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behalf of himself and all others similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SOLANO**

DARREN MULLER on behalf of himself
and all others similarly situated,

Plaintiff,

vs.

PARK MANAGEMENT CORP. dba SIX
FLAGS DISCOVERY KINGDOM, a
California corporation, and DOES 1
through 50, inclusive,

Defendant.

Case No. FCS054401
ASSIGNED FOR ALL PURPOSES TO:
JUDGE: Hon. Stephen Gizzi
DEPT.: 3

**NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: 12-15-2022
Time: 9:30 a.m.
Dept.: 3

PLEASE TAKE NOTICE THAT on December 15, 2022, at 9:30 a.m. in Department 3
of the above-entitled court located at 580 Texas St., Fairfield, CA 94533, Plaintiff Darren Muller
("Plaintiff") will and hereby does move the Court for a Judgment and Order of final approval of
the Stipulation and Settlement of Class and Representative Action, any amendments thereto, and
all agreed-upon terms therein. This Motion, unopposed by Defendant Park Management Corp.
dba Six Flags Discovery Kingdom, seeks final approval of: (1) the Stipulation and Settlement of
Class and Representative Action and any amendments thereto; (2) the Class Settlement Amount
of Two Hundred Twenty Thousand Dollars (\$220,000); (3) all settlement payments to individual
Class Members; (4) the Class Representative enhancement payment in the amount of Five
Thousand Dollars (\$5,000) to the named Plaintiff Darren Muller; (5) costs of administering the
Settlement paid to the Settlement Administrator, ILYM Group, Inc. in the amount of Forty-Five

1 Thousand Six Hundred Dollars (\$45,600); (6) an award of Seventy-Three Thousand, Three-
2 Hundred Thirty-Three Dollars and Thirty-Three Cents (\$73,333.33) in attorneys' fees (i.e., 1/3 of
3 the Class Settlement Amount) in attorneys' fees to Class Counsel, James Hawkins, APLC, and
4 costs of Four Thousand Nine Hundred Ninety-Four Dollars and Eighty-Eight Cents (\$4,994.88)

5 This Motion is made pursuant to California Rules of Court Rule 3.769, which requires
6 court approval of the settlement of a putative class action. Further, this Motion will be based on
7 the following: Memorandum of Points and Authorities set forth herein; the Stipulation and
8 Settlement of Class and Representative Action and the Amendment to the Stipulation and
9 Settlement of Class and Representative Action, attached to the Declaration of James R. Hawkins
10 as Exhibits 1 and 2, respectively; the Declarations of James R. Hawkins, Darren Muller, and
11 Nicole Bench; Declaration of James R. Hawkins, filed in support of Plaintiff's Motion for
12 Preliminary Approval and such evidence or oral argument as may be presented at the hearing, and
13 on the complete records and file herein.

14 DATED: November 7, 2022

JAMES HAWKINS, APLC

15
16 By:



James R. Hawkins, Esq.
Isandra Y. Fernandez, Esq.
Lance Dacre, Esq.
Attorneys for Plaintiff
Darren Muller

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this unopposed motion, Plaintiff Darren Muller (“Plaintiff” or “Class
4 Representative”), on behalf of a putative class (“Class” or “Class Members”), seeks final approval
5 of the Stipulation and Settlement of Class and Representative Action and the Amendment to the
6 Stipulation and Settlement of Class and Representative Action (together, the “Settlement” or
7 “Settlement Agreement”) reached with Defendant Park Management Corp. dba Six Flags
8 Discovery Kingdom (“Defendant” and/or “Six Flags”).

9 On May 5, 2022, this Court preliminarily approved the Settlement as being fair, adequate,
10 and reasonable. The Settlement terms include a Class Settlement Amount of Two Hundred
11 Twenty Thousand Dollars (\$220,000), Plaintiff’s counsel, James Hawkins and Isandra Fernandez
12 of James Hawkins APLC as class counsel, the named Plaintiff Darren Muller as Class
13 Representative, and provisionally certified the Settlement Class which consists of: all persons
14 who applied to work for Defendant and/or all persons who are or were employed by Defendant in
15 the state of California during the Class Period and were subjected to Defendants’ employment-
16 related background check and/or credit check procedures including, but not limited to, executing
17 employment-related background check and/or credit check documents (“Class Members”). The
18 Class Period is from February 21, 2015, through October 1, 2021 (the “Class Period”). The Court
19 also preliminarily approved ILYM Group, Inc. (“Settlement Administrator”, “Administrator”, or
20 “ILYM”) as the Settlement Administrator.

21 Through two mailings, one on July 11, 2022, and one on September 23, 2022, the parties
22 notified the Class Members about the settlement through the Settlement Administrator
23 (Declaration of Nicole Bench (“Bench Decl.”) ¶ 7, 10). The deadline for requests for exclusions
24 from and objections to the Settlement for the first mailing expired August 25, 2022, 45 days after
25 the July 11, 2022 mailing, and for the second mailing, on November 7, 2022, 45 days after the
26 September 23, 2022 mailing (Settlement Agreement p. 11, ¶ X; Bench Decl. ¶ 7, 10). The benefits
27 conferred to the Settlement Class, as a result of this Settlement, are favorable. Specifically, as
28 previously set forth in Plaintiff’s Motion for Preliminary Approval (“Preliminary Approval

1 Motion”), this is a cash settlement with no reversionary aspect. Every Class Member who has not
2 opted out of the Settlement will automatically be mailed an individual settlement payment. There
3 is no claims filing process, and Class Members do not have to file a claim to be mailed a
4 payment. Moreover, out of the 10,826 class members there are no requests for exclusion, no
5 disputes, and no objections to the settlement (Bench Decl. ¶¶ 8, 14-16).

