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individually and on behalf of all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

MARA SANTAMARIA, and on behalf of
all others similarly situated,

Plaintiffs,

v.

BRIGHT HORIZONS CHILDREN'S
CENTER, a Delaware Corporation;
BRIGHT HORIZONS FAMILY
SOLUTIONS INC., a Delaware
Corporation, and DOES 1-10, inclusive,

Defendants.

Case No.: CIVSB2210140

**CLASS ACTION AND PAGA
REPRESENTATIVE ACTION**

Assigned For All Purposes To:
Judge: Joseph T. Ortiz
Dept.: S17

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS ACTION AND
PAGA SETTLEMENT, CLASS
REPRESENTATIVE ENHANCEMENT,
ATTORNEYS' FEES AND COSTS**

Date: May 23, 2023
Time: 1:30 p.m.
Dept.: S17

Action Filed: May 17, 2022

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1 **I. INTRODUCTION**

2 This motion seeks final approval of a common fund, non-reversionary wage and hour
3 class action and PAGA settlement of \$2,500,000.00¹ between Plaintiff Mara Santamaria
4 (“Plaintiff”), on behalf of herself and the conditionally certified Settlement Class, and Defendant
5 Bright Horizon’s Children’s Centers LLC and Bright Horizons Family Solutions Inc. (“Bright
6 Horizons” or “Defendants”). The proposed Settlement reached by the Parties is fair, reasonable,
7 and adequate, and provides meaningful monetary recovery to the Settlement Class Members,
8 particularly in light of Defendants asserted legal and factual defenses.

9 The Settlement was preliminarily approved on December 8, 2022. The Parties and the
10 Settlement Administrator carried out the notice and other procedures ordered by this Court. The
11 deadline for Settlement Class Members to submit a request for exclusion, object to the Settlement
12 or submit a dispute was April 3, 2023. The results of the notice procedures confirm that there has
13 been no opposition to the Settlement and that the Settlement Class Members overwhelmingly
14 approve the Settlement. 99.55% of the Class will participate in the Settlement. ILYM Group
15 received only one objection to the Settlement (which did not object to the fairness of the terms to
16 the Class Members) and less than .5% of the Settlement Class requested exclusion from the
17 Settlement. (See, Declaration of Madely Nava, filed concurrently herewith.)

18 In conjunction with Plaintiff’s request for final approval, Plaintiff also respectfully requests
19 the Court grant attorneys’ fees and costs by approving this motion and application for an award of
20 \$833,333.33 for attorneys’ fees and \$19,495.68 for costs. Plaintiff further requests that this Court
21 grant a service award of \$10,000 to Plaintiff for her efforts in obtaining this excellent result for
22 the Settlement Class. The Settlement meets the criteria for final approval and Plaintiff
23 respectfully requests this Court grant final approval and enter the proposed Order and Judgment
24 filed concurrently herewith.

25
26
27 _____
28 ¹ It should be noted that there was an error in the Preliminary Approval Order entered, as the employer’s share of payroll taxes due and payable under the Settlement is not included in the Gross Settlement Amount and shall be paid separately.

II. STATS AND SUMMARY OF PRELIMINARILY APPROVED TERMS

Gross Settlement Amount	\$2,500,000.00
Class Counsel Fees	\$833,333.33
Class Counsel Costs and Expenses	\$19,495.68
Class Representative Service Award:	\$10,000
LWDA Payment	\$75,000
Settlement Administrator Costs	\$52,000
Net Settlement Fund	\$1,510,170.99²
Total Class Members	6,416
Opt Outs	29
Objections	1
Participating Settlement Class Members (Qualified Class Members)	6,387
Applicable Workweeks	476,940
PAGA Employees	4,182
PAGA Pay Period	94,240

Each Qualified Class Member will receive a *pro rata* share of the Net Settlement Amount. To calculate each Qualified Class Member's share of the Net Settlement Amount, the Net Settlement Amount shall be multiplied by a fraction, the numerator of which is the number of work weeks the Qualified Class Member worked any regular hours as a non-exempt, hourly paid employee in California during the Settlement Class Period, and the denominator of which is the total of all weeks in which the Qualified Class Members worked any regular hours during the Settlement Class Period. (Ex. 1, ¶ 9.B.i.) The resulting number shall be the Qualified Class Member's Payment. 1/3 of each Qualified Class Member's Payment will be paid as W-2 wages 2/3 will be paid as 1099 penalties and interest. (Id., ¶ 9 B.ii.-iii.).

III. THE SETTLEMENT ADMINISTRATOR MAILED THE NOTICE

This Court appointed ILYM Group, Inc. as the Settlement Administrator to provide notification services and settlement administration pursuant to the terms of the Settlement

² Pursuant to the Settlement Agreement, 25% of the PAGA Payment (\$25,000) should be allocated to PAGA Employees regardless of whether they opt out of the Class Settlement; PAGA Employees cannot opt out of the PAGA Settlement. (Ex. 1, ¶ 5.).

1 Agreement. (Nava Decl. ¶ 3). On January 25, 2023, ILYM received the Class List and Data
2 Report from Defendants' counsel including name, most recent mailing address, social security
3 number, and the total number of applicable workweeks worked for each Settlement Class
4 Member. (Id. ¶ 5). Prior to mailing, ILYM cross-checked these addresses against the National
5 Change of Address database to determine if there was a better address. (Id. ¶ 6).

