ‘the
28 necessity for class members to individually establish eligibility and damages does not mean individual

fact questions predominate.” *Sav-On*, 34 Cal. 4th at 334.

Commonality exists if there is a predominant common legal question regarding how an employer’s policies impact its employees. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1536 (2008) (“[T]he common legal question remains the overall impact of Diva's policies on its drivers.”) Whether the plaintiff is likely to prevail on their theory of recovery is irrelevant at the certification stage since the question is “essentially a procedural one that does not ask whether an action is legally or factually meritorious.” *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003).

Here, Plaintiff contends that common questions of law and fact are present, and specifically the common questions of whether Defendant properly calculated wages, whether the Defendant failed to provide all legally required rest periods to class members, whether class members were lawfully compensated for all hours worked, whether Defendant failed to provide required expense reimbursement, and whether Class Members are entitled to damages and penalties as a result of these practices. Decl. Nordrehaug, ¶30. Defendant disputes that common questions predominate but will not oppose such a finding for purposes of this Settlement only.

D. The Claims of the Plaintiff Are Typical of the Class Claims

The typicality requirement requires the Plaintiff to demonstrate that the members of the Class have the same or similar claims as the Plaintiff. “The typicality requirement is met when the claims of the [p]laintiff arise from the same event or are based on the same legal theories.” *Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983). In *Hanlon, supra*, 150 F.3d at 1020, the Ninth Circuit held that “[u]nder the rule's permissive standards, representative claims are ‘typical’ if they are reasonably coextensive with those of absent class members; they need not be substantially identical.”

In the instant case, Plaintiff contends that there can be little doubt that the typicality requirement is satisfied. The Plaintiff, like every other member of the Class, worked for Defendant as a non-exempt employee during the Class Period. Plaintiff contends that, like every other member of the Class, they were subject to the same practices and policies of Defendant and are subject to the same defenses. Thus, Plaintiff asserts that the claims of the Plaintiff and the Class Members arise from the same course of conduct by the Defendant, involve the same employment policies and practices of Defendant, and are based on the same legal theories. Decl. Nordrehaug at ¶30. For purposes of settlement, Plaintiff

1 maintains that the typicality requirement is met as to the common issues presented in this case.
2 Defendant disputes typicality but Defendant does not oppose a finding of typicality for purposes of this
3 Settlement only.

4 **E. The Class Representative Fairly and Adequately Protected the Class**

5 Plaintiff contends that the Class Members are adequately represented here because Plaintiff and
6 representing counsel (a) do not have any conflicts of interest with other class members, and (b) will
7 prosecute the case vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. This requirement is
8 met here. First, Plaintiff is well aware of his duties as the representative of the class and has actively
9 participated in the prosecution of this case to date. Plaintiff effectively communicated with counsel,
10 provided documents to counsel and participated in the investigation and negotiations in the Action.
11 Second, Plaintiff retained competent counsel who are experienced in employment class actions and who
12 have no conflicts. Decl. Nordrehaug at ¶ 31. Third, there is no antagonism between the interests of the
13 Plaintiff and those of the Class. Both the Plaintiff and the Class Members seek monetary relief under
14 the same set of facts and legal theories. Defendant disputes that the adequacy requirement is satisfied
15 but will not oppose such a finding for purposes of this Settlement only.

16 **F. The Superiority Requirement Is Met**

17 To certify a class, the Court must also determine that a class action is superior to other available
18 methods for the fair and efficient adjudication of the controversy. “Where classwide litigation of
19 common issues will reduce litigation costs and promote greater efficiency, a class action may be
20 superior to other methods of litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.
21 1996). As courts have previously observed:

22 Absent class treatment, each individual plaintiff would present in separate, duplicative
23 proceedings the same or essentially the same arguments and evidence, including expert
24 testimony. The result would be a multiplicity of trials conducted at enormous expense
25 to both the judicial system and the litigants. “It would be neither efficient nor fair to
26 anyone, including defendants, to force multiple trials to hear the same evidence and
27 decide the same issues.”

28 *Sav-On*, 34 Cal. 4th at 340, citing *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991).

Here, Plaintiff contends that a class action is the superior mechanism for resolution of the claims
as pled by the Plaintiff. While Defendant disputes that class treatment is superior, Defendant does not

1 dispute a finding of superiority in this action for purposes of this Settlement only.

2 **VI. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE**

3 The Court has broad discretion in approving a practical notice program. *7- Eleven Owners for*
4 *Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1164 (2000). The Parties have agreed
5 upon procedures by which the Class Members will be provided with written notice of the Settlement
6 similar to those approved and utilized in hundreds of class action settlements. In accordance with the
7 Agreement, Defendant will provide to the Administrator a confidential electronic spreadsheet
8 containing the Class Data. (Agreement at ¶ 4.2.) Within 14 days after receiving the Class Data, the
9 Administrator will mail the Class Notice to all Class Members via first-class U.S. Mail using the most
10 current mailing address information available. (Agreement at ¶ 8.4(b).) A Spanish translation of the
11 Class Notice will be included in the mailing. (Agreement at ¶¶ 1.11 and 8.4(b).)

12 The Class Notice, drafted jointly and agreed upon by the Parties through their respective counsel
13 and to be approved by the Court, includes all relevant information. (See Exhibit “A” to the Agreement.)
14 The Class Notice will include, among other information: (i) information regarding the Action; (ii) the
15 impact on the rights of the Class Members if they do not opt out, including a description of the
16 applicable release; (iii) information to the Class Members regarding how to opt out and how to object
17 to the Settlement; (iv) the estimated Individual Class Payment for each of the Class Members; (iii) the
18 amount of attorneys’ fees and expenses to be sought; (v) the amount of the Plaintiff’s service award
19 request; and (vi) the anticipated expenses of the Administrator. Decl. Nordrehaug at ¶32.

20 The Class Notice will state that the Class Members shall have forty-five (45) days from the date
21 that the Notice is mailed to them (the “Response Deadline”) to request exclusion (opt-out) or to submit
22 an objection. (Agreement at ¶¶ 1.42, 8.5, 8.7.) Class Members shall be given the opportunity to object
23 to the Settlement and/or requests for attorneys’ fees and expenses and to appear at the Final Approval
24 Hearing. (Agreement at ¶ 8.7.) Class Members who do not submit a timely and proper request to opt-
25 out will automatically receive a payment of their Individual Class Payment. This notice program was
26 designed to meaningfully reach the Class Members and it advises them of all pertinent information
27 concerning the Settlement. Decl. Nordrehaug at ¶32. The mailing and distribution of the Class Notice
28 satisfies the requirements of due process and is the best notice practicable under the circumstances and

1 complies with Rules of Court 3.766 and 3.769(f).

2 **VII. CONCLUSION**

3 Plaintiff respectfully requests that the Court preliminarily approve the proposed settlement and
4 sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the final
5 fairness hearing for a date that is at least one hundred twenty (120) days from the date of Preliminary
6 Approval.

7 Dated: March 1, 2023

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

9 By: /s/ Kyle Nordrehaug
10 Kyle R. Nordrehaug, Esq.
Attorney for Plaintiff