6 Additionally, in the event the Court approves the requested fees, costs and enhancements,
7 the estimated equal share of the net settlement amount to be paid is Eight Dollars and Forty-One
8 Cents (\$8.41) (Bench Decl. ¶ 18).

9 In sum, the proposed Settlement, which is the product of diligent advocacy and
10 negotiations by Class Counsel, provides significant benefits to the Class and has been well
11 received as a favorable outcome. The Settlement of this action is fair, reasonable, and adequate,
12 and in the best interest of the Class. Accordingly, final approval of the Settlement should be
13 granted.

14 **II. LITIGATION AND SETTLEMENT**

15 **A. Pleadings**

16 On February 21, 2020, Plaintiff Darren Muller initiated this action in the Superior Court
17 for the County of Solano on behalf of himself and all others similarly situated, styled *Darren*
18 *Muller v. Park Management Corp. dba Six Flags Discovery Kingdom*, Case No. FCS054401. The
19 Complaint asserts causes of action for (1) Failure to Pay Lawful Wages; (2) Failure to Provide
20 Lawful Meal Periods or Compensation in Lieu Thereof; (3) Failure to Timely Pay Wages; (4)
21 Knowing and Intentional Failure to Comply With Itemized Employee Wage Statement
22 Provisions; (5) violation of the Fair Credit Reporting Act (FCRA), 15 USC §1681(b) *et seq.* in
23 conducting employment related background check; (6) violation of the Consumer Credit
24 Reporting Agencies Act (CCRAA), California Civil Code § 1785 *et seq.* and California Labor
25 Code §1024.5, in conducting employment related background check; (7) violation of the
26 Investigative Consumer Reporting Agencies Act (ICRAA) California Civil Code § 1786 *et seq.* in
27 conducting employment related background check; and (8) violations of the unfair competition
28 law (Bus. & Prof. Code § 17200 *et seq.*) (the “Action”). (See Declaration of James R. Hawkins

1 “Hawkins Decl.” ¶ 2).

2 Plaintiff Muller joined a prior filed action, styled *Walker v. Six Flags Entertainment*
3 *Corporation – Solano County Case No. FCS05070*, with respect to the wage and hour claims
4 only. The *Walker* matter received Final Approval on August 16, 2022. In this Action, Plaintiff
5 Muller filed a Request for Dismissal of the labor code claims so that only the background check
6 claims alleged in this matter remain (Hawkins Decl. ¶ 3)

7 **B. Discovery and Mediation**

8 Through informal discovery, Plaintiff and Six Flags have exchanged documents and
9 information related to the claims asserted. Defendant produced the background check forms and
10 the number of people for which background checks were performed (Hawkins Decl. ¶ 4.)

11 After conducting thorough informal discovery, exchanging relevant information and
12 engaging in numerous discussions regarding the claims alleged, on July 21, 2021, the parties
13 participated in a private mediation with Jeff Krivis (Hawkins Decl. ¶ 5). During the course of the
14 mediation, the parties exchanged further information and documentation concerning Plaintiff’s
15 claims and Six Flags’s defenses thereto, and aggressively advocated for their respective positions
16 (*Id.*).

17 At the conclusion of the mediation, the parties reached a settlement of this Action for a
18 maximum settlement amount of Two Hundred Twenty Thousand Dollars (\$220,000) (Hawkins
19 Decl. ¶ 6.) Following the mediation, the parties exchanged multiple drafts of the proposed
20 settlement agreement and class notice documents and engaged in communications regarding the
21 settlement terms (*Id.*) The final terms and provisions of the settlement agreement were approved
22 and executed by all the parties on or about December 28, 2021 (Hawkins Decl. ¶ 7; Exhibit 1-
23 Settlement Agreement and Exhibit 2 the Amendment to the Stipulation and Settlement of Class
24 and Representative Action).

25 Based on their own respective independent investigations and evaluations and after taking
26 into account the sharply disputed factual and legal issues involved in this matter, the discovery
27 and investigation conducted to date, Plaintiff and his counsel are of the opinion that settlement for
28 the consideration, and on the terms set forth in the Settlement Agreement, is fair, reasonable and

adequate and is in the best interests of the named Plaintiff and proposed Class Members (Hawkins Decl. ¶ 8.)

C. The Preliminarily Approved Settlement

On March 9, 2022, Plaintiff filed the Motion for Preliminary Approval of Class Action Settlement. On May 5, 2022, the Court entered the Order granting preliminary approval and preliminarily appointing class counsel (James R. Hawkins and Isandra Fernandez of James Hawkins APLC), the class representative (Darren Muller), and the Settlement Administrator ILYM Group, Inc. (ILYM). The Court also preliminarily approved the proposed Notice of Class Action Settlement. Now that administration has been completed, and subject to the Court's final approval, the fees and expenses shall be paid from the Class Settlement Amount (CSA) of Two Hundred Twenty Thousand Dollars (\$220,000) as follows:

1. Subject to Court approval, the law firm of James Hawkins, APLC shall be paid \$73,333.33 in attorneys' fees (1/3 of the CSA) and litigation costs of \$4,994.88 (Settlement Agreement p.3, ¶ I.B.; Hawkins Decl. ¶ 23).

2. Subject to Court approval \$5,000 shall be paid to the named Plaintiff, Darren Muller, for his time and effort pursuing the Action on behalf of the Class (Settlement Agreement p.5, ¶ I.I.).

3. Subject to Court approval, Settlement Administration Costs shall be deducted from the CSA and in the amount of \$45,600 (Settlement Agreement p.4, ¶ I.D.; Bench Decl. ¶ 19).