6 On February 17, 2023, ILYM mailed the Notice to 6,416 Class Members. (Nava Decl.
7 ¶7). The Notices advised Class Members of their right to request exclusion from the Settlement,
8 object to the Settlement, dispute their work weeks, or do nothing, and the implications of each
9 such action. The Notice advised Class Members of applicable deadlines and other events,
10 including the Final Approval Hearing, and how Class Members could obtain additional
11 information, including a toll-free telephone number. The Notice also disclosed the claims that
12 would be released upon final approval and each Settlement Class Member's total weeks worked
13 during the Class Period and estimated individual settlement payment based thereon. (Id., Ex. A).

14 As of the April 13, 2023, a total of 330 Notices were returned to ILYM by the U.S. Postal
15 Service. (Id. ¶ 8). 14 of the returned Notices had forwarding addresses and were promptly re-
16 mailed. (Id.). ILYM performed a skip trace to obtain an updated address for the purpose of re-
17 mailing the remaining 316 returned Notices. (Id.). ILYM obtained updated addresses for 216
18 Class Members and they were promptly re-mailed. (Id.). ILYM successfully delivered Notice to
19 6,316 of the 6,416 Class Members, which represents 98.44% of the Settlement Class. (Id.).

20 The deadline to object or request exclusion from the Settlement was April 3, 2023, except
21 for those Class Members whose Notices were remailed, in which case the deadline is extended
22 the later of April 3, 2023, or forty-five (45) calendar days from re-mailing. (Id. ¶ 11).³ Twenty-
23 nine (29) Settlement Class Members requested exclusion and one (1) submitted an objection. (Id.,
24 ¶ 11, 12).

25 ILYM followed the notice procedures set forth in the Preliminary Approval Order.
26 Therefore, notice to the Settlement Class of the proposed Settlement was reasonably calculated,
27

28 ^{3 3} The Parties will file a supplemental declaration prior to the Final Fairness Hearing and after the response deadline for any re-mailed Notices.

1 under the circumstances, and has apprised the Class Members of the pendency of the action and
2 afforded them an opportunity to opt out or present any objections or disputes.

3 **IV. THE SETTLEMENT SATISFIES THE REQUIREMENTS FOR FINAL**
4 **APPROVAL.**

5 **A. Legal Standard for Final Approval of Class Action Settlement.**

6 “[V]oluntary conciliation and settlement are the preferred means of dispute resolution.
7 This is especially true in complex class action litigation” *7-Eleven Owners for Fair*
8 *Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1140, 1151 (internal citation omitted). A
9 class action may not be dismissed, compromised, or settled without the Court’s approval. Cal. Rules
10 of Court (“CRC”) 3.769 and 3.770. The Court’s inquiry is limited to whether the proposed
11 settlement is “fair, adequate, and reasonable.” *Wershba v. Apple Comp., Inc.* (2001) 91 Cal. App.
12 4th 224, 244-245. A settlement is “fair, adequate and reasonable” warranting final approval when
13 “the interests of the class are better served by the settlement than by further litigation.” *Manual for*
14 *Complex Litigation* (4th ed. 2008) § 21.61.

15 CRC 3.769 describes the procedure for final approval of a class action settlement in three
16 distinct steps: (1) preliminary approval of the proposed settlement at an informal hearing; (2)
17 dissemination of mailed and/or published notice of the settlement to all affected Class Members;
18 and (3) a final approval hearing, at which Class Members may be heard regarding the settlement,
19 and at which matters concerning the fairness, adequacy, and reasonableness of the settlement may
20 be presented. The first and second step have been completed. The first step was completed on
21 December 8, 2022, when the Court preliminarily approved the Settlement and determined that it
22 was within the range of possible final approval. (Hawkins Decl., Ex. B [Preliminary Approval
23 Order]). The second step, dissemination of Notice to the Settlement Class, was completed February
24 17, 2023. (Nava Decl., ¶ 7, Ex. A).

25 The third and final step in the settlement approval process is the Final Approval Hearing,
26 at which the Court determines whether the Settlement is fair, adequate, and reasonable. A
27 settlement agreement is presumptively fair when it is (1) the product of arm’s-length bargaining;
28 (2) supported by sufficient investigation and/or discovery to allow assessment of Plaintiffs’
claims; (3) supported by experienced counsel; and (4) subject to only a small percentage of

1 objections. *In re Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1389 quoting
2 *Dunk*, 48 Cal. App. 4th at 1802; *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 52.

3 In determining whether to enter a final order approving the Settlement and entering
4 judgment thereon, California courts consider several factors, including the strength of the
5 Plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of
6 maintaining class action status through trial; the value of the settlement; the extent of discovery
7 completed and the stage of the proceedings; the experience and views of counsel; and the reaction
8 of the class members to the proposed settlement. *Wershba*, 91 Cal. App. 4th at 244-45. "The list
9 of factors is not exclusive and the court is free to engage in a balancing and weighing of factors
10 depending on the circumstances of each case." *Id.* at 245. Courts must also give:

11 proper deference to the private consensual decision of the parties, [since] the court's
12 intrusion upon what is otherwise a private consensual agreement negotiated
13 between the parties to a lawsuit must be limited to the extent necessary to reach a
14 reasoned judgment that the agreement is not the product of fraud or overreaching
by, or collusion between, the negotiating parties, and the settlement, taken as a
whole, is fair, reasonable and adequate to all concerned.

