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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO – NORTH COUNTY

ANTONY M. SMITH and OMAR AYALA,
individuals, on behalf of themselves, and on
behalf of all persons similarly situated and
aggrieved

Plaintiffs,

v.

ZODIAC POOL SYSTEMS, LLC, a
Delaware limited liability company doing
business in California; and Does 1 through
50, Inclusive

Defendants.

Case No. 37-2020-00036431-CU-OE-NC

ASSIGNED FOR ALL PURPOSES TO:

The Honorable Earl H. Maas, III, Dept. N-28

CLASS AND REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT, APPROVAL OF CLASS
NOTICE, AND SETTING OF FINAL
APPROVAL HEARING**

Date: June 10, 2022

Time: 1:30 p.m.

Dept: N-28

Judge: Hon. Earl H. Maas, III

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Trial date: Not set

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1 **I. INTRODUCTION**

2 This motion seeks preliminary approval of a pre-certification wage and hour class and
3 Private Attorneys General Act Settlement of \$1,200,000 of the Actions brought by Plaintiffs
4 Antony M. Smith and Omar Ayala against Defendant Zodiac Pool Systems, LLC (“Defendant”
5 or “Zodiac”), individually and on behalf of the Class employed in California by Defendant as
6 non-exempt employees at any during the period from May 27, 2016 through August 2, 2021.
7 Declaration of Diana M. Khoury, (“Khoury Decl.”), ¶10, **Exhibit 1** - Stipulation of Class and
8 Representative Action Settlement and Release of Claims and its exhibits (“Settlement
9 Agreement” or “SA”) submitted for preliminary approval, ¶¶5, 7, 18.

10 **II. THE PARTIES**

11 **A. Defendant**

12 Zodiac Pool Systems, LLC, a Delaware limited liability company, does business
13 throughout California, including San Diego County, California.

14 **B. Plaintiffs and the Proposed Class**

15 Plaintiff Omar Ayala worked for Zodiac in California as a non-exempt “Assembler,
16 Tester, and Builder” from October 2017 through October 2019.¹ Declaration of Plaintiff Omar
17 Ayala, (Ayala Decl.), ¶3. Plaintiff Antony M. Smith worked for Zodiac in California as a non-
18 exempt “Technical Support Level One Advisor” from August 2018 through August 2020.
19 Declaration of Plaintiff Antony M. Smith, (Smith Decl.), ¶4.

20 The proposed Class is defined as all individuals who were employed by Zodiac in any
21 non-exempt position in California at any time during the Class Period (May 27, 2016 through
22 August 2, 2021). Khoury Decl. ¶¶10, 12; SA ¶¶5, 7. There are an estimated 323 Class Members
23 that worked an estimated 34,020² Work Weeks during the period from May 27, 2016 to May 4,
24 2016. Khoury Decl. ¶13; SA ¶42.

25 _____
26 ¹On March 2013, Omar Ayala was hired by Grand Effects, Inc. On October 2, 2017, Zodiac
acquired Grand Effects, Inc., and retained Mr. Ayala as an employee.

27 ²The Agreement provides that the total number of weeks covered by the Settlement shall be no
28 greater than 37,422 (10% greater than the estimated weeks through May 4, 2021). SA ¶42.

III. PLAINTIFFS' CLAIMS

A. Failure to Pay all Wages

Plaintiffs' unpaid wages claim is based on Zodiac's alleged failure to pay for all hours worked. Plaintiffs allege that Plaintiffs and the Class Members performed work off-the-clock for which they were not compensated and which resulted in unpaid straight-time and overtime wages throughout the Class Period. Plaintiffs also allege that Zodiac's use of a payroll system that automatically rounds employee time up or down to the nearest quarter hour provides an inaccurate measure of employee worktime, and violates California law. Khoury Decl. ¶14. California law requires employers to pay their employees for all time they are at work and subject to the employers' control. *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal.4th 833, 839 (2015). "A system is fair and neutral and does not systematically undercompensate employees where it results in a net surplus of compensated hours and a net economic benefit to employees viewed as a whole." *AHMC Healthcare, Inc. v. Superior Court*, 24 Cal.App.5th 1014, 1028 (2018).

An employer may not round its employees' time worked unless the policy is fair and neutral on its face and it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal. App. 4th 889.