4. Payment to Class Members shall be calculated and apportioned from the Net Settlement Amount based on each Class Member's pro-rata share of the Net Settlement Amount. Each Class Member is entitled to an equal share of the Net Settlement Amount (Settlement Agreement p. 14 ¶ VII.1). The Net Settlement Amount means the Class Settlement Amount less all of the following as approved by the Court: (a) Class Representative Enhancement Payment; (b) Claims Administration Costs; and (c) Attorneys' Fees and Costs (Settlement Agreement p. 7 ¶ I.N).

5. Settlement Payments shall be allocated as follows for tax purposes as

1 follows: All Individual Settlement Payments will be allocated as non-wages. Because there are no
2 wage claims asserted, no withholdings shall be made on the Individual Settlement Payments. The
3 Settlement Administrator shall report the Individual Settlement Payments on an IRS Form-1099
4 as required by law (Settlement Agreement p.19, ¶ XI).

5 6. This is a non-reversionary settlement with no reversion to Six Flags. To the
6 extent that an Individual Settlement Payment check is (1) undeliverable, or (2) uncashed 180 days
7 after the date listed on the check, the check shall become null and void, any monies remaining in
8 the distribution account shall be distributed to a *cy pres*, Legal Services of Northern California,
9 (“LSNC”), a non-profit organization that provides free civil legal assistance to low-income people
10 and other vulnerable populations in Northern California, including in Solano County (Settlement
11 Agreement p. 18-19 ¶ X.2 per the Amendment to the Stipulation and Settlement of Class and
12 Representative Action).

13 **D. Dissemination of Class Notice**

14 On June 27, 2022 and July 29, 2022, ILYM received the mailing list containing the Class
15 Members’ names, most recent mailing address and telephone numbers, social security numbers,
16 and pertinent employment information for each Class Member during the Class Period (“Class
17 List”) (Bench Decl. ¶¶ 5, 8) The Class List contained data for Ten Thousand Eight Hundred
18 Twenty-Six (10,826¹) Class Members (Bench Decl. ¶ 8). The mailing addresses contained in the
19 Class List were processed and updated and the Notice Packets were mailed via First Class Mail to
20 10,138 Class Members on July 11, 2022. On July 29, 2022, a second mailing via First Class Mail
21 was sent to an additional 519 Class Members (Bench Decl. ¶ 6, 10). For the Notice Packets
22 returned from the post office without a forwarding address, ILYM performed an advanced
23 address search (i.e. skip trace) on all of these addresses. To date, 179² Notice Packets remain
24 undeliverable (Bench Decl. ¶ 13).

25 **E. The Settlement Provides Reasonable Compensation to the Class Members**

26 Even without the presumption of fairness and reasonableness, the Settlement clearly is

27 ¹ Of the 10,826 names provided, 169 contained no mailing address and none could be ascertained (Bench Decl. ¶ 8).

28 ² This 179 refers to packets that were mailed and returned. Adding the 169 individuals with no addresses, the total
that were not mailed is 348.

1 within the range of reasonableness. Subject to Court approval, the total potential Net Settlement
2 Amount is approximately \$91,071.79 (Bench Decl. ¶ 18). All Settlement Class Members will be
3 paid their portion of the Net Settlement Amount. The estimated equal share of the net settlement
4 amount to be paid is Eight Dollars and Forty-One Cents (\$8.41) (Bench Decl. ¶ 18).

5 The predominant claims in this action arise from alleged violations of California law with
6 respect to background check and/or credit check procedures, including the use and execution of
7 documents related to those procedures. Specifically, Plaintiff alleges that as part of the
8 employment application, Defendant required Plaintiff and Class Members to sign various
9 documents all purporting to provide disclosure and authorization for Six Flags to perform a
10 background check and obtain consumer credit reports on Plaintiff and the Class Members
11 (Hawkins Decl. ¶ 9). The documents contained excess and inconsistent verbiage, failed to provide
12 requisite information, and contained a liability waiver. When all documents are read together,
13 they are ambiguous, vague, and confusing. Plaintiff and Class members allege that the documents
14 and resulting background checks and/or credit checks fail to meet California and Federal
15 requirements (*Id.*).

16 Plaintiff and the Class Members also allege Six Flags unlawfully performed
17 credit checks on Plaintiff and Class Members in violation of Lab. Code §1024.5 which restricts
18 the category of employees on whom employers can obtain a consumer credit report (Hawkins
19 Decl. ¶ 10).

20 Six Flags adamantly denies Plaintiff's allegations and maintains that their procedures and
21 documents complied with all California and Federal rules and regulations. Specifically,
22 Defendant contends that the "Fair Credit Reporting Act Disclosure & Authorization" form
23 complies with the requirements of the FCRA in that the document consists solely of the FCRA
24 required disclosure and an authorization for the employee to execute (Hawkins Decl. ¶ 11).
25 Defendant also disputed that Plaintiff would be able to prevail on the "willfulness" requirement or
26 show any recognizable injury. Defendant has also denied and continues to deny that the lawsuit is
27 appropriate for class treatment for any purpose other than for settlement purposes only (*Id.*).

28 As thoroughly discussed in Plaintiff's motion for preliminary approval, Plaintiff's counsel

1 estimated a maximum of statutory damages of \$462,000 that may be owed to the putative class,
2 assuming Plaintiff and the Class were able to obtain an order certifying the class and were also
3 able to prove their claims (Hawkins Decl. ¶ 12).

4 Through his counsel, Plaintiff took into consideration the significant risk that class
5 certification could be denied on the central claims, or that a merits decision on the central claims
6 would not favor the Class (Hawkins Decl. ¶ 13). Plaintiff also considered the expense and length
7 of continued proceedings necessary to continue the Action against Defendant through trial and
8 any possible appeals along with Defendant's financial position (*Id.*). Thus, the settlement for
9 Settlement Class members is fair, reasonable, and adequate, given the inherent risk of litigation,
10 the risk relative to class certification, and the costs of pursuing such litigation (*Id.*).