15 *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1027. For the reasons set forth below,
16 the Court should grant final approval of the Settlement in this third step.

17 **B. The Factors to be Considered Favor Final Approval**

18 Settlement resolves inherent uncertainty and is therefore strongly favored by the courts,
19 particularly in class actions. *See Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950.
20 Here, Plaintiff recognized several risks inherent in litigating this case: (1) the risks associated with
21 certifying the action as a class action; (2) the risks associated with maintaining the class action
22 status through trial; (3) the likelihood of class action recovery at trial after analyzing the merits of
23 Defendants' legal defenses; and (4) the current state of the law regarding certification and
establishing common questions of fact. (Hawkins Final Decl. ¶20.).

24 Defendants vigorously deny all claims in this litigation and argue that the claims are not
25 amenable to class certification. (Ex. 3, Hawkins Prelim. Decl. ¶ 12.) Defendants argued they
26 maintained lawful written policies that were provided to the class members, and trained employees
27 to follow lawful meal and rest break procedures. (*Id.* ¶ 25-32). They argued that they always
28 complied with applicable law and maintained lawful policies and procedures. (*Id.* ¶ 27).

1 Defendants also contended that class treatment was not warranted because to the extent Plaintiff
2 could prove that a meal or rest period was missed, late or short, it was a matter of individual
3 preference. (Id. ¶ 27.) As such, Plaintiff’s counsel considered the risks of receiving no recovery,
4 balanced by the investigation and analysis Plaintiff’s counsel performed in valuing the case.

5 Similarly, Plaintiff’s counsel considered the likelihood of obtaining a similar or greater
6 recovery in the event Plaintiff obtained a judgment in her favor. The fact that, even in Plaintiff
7 proves Defendants’ liability for all the claims alleged in the Complaint, Plaintiff would still have
8 to prove the amount of damages owed in this case weighs in favor of approval of the Settlement.
9 Absent a settlement, the Parties will have to engage in costly and complex damages calculations
10 regarding the claims alleged in the lawsuit (e.g., daily “off the clock” wages owed, daily “rounding”
11 wages owed, daily/weekly overtime premiums owed, meal/rest period premiums owed, interest,
12 and PAGA penalties, among others), which are subject to a myriad of differing calculations and
13 formulas. Furthermore, Plaintiff’s counsel examined the likelihood of obtaining class certification
14 and maintaining the class action status through trial. In addition, if this case were to continue as a
15 class action through trial, both Parties will necessarily incur substantial litigation expenses,
16 including the expense and time of analyzing voluminous document, and hiring statisticians and
17 additional expert witnesses to testify at trial. (Hawkins Final Decl. ¶20; see also Ex. 3, Hawkins
18 Prelim Decl.).

19 While the proposed Settlement may be less than the Class could potentially recover
20 following trial, it is highly unlikely that Plaintiff and the Class would receive the full amount to
21 which they believe they are entitled for the reasons discussed above. As such, the Gross Settlement
22 Amount, even if only a fraction of a total *potential* recovery, is a fair and adequate *real* recovery
23 for Class Members. See *In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459.

24 **C. The Value and Fairness of the Settlement Favors the Court’s Final
25 Approval.**

26 In evaluating the fairness of consideration offered in settlement, it is not the role of the
27 courts to second guess the negotiated resolution of the litigants. “[T]he court’s intrusion upon
28 what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must
be limited to the extent necessary to reach a reasoned judgment that the agreement is not the

1 product of fraud or overreaching by, or collusion between, the negotiating parties, and that the
2 settlement, taken as a whole, is fair, reasonable, and adequate to all concerned.” *Hanlon*, 150 F.
3 3d 1027. The issue is not whether the settlement could have been better in some fashion, but
4 whether it is fair. (Id.)

5 The monetary relief provided by the Settlement is a meaningful recovery to the Class
6 warranting final approval. In conjunction with Plaintiff’s Motion for Preliminary Approval, Class
7 Counsel provided the Court with a detailed description of the claims, defenses and Defendants’
8 potential exposure on those claims, thereby providing the Court with a sufficient understanding of
9 the amount in controversy and potential outcomes of the case, so that it can properly evaluate the
10 sufficiency of the Settlement, as required in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th
11 116, 129-30 (2008) (trial court needs sufficient information about the potential value of the case
12 and issues to review the reasonableness of the settlement). (See, Ex. 3, Hawkins Prelim Decl. ¶¶
13 25-34.) At that time, the Court found that the Settlement appeared to be fair, adequate and
14 reasonable and favors approval. (See, Ex. 2.). Nothing has changed to disrupt that finding. Only
15 one objection was lodged to the Settlement, but the objection did not indicate that the Class
16 Member believed that some aspect of the Settlement was unfair to the Class Members or
17 inadequate. (See, Nava Decl. ¶12, Ex. B.). Rather, the objection states that the Objector had
18 “been employed by Bright Horizons for 27 years and ha[d] never been wronged by them.” (Id.).
19 Moreover, less than .5% of the Settlement Class Members requested exclusion from the
20 Settlement. This excellent result confirms the Court’s preliminary approval finding that the
21 Settlement is fair, reasonable, and adequate. (Ex. 2, Preliminary Approval Order.).