Zodiac's timekeeping system rounded the arrival and departure times of employees to the nearest quarter-hour and based upon Plaintiffs' analysis of Zodiac's records, Plaintiffs contend that meal periods were rounded as well.³ When rounding to the nearest quarter-hour, the 7-minute rule was used, and was applied as follows: if a shift started at 8:00 a.m. and the employee clocked in at 8:06 a.m., the timecard would reflect a start time of 8:00 a.m. However, if the employee clocked in at 8:07 a.m., the timecard would reflect a start time of 8:15 a.m.

³Plaintiffs' analysis of time punch data revealed that in Plaintiffs' view, Zodiac's timekeeping system rounded meal periods which Plaintiffs contend violates California law, even though Zodiac's written policies stated they did not. ("The rounding rules apply to arrival and departure times only. The system will not round for meal breaks;" "As a reminder, rounding rules do not apply to meal breaks."). The time punch data revealed that all meal periods were rounded as employees were paid for hours ending in .00, .25, .50, or .75. Khoury Decl. ¶16.

1 Although neutral on its face, Plaintiffs contend that this method of calculating employee hours
2 worked violates the California Labor Code because it systematically undercompensated
3 employees, resulting in unpaid wages for all hours worked. Khoury Decl. ¶15.

4 **B. Failure to Provide Meal and Rest Periods – Labor Code §§ 226.7, 512**

5 With respect to meal periods, employers must provide “an uninterrupted 30-minute
6 period during which the employee is relieved of all duty.” “[F]irst meal periods must start after
7 no more than five hours.” *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004,
8 1035, 1042. With respect to rest breaks, California employers must authorize the first rest break
9 in “shifts from three and one-half to six hours in length...” *Brinker* at 1029. Plaintiffs’ meal
10 and rest period claims are based on Zodiac’s alleged failure to provide meal and rest periods
11 premiums (one-hour’s pay at their regular rate) when Class Members were unable to take
12 timely and compliant breaks due to the demands of the job. Plaintiffs also allege that although
13 Class Members worked shifts of more than ten (10) hours, Zodiac failed to provide a second
14 meal period, as required under California law. Khoury Decl. ¶17.

15 Employers must provide unpaid meal periods and paid rest periods in accordance with
16 Labor Code §§ 226.7 and 512, and the IWC Wage Orders. When an employee is unable to take
17 a required meal or rest period, they must be paid a premium “at the employee’s regular rate of
18 compensation for each workday that the meal or rest period is not provided.” Labor Code §
19 226.7(c).

20 **C. Overtime Regular Rate Violation**

21 Plaintiffs’ claim for overtime regular rate violations arises from Zodiac’s alleged failure
22 to include all required forms of compensation in the calculation of Plaintiffs’ and Class
23 Members’ regular rates for purposes of calculating overtime wages. Plaintiff alleges that
24 amounts paid to Plaintiffs and Class Members under Zodiac’s flat-sum non-discretionary
25 incentive program were not included in their overtime regular rates. Khoury Decl. ¶18.

26 **D. Unreimbursed Business Expenses – Labor Code § 2802**

27 Plaintiffs’ claim for unreimbursed business expenses arises from Zodiac’s alleged
28 failure to reimburse costs incurred in using personal cell phones to carry out Class Members’

1 job duties. Plaintiffs allege they and other putative Class Members frequently used their cell
2 phones for work-related purposes, such as taking photos of the work completed at client
3 locations and sending to supervisors for review, and taking calls regarding technical issues
4 experienced in the field, as well as calls from customers and homeowners who were using the
5 company's products. (See Declarations of Omar Ayala and Antony Smith). Plaintiffs were not
6 reimbursed for the use of their cell phones. Khoury Decl. ¶19.

7 Labor Code § 2802(a) provides that "[a]n employer shall indemnify his or her employee
8 for all necessary expenditures or losses incurred by the employee in direct consequence of the
9 discharge of his or her duties, or of his or her obedience to the directions of the employer, even
10 though unlawful, unless the employee, at the time of obeying the directions, believed them to
11 be unlawful."