11 III. FINAL SETTLEMENT APPROVAL IS APPROPRIATE

12 The law favors settlement, particularly in class actions and other complex cases in which
13 substantial resources can be conserved by avoiding the time, cost and rigors of formal litigation.
14 *City of Seattle* 955 F.2d at 1276; *Potter v Pacific Coast Lumber Company*, (1951) 37 Cal. 2d.
15 592, 602-603.; 4 NEWBERG §11.41. When faced with a motion for final approval of a class
16 action settlement under *Code of Civil Procedure* §382, a court inquires whether the settlement is
17 "fair, adequate, and reasonable." See e.g., *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*,
18 (2010) 186 Cal. App. 4th 399, 407-408; *Kullar v. Foot Locker Retail, Inc.* (2008) 168
19 Cal.App.4th 116, 129-30; *Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1801.

20 A. This Court Preliminarily Found This Settlement to be Fair, Adequate, and 21 Reasonable, and Nothing has Changed to Disturb That.

22 Before granting preliminary approval of a class action settlement, courts must determine
23 that the proposed settlement is fair, reasonable, and adequate — and not a product of fraud,
24 overreaching, or collusion. Cal. R. Ct. 3.769 (g); Cal. Civ. Pro. Code § 382; *Dunk v. Ford Motor*
25 *Co.*, *supra*, 48 Cal.App.4th at 1801. Courts must presume that a settlement is fair, reasonable, and
26 adequate, and thus appropriate for preliminary approval when the following three factors are
27 satisfied: (1) the parties reached settlement after arms-length negotiations; (2) counsel conducted
28 sufficient investigation and discovery to allow themselves and the court to act intelligently; and

(3) counsel is experienced in similar litigation *Id.* at 1802. *See also 7-Eleven Owners for Fair Franchising v. Southland Corp.*, (2000) 85 Cal. App. 4th 1135, 1146. Further, as discussed below, although not determinative, courts consider the percentage of objectors in determining whether a presumption of fairness exists. *Id.* There is no question that these factors are satisfied here. The parties conducted a sufficient amount of discovery and participated in a private mediation and numerous conferences of counsel that ultimately led to an arms-length settlement that provides for substantial recovery. Moreover, out of 10,478 class members presumed to have received the Notice Packets, there were no requests for exclusion from, no disputes with, and no objections to, the Settlement (Bench Decl. ¶¶ 14-16)³.

1. The Settlement Resulted From Non-Collusive, Arms Length Negotiations

There certainly is no collusion between the parties. The involvement of a neutral third-party mediator is a factor that favors approval and evidences the presumptive fairness of the arm's-length negotiations. Indeed, courts should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring themselves that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct *Kullar v. Foot Locker, supra*, 168 Cal. App. 4th at 129. Here, the parties engaged in a mediation session with a knowledgeable wage and hour mediator Jeff Krivis, which resulted in a settlement (Hawkins Decl. ¶¶ 5-7).

2. The Settlement is Supported by Substantial Investigative and Discovery Efforts.

As discussed in the preliminary approval papers, supporting declaration and herein, Class Counsel analyzed a significant amount of information that Defendant produced in response to informal discovery requests and requests in preparation for mediation (Hawkins Decl. ¶¶ 4-8). The parties have conducted significant investigation of the facts and law during the prosecution of the Action. Class Counsels' research enabled them to pinpoint the relevant issues and claims and

³ Out of 10,657 class members to whom the Notice Packets were mailed, 179 remain undeliverable. (Bench Decl. ¶ 13.)

1 to assess potential liability and damages. These efforts resulted in the parties having a clear view
2 of the strengths and weaknesses of their respective cases and achieving a resolution on favorable
3 terms, as was evidenced during mediation and negotiations leading to Settlement (*Id.*).

4 **3. Class Counsel is Experienced in Similar Litigation**

5 The endorsement of qualified and well-informed counsel of the settlement as fair is
6 entitled to significant weight. *See Dunk, supra*, 48 Cal.App.4th at 1802. As discussed in the
7 preliminary approval papers and set forth in the declaration of Class Counsel, Class Counsel have
8 represented, mediated, and settled other employee class actions in wage and hour litigation and
9 have knowledge of the strengths and weaknesses of the claims against Defendant and the benefits
10 of the proposed settlement under the circumstances of the case. (Hawkins Decl. ¶¶ 4, 8, 13-18).
11 Class Counsel contends that the Settlement is fair, adequate, reasonable, and in the best interests
12 of the Class as a whole (Hawkins Decl. ¶¶ 8, 13).

13 **4. The Class Members' Positive Reaction to the Settlement Favors Final**
14 **Approval**

15 Finally, courts look at the reaction of class members to determine if a settlement that
16 directly affects their interests should be approved as fair, adequate, and reasonable. As already
17 discussed herein, out of 10,478 class members presumed to have received the Notice Packets,
18 there are no disputes and no objections to the Settlement (Bench Decl. ¶¶ 15, 16.) Further, a court
19 may appropriately infer that a class action settlement is fair, adequate, and reasonable even when
20 class members object to it. Indeed, a court may approve a class action settlement as fair, adequate,
21 and reasonable even over the objections of a significant percentage of class members. *See Boyd v.*
22 *Betchel Corp.*, (D.C. Cal 1976) 485 F. Supp. 610, 624. *Reed v. General Motors* (5th Cir. 1983)
23 703 F.2d 170, 174; *In re Wash. Pub. Power Supply System Sec. Litig.* (D. Ariz. 1989) 720 F.
24 Supp. 1379, 1394. Here, there are no objections to the Settlement which the Court should
25 construe as a further indication of Class Members' support for the Settlement as fair, adequate,
26 and reasonable (Bench Decl. ¶ 15.)