22 Here, Plaintiff, through Class Counsel, secured a common fund of \$2,500,000.00 for the
23 Settlement of the claims alleged in the class action. This is well within the ballpark of
24 reasonableness and is respectfully submitted to be a meaningful benefit to the Class Members.
25 The 6,387 Participating Class Members will be paid a pro-rata portion of the Net Settlement
26 Amount. Exclusive of PAGA, the highest Individual Settlement Payment to a Settlement Class
27 Member is estimated to be approximately \$880.95, the average Individual Settlement Payment is
28 currently estimated to be approximately \$232.45. (Nava Decl. ¶ 14).

1 While Class Counsel believes Plaintiff's claims are meritorious, Defendants have
2 consistently denied liability, disputed Plaintiff's claimed damages, and raised formidable factual
3 and legal arguments which could potentially defeat Class Members' claims at either class
4 certification or trial. (Ex. 3, Hawkins Prelim. Decl. ¶ 12, 22, 25-34.). Given these available
5 grounds for defending against the asserted class claims and the risks of maintaining class
6 certification through the trial of the action and throughout any appeals, the Settlement is fair,
7 reasonable, and adequate. (Id., ¶ 12, 22, 25-34, 52; see also Hawkins Final Decl. ¶ 20.)

8 **D. The Parties' Investigation Favors the Court's Final Approval**

9 "[T]he extent of discovery completed and the stage of proceedings" are factors considered
10 in assessing the fairness, adequacy, and reasonableness of a class action Settlement. *Dunk*, 48 Cal.
11 App. 4th at 1801. "This factor evaluates whether the parties have sufficient information to make
12 an informed decision about settlement." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 588
(N.D. Cal. 2015) (citation omitted).

13 Plaintiff and Defendants entered the Settlement only after conducting an extensive
14 investigation and document/information exchange, which enabled Class Counsel and Defense
15 Counsel to thoroughly evaluate the strengths and weaknesses of the claims and defenses asserted.
16 Class Counsel previously provided a detailed description of the investigation conducted in this
17 action in the Motion for Preliminary Approval. (Ex. 3, Hawkins Prelim. Decl. ¶¶ 11-16, 20, 22.).
18 In addition, the settlement negotiations between the Parties were extensive and occurred at arm's
19 length. The Parties attended a successful mediation session with Gig Kyriacou, an experienced
20 wage and hour mediator. Thus, the Parties' investigation and discovery are sufficient to allow
21 Class Counsel and the Court to act intelligently. (Id., ¶¶ 5-6, 14-15; Hawkins Final Decl. ¶ 18.)

22 **E. The Endorsement of the Parties' Counsel Favors Final Approval**

23 The endorsement of experienced and well-informed counsel of a settlement as fair, reasonable,
24 and adequate is entitled to significant weight. *Dunk*, 48 Cal. App. 4th at 1801-02; *see also Larsen*
25 *v. Trader Joe's Company* (N.D. Cal. July 11, 2014) No. 11cv05188-WHO, 2014 WL 3404531
26 ("A [trial] court is entitled to give consideration to the opinion of competent counsel that the
27 settlement is fair, reasonable, and adequate."). Here, counsel for both Parties have significant
28 experience litigating wage and hour class actions. Class Counsel endorses the Settlement as being

1 fair, adequate and reasonable, and believes that the Settlement is the best interest of the Class, and
2 an excellent result for the Class. (Ex. 3, Hawkins Prelim. Decl. ¶ 16, 22-23, 34; Hawkins Final
3 Decl. ¶ 19). This endorsement of counsel is entitled to significant weight in favor of final
4 approval. *Boyd v. Bechtel Corp.* (N.D. Cal. Aug. 22, 1979) 485 F. Supp. 610, 622 (“The
5 recommendations of plaintiff’s counsel should be given a presumption of reasonableness.”).

6 **V. THE SETTLEMENT ADMINISTRATOR’S REQUESTED EXPENSES ARE**
7 **REASONABLE AND APPROPRIATE.**

8 In accordance with the Court’s Preliminary Approval Order, the Parties retained a neutral
9 third-party administrator, ILYM Group, Inc., to administer the notice process and perform the
10 duties set forth in the Agreement and as directed by the Parties. (Nava Decl. ¶ 3). The Court
11 preliminarily approved up to \$52,000 for settlement administration costs. ILYM Group will
12 incur actual fees and expenses for present and future work in the amount of \$52,000. (Id. ¶ 14.).
13 Plaintiff believes this request is appropriate and respectfully requests the Court award this
14 amount to ILYM Group. (Id. ¶ 16.)