27 **IV. CLASS REPRESENTATIVE ENHANCEMENT IS REASONABLE**

28 The settlement provides for an enhancement payment to be paid to the Class

1 Representative. The purpose is to provide an additional incentive payment, taking into
2 consideration the risks, time and effort in coming forward to fulfill all the duties associated with
3 being a class representative. Awarding incentive awards to compensate named plaintiffs in class
4 actions has been specifically recognized. See, e.g. *Clark v. American Residential Services, LLC*,
5 (2009) 175 Cal App 4th 785, 804 (incentive awards to named plaintiff appropriate for
6 participation in class action); *Bell v Farmers Ins. Exchange*, (2004) 115 Cal App 4th 715, 726
7 (upholding “service payments” to named plaintiffs for their efforts in bringing class case).

8 As stated by the Court of Appeal in the *Cellphone Termination Fee Cases*: incentive
9 awards are "intended to compensate class representatives for work done on behalf of the class, to
10 make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to
11 recognize their willingness to act as a private attorney general." *Cellphone Termination Fee*
12 *Cases*, (2010) 186 Cal. App. 4th 1380, 1394 (approving an incentive award of \$10,000).

13 The class representative enhancement payment is intended to compensate named Plaintiff
14 Darren Muller as the class representative for his willingness to accept the responsibility of
15 representing the interests of all class members (Hawkins Decl. ¶ 19). The purpose is to provide an
16 incentive payment, taking into consideration the risks, time, and effort expended by him in
17 coming forward to provide invaluable information and to litigate this matter on behalf of all Class
18 Members. The enhancement payment is also in consideration for executing a general release of all
19 his claims against Six Flags, which is much broader than the release given by the rest of the Class
20 Members (*Id.*) (Declaration of Darren Muller (“Muller Decl.”) ¶¶ 7, 8, 10).

21 Plaintiff also risked potential judgment against him if this case had been unsuccessful. In
22 class action losses, class representatives are deemed the losing party that is liable for the
23 prevailing party’s costs *Earley v. Superior Court*, (2000) 79 Cal. App. 4th 1420, 1433-1434.
24 Finally, Plaintiff also risked this lawsuit having a negative impact on future employment
25 opportunities, as prospective employers may be less inclined to hire an employee who has served
26 as a class representative (Muller Decl. ¶¶ 7, 9.) See, e.g. *Staton v. Boeing*, 327 F.3d 938, 977 (9th
27 Cir. 2003). As such, Plaintiff respectfully requests that this Court approve the Class
28 Representative enhancement payment in the amount of \$5,000.

1 **V. CLASS COUNSELS' REQUEST FOR ATTORNEYS FEE AWARD IS REASONABLE**

2 Subject to court approval, this settlement amount of \$220,000 includes Class Counsels'
3 attorneys' fees of \$73,333.33. Plaintiff and class members are entitled to recover their attorneys'
4 fees and costs. (Labor Code §2802; Code Civ. Proc. §1021.5(a); *Earley v. Super. Ct.*, (2000) 79
5 Cal.App.4th 1420. A fee award is justified when class benefits are obtained via settlement. *Maria*
6 *P. v. Riles*, (1987) 43 Cal.3d 1281, 1290-91; *Westside Cmty. for Indep. Living, Inc. v. Obledo*,
7 (1983) 33 Cal.3d 348, 352-53.

8 Fee awards may be based on (1) the percentage-of-the-benefit method; or (2) the lodestar
9 plus multiplier method. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254;
10 *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27. Both methods are proper in
11 California, with courts often only using a lodestar-multiplier method as a check against the
12 reasonableness of a percentage fee award. (*See, e.g., Serrano v. Priest (Serano III)*, (1977) 20
13 Cal.3d 25, 48-49 fn. 23; *People ex rel. Dept. of Transportation v. Yuki*, 31 (1995)Cal. App. 4th
14 1754, 1769-1772; *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, (1985)172 Cal. App. 3d
15 914, 954.

16 **A. Class Counsels' Requested Fees Are Reasonable Under the Lodestar/Multiplier Method.**

17 The lodestar-multiplier method begins with a calculation of time spent and reasonable
18 hourly compensation of each attorney and paralegal who worked on the case. Then to compensate
19 counsel for risk, quality, and result, courts commonly apply a "multiplier" to the lodestar in
20 awarding attorneys' fees. California courts often increase the base lodestar with a multiplier after
21 considering: (1) the continuing obligation of plaintiff's counsel to devote time and effort to the
22 litigation; (2) the extent to which the litigation precluded other employment by the attorneys; (3)
23 the contingent nature of the fee agreement, both from the point of view of eventual success on the
24 merits and securing an award; (4) the experience, reputation, and ability of the attorneys who
25 performed the services, and the skill they displayed in litigation; (5) the amount involved and the
26 results obtained on behalf of the class by plaintiff's counsel; and (6) the reaction of the class
27 members. *See, e.g. Serrano, supra*, 20 Cal. 3d at 49; *Dunk v. Ford Motor Co., supra*, 48 Cal.
28 App. 4th at 1810 n.21. However, no rigid formula applies, and each factor should be considered

only “where appropriate.” See *Dept. of Transp. v. Yuki*, (1995) 31 Cal. App. 4th 1754, 1771; See also *Serrano*, *supra*, 20 Cal.3d at 49.