15 **VI. THE ATTORNEYS’ FEES REQUESTED ARE FAIR AND REASONABLE AND**
16 **FAVOR APPROVAL**

17 “When a fee is set by a court rather than by contract, the object is to set it at a level that will
18 approximate what the market would set. . . . The judge, in other words, is trying to mimic the market
19 in legal services.” *Gaskill v. Gordon* (7th Cir. 1998) 160 F.3d 361, 363. Given the unique reliance
20 of our legal system on private litigants to enforce substantive provisions of law in class actions,
21 attorneys providing these substantial benefits should be paid an award equal to the amount
22 negotiated in private bargaining that takes place in the legal marketplace. *Deposit Guaranty Nat.*
23 *Bank, Jackson, Miss. v. Roper* (1980) 445 U.S. 326, 338, *rehq. denied*, 446 U.S. 947. The
24 “percentage of the fund method more accurately reflects the results achieved.” *Laffitte v. Robert*
25 *Half International, Inc.*, 1 Cal. 5th 439 (2016); see also *Lealao v. Beneficial California, Inc.* (2000)
26 82 Cal.App.4th 19, 50.

27 At the time this case was brought, the result was far from certain. Defendants’ numerous
28 defenses to the case created difficulties with proof and complex legal issues for Class Counsel to
overcome. Defendants have always challenged whether Plaintiff can prove predominance or

1 whether a class action trial was manageable under the standards set forth in *Duran v. U.S. Bank*
2 *Nat'l Assn.* (2014) 59 Cal. 4th 1. As a result, there was considerable risk that Plaintiff would not
3 prevail on a motion for certification or that Defendants would prevail on their defenses thereby
4 defeating any recovery to the Class. Even if Plaintiff was to obtain class certification, liability is
5 by no means a foregone conclusion. The Settlement was possible only because Plaintiff was able
6 to persuade Defendants that she could potentially prevail on the legal issues regarding liability and
7 obtain and maintain class certification for the Class through trial and overcome difficulties in proof
8 as to monetary relief. In successfully navigating these hurdles so as to persuade Defendants to settle,
9 Class Counsel displayed skills consistent with those that might be expected of attorneys of
10 comparable experience. (Hawkins Final Decl. ¶ 52, 60.).

11 To represent the Class on a contingent fee basis, Class Counsel had to devote the necessary
12 time and resources to this contingent case. (Hawkins Final Decl. ¶¶ 37-53, 60-62.). Class Counsel
13 gave up the hourly work that a firm can bank on for the risky contingent fee work in this case which
14 could have paid Class Counsel nothing. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

15 **A. The Agreement for the Payment of Fees and Expenses is Appropriate and**
16 **Should be Enforced**

17 Parties to a class action may negotiate not only the settlement of the action itself, but also
18 the payment of attorneys' fees. See *Evans v. Jeff D.* (1980) 475 U.S. 717, 734-35, 738, n.30.
19 "Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart* (1983) 461 U.S.
20 424, 437. The trial court "has a responsibility to encourage agreement" on fees. *Blum v. Stenson*
21 (1984) 465 U.S. 886, 902 n.19. Here, as part of the Settlement, the Parties agreed that Class Counsel
22 may seek an award of up to one-third (1/3) or \$833,333.33 of the Gross Settlement Amount for
23 attorneys' fees. (Ex. 1, Settlement, ¶ 4.). Such a fee is in line with what the market would provide
24 for similar services and the Court therefore can most certainly enforce the agreement. The United
25 States Supreme Court instructed, "... attorneys providing the essential enforcement services must
26 be provided incentives roughly comparable to those negotiated in the private bargaining that takes
27 place in the legal marketplace, as it will otherwise be economic for Defendants to increase injurious
28 behavior." *Deposit Guaranty Nat. Bank, supra*, 445 U.S. at 338.

Here, the requested fee and cost award was negotiated during adversarial bargaining by

1 counsel for each of the Parties, after the substantive terms of the Settlement had been negotiated.
2 The requested fee and cost award was a product of arms-length negotiations and fairly reflects the
3 marketplace value of the services rendered by Class Counsel in this case. (Hawkins Final Decl. ¶
4 18, 34.). Thus, the fee agreed to by the Parties should be approved.

5 **B. Class Counsel’s Fee Award is Properly Calculated as a Percentage of the Total**
6 **Value Created for the Benefit of the Class**

7 Class Counsel seeks an attorney fee award for their successful prosecution and resolution
8 of this action, calculated as one-third (1/3) of the value of the common fund created by the
9 Settlement. Courts have long recognized that an appropriate method for determining the award of
10 attorneys’ fees is based on a percentage of the total value of benefits afforded to class members by
11 the settlement. *Laffitte*, 1 Cal. 5th at 494; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Paul,*
12 *Johnson, Alston & Hunt v. Graulity* (9th Cir. 1989) 886 F.2d 268, 272; *Vincent v. Hughes Air West,*
13 *Inc.* (9th Cir. 1977) 557 F.2d 759, 769. The awarding of a fee based on a percentage of the common
14 fund recovered is to “spread litigation costs proportionately among all the beneficiaries so that the
15 active beneficiary does not bear the entire burden alone.” *Vincent, supra*, 557 F.2d at 769. The
16 Gross Settlement Amount is \$2,500,0000, thus Class Counsel requests \$833,333.33 in attorneys’
17 fees as it is properly calculated as a percentage (33-1/3%) of the common fund created for the
benefit of the Settlement Class.

18 **1. In a Common Fund Case, the Supreme Court Approves an Award Based**
19 **Upon the Percentage of the Fund**

20 California courts are expressly authorized to award attorneys’ fees so as “to ensure that the
21 fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable
22 litigation.” *Lealao v. Beneficial Cal., Inc., supra*, 82 Cal.App.4th at 50. As *Lealao* explained,
23 “attorneys providing the essential enforcement services must be provided incentives roughly
24 comparable to those negotiated in the private bargaining that takes place in the legal marketplace,
25 as it will otherwise be economic for Defendants to increase injurious behavior. It has therefore been
26 urged (most persistently by Judge Richard Posner) that in defining a ‘reasonable fee’ in such
27 representative actions the law should ‘mimic the market’.” *Id.* at 47.

28 In this case, the fees are being paid from the common fund, accordingly, the fee should be

1 awarded to mimic fees freely negotiated in the legal marketplace for comparable common fund
2 cases under *Lealao*. As *Lealao* acknowledged, the percentage-of-the-benefit approach should be
3 considered because here “it better approximates the workings of the marketplace than the lodestar
4 approach.” *Id.*, 82 Cal.App.4th at 49; see also *Apple Computer, Inc. v. Superior Court* (2005) 126
5 Cal.App.4th 1253, 1270. In *Laffitte*, the California Supreme Court confirmed that the percentage
6 of the fund method is properly used in a common fund case:

7 The recognized advantages of the percentage method – including relative ease of
8 calculation, alignment of incentives between counsel and the class, a better
9 approximation of market conditions in a contingency case, and the encouragement
10 it provides counsel to seek an early settlement and avoid unnecessarily prolonging
11 the litigation [citations omitted]--persuade us the percentage method is a valuable
12 tool that should not be denied our trial courts.

13 *Laffitte*, 1 Cal. 5th at 503. Moreover, the Supreme Court in *Laffitte* indicated that the trial courts
14 may utilize a “lodestar cross-check” to double check the reasonableness of the percentage fee
15 award. *Id.* Indeed, the Court explicitly held that the lodestar is a cross check that should not override
16 the primary use of the percentage method in stating, “[W]e emphasize the lodestar calculation,
17 when used in this manner, does not override the trial court's primary determination of the fee as a
18 percentage of the common fund and thus does not impose an absolute maximum or minimum on
19 the potential fee award . . . A lodestar cross-check is simply a quantitative method for bringing a
20 measure of the time spent by counsel into the trial court's reasonableness determination; as such, it
21 is not likely to radically alter the incentives created by a court's use of the percentage method.” *Id.*
22 at 505.

23 Because the Settlement is a common fund, and the percentage of the fund is the comparable
24 marketplace for fee awards in common fund cases, *Laffitte* and *Lealao* support an award based
25 upon the percentage of the common fund. Here, as noted above, one-third is within the reasonable
26 range of comparable awards for common fund cases, which establishes the requested award as
27 reasonable. Moreover, as discussed below, the use of the lodestar cross-check in this case further
28 supports the reasonableness of the percentage fee award as it falls squarely within the range
approved by California Courts.

29 **2. The Percentage Fee Award is Supported by a Lodestar Cross-Check**

30 The reasonableness of the requested attorneys’ fee of \$833,333.33 is also established by

1 reference to Class Counsel's lodestar cross-check in this matter. The lodestar for all Plaintiffs'
2 counsel in this case is approximately \$359,100.00. (Hawkins Final Decl. ¶ 37). This amount does
3 not include all of the time that will be spent on administering this settlement following final
4 approval and responding to inquiries by class members, which is likely to be significant.

5 As such, the requested fee requires only a small multiplier and falls well within the
6 benchmark of 25% to 40% of a common fund. It is fair compensation for undertaking such
7 complex, risky, and time-consuming litigation on a contingent basis. In a similar wage and hour
8 class action, *Laffitte v. Robert Half International, Inc.*, 1 Cal. 5th 480 (2016), the California
9 Supreme Court affirmed an award of attorneys' fees equal to 1/3 of the common fund, which
10 correlated to the lodestar with a 2.13 multiplier. Under California law, lodestar multipliers can
11 range from 2 to 4 or even higher. See, e.g., *Chavez, supra*, 162 Cal. App. 4th at 49-50 (approving
12 multiplier of about 2.5); *Coalition for L.A. County Planning etc. Interest v. Bd. of Supervisors*, 76
13 Cal. App. 3d 241, 251 (1977) (approving multiplier of about 12.8). Here, Class Counsel only seeks
14 a small positive multiplier of approximately 2.32 to reach the requested award. (Hawkins Final
15 Decl. ¶ 46.) Plaintiff's counsel has expended significant resources, costs and time in investigating,
16 bringing and litigating this action over the last nearly two years in two courts. Therefore, Plaintiff
17 respectfully submits that the requested fee award is well within the range approved by California
18 Courts and is undoubtedly reasonable.