1. Time and Effort.

Class Counsel, who are experienced wage and hour class action attorneys, have put a significant number of hours in this case. Class Counsel had to conduct substantial investigation, research numerous issues, review and analyze policies, procedures, and practices, independently analyze provided documents, and discuss with class members (Hawkins Decl. ¶¶ 4-6, 20). Those efforts, along with negotiating the settlement, attempting to obtain preliminary approval, preparing and filing the final approval papers, required a significant amount of time and labor. (*Id.*) Since in or about December 2019, prior to the inception of the filing of this lawsuit on February 21, 2020, the total amount of attorney time and paralegal time estimated to have been expended, and also estimated to be expended in finalizing this matter, is 123 hours. Class Counsels’ base lodestar total equates to attorney fees of \$94,000 (Hawkins Decl. ¶ 21).

2. Extent Litigation Precluded Other Employment.

Inherent to class action litigation is the amount of time and labor required to properly adjudicate the case. From start to Settlement, judgment or verdict, class action litigation commands commitment, an extensive amount of time, labor and resources to successfully litigate. Although this litigation did not conclusively preclude other employment it did impact Class Counsels’ ability to take on other class action cases. Class Counsel is a boutique law firm with few attorneys and staff (Hawkins Decl. ¶ 17, 20).

3. Contingent Nature of the Agreement.

In *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1132, the court noted, the economic rationale for contingency cases has been explained as follows: “A contingent fee must be higher than a fee for the same legal services paid as they are performed. As discussed further below, the contingent fee compensates the lawyer not only for the legal services he renders but also for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.” (Posner, *Economic Analysis of Law* (4th ed. 1992) pp. 534,

1 567.) “A lawyer who both bears the risk of not being paid and provides legal services is not
2 receiving the fair market value of his work if he is paid only for the second of these functions. If
3 he is paid no more, competent counsel will be reluctant to accept fee award cases.” *Id.* Here,
4 Class Counsel took the matter on a contingent basis (Hawkins Decl. ¶ 22).

5 **4. Experience, Reputation, and Ability of Plaintiff’s Counsel.**

6 As also set forth in the Declaration of James R. Hawkins submitted in support of the
7 Preliminary Approval Motion and discussed herein, Class Counsels’ skill and experience in
8 litigating wage and hour class actions, in state and federal forums, contributed to the results
9 obtained on behalf of the putative class members (Hawkins Decl. ¶¶ 14-18).

10 **5. Results Obtained on Behalf of the Class by Plaintiff’s Counsel.**

11 The award of attorney fees should reflect the successful outcome of the case *Hensley v.*
12 *Eckerhart*, (1983) 461 U.S. 424,440. As already discussed herein and in the preliminary approval
13 motion, this case involves difficult issues largely precluding a clear-cut outcome as to liability.
14 There also were significant class certification issues concerning whether individual issues
15 predominate and whether class member declarations and statistical samplings can support
16 certification. Defendants recognized the uncertainty of Plaintiff’s claims and vigorously disputed
17 liability, Class Counsels’ ability to obtain certification, and the amount of damages. Nevertheless,
18 despite the obstacles as already discussed in the preliminary approval motion and herein, Class
19 Counsel obtained significant financial compensation for the class members. All class members
20 who did not opt out of the Settlement will receive payments. The estimated equal share of the net
21 settlement amount to be paid is Eight Dollars and Forty-One Cents (\$8.41) (Bench Decl. ¶ 18).
22 These amounts are within the reasonable approved amounts for standalone FCRA settlements as
23 discussed in the Preliminary Approval Motion.

24 Further, as also discussed, Plaintiff would have faced significant legal and factual
25 obstacles in demonstrating that Class certification was appropriate. Despite the complexity of the
26 case, Class Counsel have, through the investment of substantial effort, and the resources of their
27 boutique law firm, been able to secure a great Settlement on behalf of the Class Members.

28 **6. Reaction of Putative Class Members.**

1 As already discussed herein, the reaction of the Class Members has been positive.
2 Specifically, not one of the Class Members objected to Class Counsel's request for attorneys'
3 fees, nor did anyone request exclusion, or dispute the Settlement, which also provides compelling
4 evidence that the request is fair, adequate, and reasonable.

5 In sum, based on the six factors discussed above, Class Counsels' lodestar in this action
6 should be enhanced by application of a multiplier. Additionally, by settling this case prior to trial
7 rather than continuing to litigate issues that remain somewhat unsettled, counsel obtained great
8 results for the class at far less expense to the parties, the counsel and to this Court. Accordingly, a
9 positive multiplier of Class Counsels' lodestar is further warranted. "Considering that our
10 Supreme Court has placed an extraordinarily high value on settlement, it would seem counsel
11 should be rewarded, not punished, for helping to achieve that goal." *Lealao, supra*, 82 Cal. App.
12 4th at 52. Multipliers of two to four are commonplace in California class actions and can range
13 even higher. *Wershba, supra*, 91 Cal. App. 4th at 255; *In re California Indirect Purchases*
14 (October 22, 1998) WL1031494 at * 10, fn 5. In this case, a lodestar multiplier is not required to
15 reach the agreed upon class counsel fee of \$73,333.33.

16 **B. Class Counsels' Requested Fees Are Reasonable Under the Percentage of the**
17 **Benefit Method.**

18 **1. Attorney's Fees Should be Based Upon the Total Benefit to the Class.**

19 The primary benefit of the percentage method is that it focuses on the benefit conferred on
20 the class as a result of the efforts of Class Counsel. Awarding Class Counsel fees based on a
21 percentage of the recovery has the advantages of eliminating the incentive for attorneys to
22 increase hours unnecessarily, encouraging early settlement of disputes, and preserving judicial
23 resources otherwise used to monitor attorneys' billable hours. See *In re Activision Sec. Litig.*,
24 (N.D. Cal. 1989) 723 F. Supp. 1373, 1378-79; *MANUAL FOR COMPLEX LITIGATION* 4th ed.
25 §14.121 (2004) ("in practice, the lodestar method is difficult to apply, time consuming to
26 administer, inconsistent in result. . . capable of manipulation,... [and] creates inherent incentive to
27 prolong the litigation"); See also *In re Quantum Health Resources, Inc.* (C.D.Cal. 1997) 962
28

1 F.Supp. 1254, 1256 (noting that lodestar “creates an incentive to keep litigation going in order to
2 maximize the number of hours included in the court’s lodestar calculation”).