18 **3. The Percentage Award is Reasonable**

19 Fee determinations in both common fund and statutory fee situations are incapable of
20 mathematical precision because of the intangible factors that must be resolved in the court's
21 discretion based on the circumstances of each particular case. See, A. Conte, Attorney Fee Awards,
22 2nd Ed., 207, at 44. A court must decide, based on the unique posture of each case, what percentage
23 of the common fund would most reasonably compensate Class Counsel given the nature of the
24 litigation and the performance of counsel. *Paul, Johnson, Alston & Hunt, supra*, 886 F.2d at 272.
25 Courts apply a five-part test in reviewing a reasonable percentage fee in common fund cases: (1)
26 the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the
27 contingent nature of the fee and the financial burden carried by the Plaintiffs; and (5) awards made
28 in similar cases. *In re Omnivision Technologies, Inc.* (N.D. Cal. 2007) 2007 WL 4293467 at *9.

1 Here, each of the five factors are met and strongly support an award of the percentage fee (33-
2 1/3%) requested in this case.

3 **a. The Results Achieved**

4 “The overall result and benefit to the class from the litigation is the most critical factor in
5 granting a fee award.” *Omnivision*, 2007 WL 4293467 at *9. Class Counsel obtained a very
6 favorable result in this case for the Class Members. The Settlement provides monetary benefits to
7 the Class Members. All Class Members will receive a meaningful payment of their damages
8 without the need to submit a claim form and the \$2.5 million settlement will be paid without
9 reversion to Defendants. (Hawkins Final Decl. ¶ 47.) The Settlement is advantageous to the Class
10 Members because the proceeds will be distributed shortly as opposed to waiting additional years
11 for a similar, or possibly, less favorable result. There is little question that the result achieved in
12 this litigation is favorable. The average estimated payment amongst all Class Members is \$232.45
13 and the highest is \$880.95. (Nava Decl., ¶ 14).

14 **b. The Risks of Litigation**

15 “The risk that further litigation might result in Plaintiff not recovering at all, particularly a
16 case involving complicated legal issues, is a significant factor in the award of fees” *Omnivision*,
17 2007 WL 4293467 at *9. As detailed above, the result was far from certain. Here, and as
18 extensively detailed in Plaintiff’s Motion for Preliminary Approval, a number of defenses asserted
19 by Defendants present serious threats to the claims of Plaintiff and the other Class Members. There
20 was considerable risk that Plaintiff would not prevail on a motion for class certification and/or
21 Defendants would prevail on their defenses, thus, defeating any and all recovery to the class. Even
22 if Plaintiff successfully obtained class certification of the wage and hour claims, proving class-wide
23 liability was by no means a foregone conclusion. All of these were very substantial risks any of
24 which could have resulted in the Class receiving nothing if the claims were litigated. (See, Hawkins
25 Prelim. Decl. generally; Hawkins Final Decl. ¶ 48.).

26 **c. The Skill Required and the Quality of Work**

27 Practice in the narrow areas of wage and hour and class action litigation requires skill,
28 knowledge and experience in two distinct subsets of the law, and class counsel must have expertise
in both. The issues presented in this case required more than a general appreciation of wage and

hour law and class action procedure as this area of practice is still developing as evidenced by the California Supreme Court's ruling in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004 and the Court of Appeal's rulings in *Gonzales v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 and *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98. The Settlement was possible only because Class Counsel was able to persuade Defendants that Plaintiff could potentially prevail on the difficult legal issues regarding liability, maintain class certification, overcome difficulties in proof as to monetary relief and take the case to trial. (Hawkins Final Decl. ¶¶ 29, 35, 52; see also **Exs. 4 and 5** in support of reasonableness of rates).

In successfully navigating these hurdles Class Counsel displayed the necessary dual skill set. The high quality of the work in this case was mandated by the very vigorous and contentious defense presented by counsel for Defendants. Class Counsel was required to invest substantial time and resources in this action. The favorable result obtained by the settlement supports the skill and quality of work of Class Counsel. (Hawkins Final Decl. ¶¶ 37-46).

d. The Contingent Nature of the Fee and Financial Burden

There is a substantial difference between the risk assumed by attorneys being paid by the hour and attorneys working on a contingent fee basis. *Powers v. Eichen* (9th Cir. 2000) 229 F.3d 1249, 1256. The attorney working on a contingent basis can only log hours while working without pay towards a result that will hopefully entitle him to a marketplace contingent fee considering the risk and other factors of the undertaking, otherwise, the contingent fee attorney receives nothing. *Id.* at 1257.

In this case, Class Counsel subjected themselves to this contingent fee market risk in this all or nothing contingent fee case wherein the necessity and financial burden of private enforcement makes the requested award appropriate. Counsel retained on a contingency fee basis, is entitled to a premium in order to compensate for both the risks and the delay in payment. See e.g. *Stanger v. China Elec. Motor, Inc.* (9th Cir. 2016) 812 F.3d 734 (courts "must" apply a risk enhancement); *Stetson v. Grissom* (9th Cir. 2016) 821 F.3d 1157, 1166 (abuse of discretion not to apply risk multiplier). Despite the most vigorous and competent of efforts, success is never guaranteed. *McKittrick v. Gardner* (4th Cir. 1967) 378 F.2d 872, 875. If counsel is not adequately compensated for the risks inherent in difficult class actions, competent attorneys will be discouraged from

1 prosecuting similar cases. *Steiner v. BOC Financial Corp.* (S.D.N.Y. 1980) 1980 U.S. Dist. LEXIS
2 14561 at *6- *7. Here, a number of difficult issues, the adverse resolution of any one of which
3 could have doomed the successful prosecution of the action, were present here. (Hawkins Final
4 Decl. ¶ 20.). As discussed above, attorneys' fees in this case were not only contingent but extremely
5 risky, with a very real chance that Class Counsel would receive nothing for their efforts, having
6 devoted time and advanced costs. Because the risk of advancing costs in this type of litigation can
7 be significant, it is therefore cost prohibitive to many attorneys. Moreover, Class Counsel has
8 advanced \$19,495.68 in costs which could not have been recovered if this case had been lost.
9 (Hawkins Final Decl. ¶ 61, Ex. 6).

10 **e. Awards in Similar Cases**

11 The attorneys' fees requested by Class Counsel are within the range of fees awarded in
12 comparable cases. Courts have historically awarded fees in the range of 20% to 50%. *In re Warner*
13 *Communications Sec. Lit* (S.D. N.Y. 1985) 618 F.Supp. 735, 749-50. Class Counsels' requested
14 fees are one-third (1/3) of the total value of the case, a percentage well within the range of
15 reasonableness given the excellent results obtained for the Class, the risks undertaken, and the skill
16 of the prosecution. *See Laffitte*, 1 Cal. 5th at 486, 506.

17 **4. Class Counsel's Costs Were Reasonably Incurred And Should Be Reimbursed.**

18 Class Counsel requests reimbursement for expenses and costs in the amount of \$19,495.68
19 which is less than the \$20,000 preliminarily approved by this Court. These litigation expenses are
20 detailed in the Hawkins Declaration. (Hawkins Final Decl., Ex. 6). These costs were reasonably
21 incurred in the prosecution of this matter. (Id.).

22 **VII. The Class Representative Should Receive the Requested Enhancement Payment**

23 Plaintiff respectfully requests that she be awarded \$10,000 as the agreed Class
24 Representative Enhancement Payment for her service as the Class Representative. The requested
25 award is reasonable and appropriate given the considerable time and effort expended in assisting
26 Class Counsel with the investigation and prosecution of the action, and the risks she has undertaken
27 in acting as Class Representative. (Hawkins Final Decl. ¶ 57.).

28 Plaintiff performed her duties to the Class admirably and without exception. The full extent
of her participation is set forth in the Hawkins Declaration and the Declaration of Mara Santamaria

1 filed concurrently herewith. (See Hawkins Final Decl. ¶ 23-28; Santamaria Decl., generally). The
2 Class Representative actively assisted with the case, searched for and produced numerous
3 documents, followed case developments, participated in extensive communications with Class
4 Counsel, identified witnesses, provided numerous sworn declarations, assisted with investigation
5 and informal discovery, assisted with mediation, and reviewed documents in preparation for
6 submission to this court. (Santamaria Decl. ¶¶ 9-13). She also assumed the risk that she might
7 possibly be liable for costs incurred in the case. (Id. ¶ 25). She also risked being “blacklisted” by
8 other future employers for having sued Defendants in a class action. (Id.). See *Guippone v. BH*
9 *S&B Holdings LLC* (S.D.N.Y. Oct. 28, 2011) 2011 U.S. Dist. LEXIS 126026, at **4, 20. Without
10 Plaintiff’s support, cooperation and information, no other fellow employees would be receiving any
11 benefit. The payment of the enhancement award to a successful class representative is appropriate
12 and the amount of \$10,000.00 is a small portion of the total Settlement secured on behalf of the
13 Class. This payment to compensate Plaintiff for her effort and risk in bringing this case to benefit
14 the other 6,386 employees and secure a total settlement of \$2,500,000.

15 **VIII. CONCLUSION**

16 The Settlement is the product of arm’s length negotiations after significant research,
17 investigation, information exchange, mediation, and negotiation. It provides meaningful benefits
18 to the Class Members that are discernibly fair when weighed against the significant potential risks,
19 delays, and costs of further litigation. Thus, Plaintiff respectfully requests that the Court grant final
20 approval to the Settlement, and award ILYM Group \$52,000 for the costs of administration.

21 In addition, Class Counsel’s fee request is well within the realm of reasonableness
22 approved by courts given the efforts expended in this case. Class Counsel undertook great risks
23 on a contingent fee basis and achieved a favorable result for the benefit of Settlement Class
24 Members. Class Counsel respectfully requests approval of the application for award of attorneys’
25 fees of \$833,333.33, reimbursement of litigations costs of \$19,495.68, and an enhancement award

26 ///

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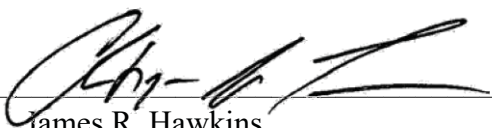
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1 of \$10,000 to Plaintiff as Class Representative.

2
3 Dated: May 1, 2023

Respectfully Submitted:

4 James Hawkins, APLC

5
6 By:  _____

James R. Hawkins

Christina M. Lucio

8 Mitchell J. Murray

9 Attorneys for Plaintiff Mara Santamaria