3 The percentage of the fund method survives in California class action cases. *Laffitte v*
4 *Robert Half Intern, Inc.* (2016) 1 Ca. 4th 480, 506.[See also. *Chavez v. Netflix, Inc.*, (2008) 162
5 Cal. App. 4th 43 at 65, 66; *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.*,
6 (2005) 127 Cal. App. 4th 387, 397 [the common fund doctrine is “frequently applied in class
7 actions when the efforts of the attorney for the named class representatives produce monetary
8 benefits for the entire class”]; *Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal. App. 4th at 254.

9 **2. The Contingent Nature of Class Counsels’ Representation Supports**
10 **the Requested Fees Based on 1/3 of the CSA.**

11 Further, the contingent nature of Class Counsels’ representation also warrants the
12 requested attorney fees based on the percentage of the common fund. The risks in taking on any
13 class action are enormous especially in regards to wage-and-hour class actions because the wage
14 laws are still developing and a change in the law could wipe out a plaintiff's recovery. This holds
15 true regarding the rules for disclosures under the FCRA as well. Litigating a class action through
16 trial takes years and requires the investment of hundreds of thousands of dollars. Attorneys
17 willing to undertake this risk deserve appropriate compensation. As elaborated by the California
18 Supreme Court in *Graham v. Daimler Chrysler Corp.*, (2008) 34 Cal. 4th 553, 579-580, counsel
19 should be awarded a fee enhancer for taking on contingent cases because a "contingent fee
20 compensates the lawyer not only for the legal services he renders but for the loan of those
21 services. The implicit interest rate on such a loan is higher because the risk of default (the loss of
22 the case, which cancels the debt of the client to the lawyer) is much higher than that of
23 conventional loans."

24 As the California Supreme Court specifically explained:

25 A contingent fee must be higher than a fee for the same legal services paid as they
26 are performed. The contingent fee compensates the lawyer not only for the legal
27 services he renders but for the loan of those services. The implicit interest rate on
28 such a loan is higher because the risk of default (the loss of the case, which cancels
the debt of the client to the lawyer) is much higher than that of conventional loans.
A lawyer who both bears the risk of not being paid and provides legal services is
not receiving the fair market value of his work if he is paid only for the second of

1 these functions. If he is paid no more, competent counsel will be reluctant to
2 accept fee award cases.

3 *Id.* at 580.(citing *Ketchum v. Moses*,(2001) 24 Cal. 4th 1122, 1132-33).

4 In the legal marketplace, an attorney whose compensation is entirely dependent on success
5 – who takes a significant risk – should and does expect a significantly higher fee than an attorney
6 who is paid a market rate as the case goes along, win or lose. *See, e.g., Rader v. Thrasher*, (1962)
7 57 Cal. 2d 244, 253 (“[a] contingent fee contract, since it involves a gamble on the result, may
8 properly provide for a larger compensation than would otherwise be reasonable” (citation
9 omitted); *Salton Bay Marina v. Imperial Irrig. Dist.*, (1985) 172 Cal. App. 3d 914, 955
10 (contingent nature of the litigation is a relevant factor in determining a reasonable attorney fee
11 award).

12 Class Counsel represented the class members in this matter and has borne the entire risk
13 and costs of litigation on a pure contingency basis. To date, Class Counsel has not received any
14 compensation and expended litigation costs on behalf of the class. Class action contingency cases
15 are inherently risky (Hawkins Decl. ¶ 22). Upon retention, Class Counsel makes a commitment to
16 litigate the case through trial. These types of cases can take years, hundreds of hours of work and
17 cost an enormous amount of money; these risks are known upon retention. The risks involved
18 coupled with the contingency basis of this case further support Class Counsel’s request for
19 attorneys’ fees and costs (*Id.*).

20 **3. Additional Factors Regarding the Contingency Market Rate Justify**
21 **the Requested Fee Award.**

22 Further, important public policies underlie a court's determination of a motion for
23 attorneys' fees in class actions. Employees who are wronged by an employer’s violation of state
24 and federal labor laws should have access to counsel with the ability and resources necessary to
25 litigate complex cases. *See e.g. Say-On Drug Stores, Inc. v. Superior Court*, (2004) 34 Cal. 4th
26 319, 340 (enforcement of labor laws and class action device both matters of public policy); Our
27 legal system places unique reliance on private litigants to enforce substantive provisions of
28 employment law through class actions. *See e.g. Gentry v. Superior Court*, 42 Cal. 4th 443, 450-6

(2007) (confirming the public importance of private enforcement of overtime laws through class actions); *Lealao*, 82 Cal. App. 4th (legal system relies on private litigants to enforce substantive provisions of law through class and derivative actions; attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace).

As the California Court of Appeal recognized in *Thayer v. Wells Fargo Bank, supra*, 92 Cal. App. 4th at 839: "Adequate fee awards are perhaps the most effective means of achieving [the] salutary goal [of encouraging `private attorney general actions and] [c]ourts should not be indifferent to the realities of the legal marketplace or unduly parsimonious in the calculation of such fees." *See also Lealao*, 82 Cal.App.4th at 53 (cautioning against fee awards that are too small and therefore "chill the private enforcement essential to vindication of many rights..."). At a minimum, attorneys providing these substantial benefits should be paid an award equal to the amount negotiated in private bargaining that take place in the legal marketplace. *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, (1980) 445 U.S. 326, 338; *Lealao*, 82 Cal. App. 4th at 49-50.

4. Class Counsels' Requested Fee Award is Well Within California's Benchmark Awards and Thus Reasonable Under the Percentage of the Benefit Method.

Class Counsel's request for 1/3 of the monetary fund recovered is California's standard benchmark and well within the range customarily approved by the California courts in comparable class actions and other class actions as well as with contingency contracts negotiated by plaintiffs and their counsel. "Empirical studies also show that regardless of whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *See e.g. Chavez v. Netflix, Inc., supra* 162 Cal. App. 4th at 66 fn.11; *In re California Indirect Purchases* (October 22, 1998) WL1031494 at * 9(citing to *In re Milk Antitrust Litigation* (L.A. Sup. Ct. 1998) Civ. Case No. BC070061 (33 1/3% award); *In re Facsimile Paper Antitrust Litigation* (San Francisco Sup. Ct. 1997) Civ. Case No. BC0070061 (33 1/3% award) *In re Liquid Carbon Dioxide Cases* (San Diego Sup.Ct.1996) J.C.C.P. 3012 (33

1 1/3% award); *Romero v Producers Dairy Food, Inc.* (E.D. Cal. Nov. 14, 2007) WL 3492841 at *
2 4 (“fee awards in class actions average around one-third of the recovery.” (quoting *Newberg on*
3 *Class Actions* § 14.6 (4th ed.2007)).

4 Moreover, the percentage should be measured against the full fund established by the
5 settlement and not upon the total value of the net settlement fund. *Williams v. MGM-Pathe*
6 *Communications Co.*, (9th Cir. 1997)129 F.3d 1026, 1027. This method recognizes that the
7 efforts of class counsel established the entire settlement, including non-monetary benefits, for the
8 benefit of the class. *Id.* In the Ninth Circuit’s decision in *Williams*, the parties settled class action
9 claims in favor of the class for a total settlement fund of \$4.5 million, and the district court
10 awarded class counsel attorneys’ fees based upon “the class members’ claims against that fund.
11 *Williams*, 129 F.3d at 1027. The class counsel in *Williams* contended that the district court erred
12 and should have calculated their fee as one-third of the entire \$4.5 million settlement fund. *Id.*
13 The Ninth Circuit agreed with class counsel and determined that the district court’s award of a fee
14 based solely upon the claims against the settlement fund was an abuse of its discretion.

15 Ninth Circuit courts have applied *Williams* in a variety of contexts, including claims made
16 settlements without a minimum or maximum recovery. *See, e.g., Browning v. Yahoo! Inc.*, (N.D.
17 Cal. Nov. 16, 2007) WL 4105971 at *13–14(claims-made settlement with no minimum or
18 maximum recovery); *Young v. Polo Retail*, (N.D. Cal. Mar. 28, 2007) WL 951821 at*14-24
19 (same); *Lopez v. Youngblood*, (E.D. Cal. Sept. 1, 2011) WL 10483569 at *32–43 (reversionary
20 common fund with maximum recovery only). *Hopson v. Hanesbrands Inc.*, (N.D. Cal. Apr. 3,
21 2009) 09 WL 928133 at *11; *Glass v. UBS Financial Services*, (N.D. Cal. Jan. 26, 2007) WL
22 221862 at *16) (same). In sum, Class Counsels’ request for an award of attorney's fees in the
23 amount of 1/3 of the maximum settlement amount is reasonable.

24 VI. CLASS COUNSELS’ REQUESTED COSTS ARE REASONABLE

25 Class Counsel has not only expended substantial time in diligently prosecuting this
26 Action, but they have also expended considerable resources during litigation with no guarantee
27 that their costs would be reimbursed. The Settlement provides for reasonable actual costs of up to
28 \$15,000.00. (Settlement Agreement p. 3, ¶ I.B) The attorney cost amount incurred is \$4,994.88,

1 thus Class Counsel respectfully requests that the Court approve the incurred amount as per the
2 Settlement Agreement (Hawkins Decl. ¶ 23, Exh. 3).

3 **VII. THE SETTLEMENT ADMINISTRATOR'S REQUESTED EXPENSES ARE**
4 **REASONABLE**

5 ILYM was retained to administer the notice and claims process. ILYM's duties included,
6 among other things: a) preparing, printing and mailing of the class notice packets and b) receiving
7 and reviewing claims and exclusion requests. (Bench Decl. ¶ 3). In the preliminary moving
8 papers, Plaintiff requested that, as per the Settlement Agreement, the Settlement Administrator be
9 awarded costs of administering the settlement in an amount estimated to be \$48,000. As per
10 ILYM, the costs of administering the settlement are \$45,600.00 and should be awarded (Bench
11 Decl. ¶ 19).

12 **VIII. CONCLUSION**

13 For all of the foregoing reasons, Plaintiff requests that the Court (1) grant final approval of
14 this Settlement and approve distribution to the Settlement Class Members, (2) approve Settlement
15 Administrator costs in the amount of \$45,600 (3) approve Class Counsel's request for an award of
16 \$73,333.33 in attorneys' fees and \$4,994.88 in costs, and (4) approve the request for \$5,000
17 enhancement payment to the named Plaintiff and Class Representative Darren Muller. Finally,
18 Plaintiff requests that the Court enter the [Proposed] Judgment and Final Order Approving Class
19 Action Settlement, submitted concurrently herewith.

20 **Respectfully Submitted,**

21 Dated: November 17, 2022

22 **JAMES HAWKINS, APLC**

23 

24 James R. Hawkins, Esq.
25 Isandra Y. Fernandez, Esq.
26 Lance Dacre, Esq.
27 Attorneys for Plaintiff
28 Darren Muller