12 **E. Derivative Claims – Labor Code §§203, 226; Business & Professions Code**
13 **§ 17200, *et seq.***

14 Plaintiffs' claims for Zodiac's alleged failure to provide accurate itemized wage
15 statements reflecting, among other things, the name and address of the legal entity that is the
16 employer, the correct overtime rate for overtime worked, including, work performed in excess
17 of eight (8) hours in a workday and/or forty (40) hours in any workweek, and the correct
18 premium payment for missed meal and rest periods in violation of Labor Code § 226, Zodiac's
19 alleged failure to timely pay all wages due upon termination of employment in violation of
20 Labor Code §203, and Zodiac's alleged unfair business practices in violation of Business &
21 Professions Code § 17200, *et seq.* flow directly from the underlying claims described above.
22 Khoury Decl. ¶20.

23 **F. PAGA Civil Penalties – Labor Code §§2699, *et seq.***

24 Labor Code section 2699(f)(2) provides for recovery of civil penalties by aggrieved
25 employees for violations of the Labor Code. The default civil penalty is \$100 for the initial
26 violation and \$200 for each subsequent violation for each underpaid employee. Labor Code §
27 2699(f)(2). Plaintiffs seek PAGA penalties for violations of the Labor Code of which 75%
28 would be paid to the California Labor and Workforce Development Agency (LWDA) and 25%
would be distributed to PAGA Members. Labor Code § 2699(i).

1 Zodiac has denied and continues to deny that it committed any unlawful acts, and
2 contends Plaintiffs and all putative Class Members were treated lawfully, were not harmed by
3 any of its actions, and are not entitled to any recovery for the claims alleged in this Action as
4 set forth above. Zodiac agreed to enter into the Settlement of this Action to avoid the cost and
5 business disruption associated with further defense of this Action.

6 **IV. LITIGATION HISTORY**

7 On May 27, 2020, Plaintiff Ayala filed a class and PAGA complaint in the San Diego
8 County Superior Court (Case No. 37-2020-00017229-CU-OE-CTL) naming Zodiac as
9 Defendant after the requisite 65-day waiting period under the Private Attorneys General Act
10 (“PAGA”) – California Labor Code §2698, et seq., had elapsed, (“Ayala Action”). On July 20,
11 2020, Zodiac removed the Ayala Action to the United States District Court for the Southern
12 District of California, Case No. 20 CV01381-H (MSB). Khoury Decl. ¶21, **Exhibit 2** (PAGA
13 letter, March 20, 2020); **Exhibit 3** (Ayala Complaint); **Exhibit 4** (Notice of Removal, United
14 States District Court, Southern District of California Case No. 20-CV-1381-H-MSB.)

15 On October 7, 2020, Plaintiff Smith filed a class action complaint in the San Diego
16 County Superior Court – North County Division, Case No. 37-2020-00036431-CU-OE-NC
17 naming Zodiac as the Defendant, (Smith Action). The Smith Action alleged substantially
18 similar claims as those alleged in the Ayala Action. Khoury Decl. ¶22, **Exhibit 5** (Smith
19 Complaint). As a term of the proposed settlement of these cases, a First Amended Complaint
20 was filed on October 1, 2021 in the above-captioned Smith Action incorporating the Class and
21 PAGA claims of both these actions into a single complaint. Khoury Decl. ¶23, **Exhibit 6** (First
22 Amended Complaint, “FAC”).

23 **V. INVESTIGATION AND DISCOVERY**

24 Plaintiffs conducted significant investigation of the facts and law both before and after
25 the Action was filed. On July 17, 2020, prior to removal, Plaintiff Omar Ayala served written
26 discovery on Zodiac that included special interrogatories, requests for production of
27 documents, requests for admissions and form interrogatories. Following removal, on September
28 14, 2020, Ayala served Zodiac with the same discovery. Khoury Decl. ¶24. On October 2, 2020

1 the Parties exchanged their initial disclosures pursuant to Fed.R.Civ.P. Rule 26(a)(1)
2 identifying witnesses and relevant documents. Khoury Decl. ¶25. Following meet and confer
3 discussions regarding the outstanding discovery, the Parties conferred about the possibility of a
4 Class-wide resolution and agreed to attend mediation. To that end, Plaintiffs' Counsel
5 requested Zodiac produce the relevant data and information to allow Plaintiffs to prepare for a
6 meaningful and informed session at mediation. *Id.*

7 Subject to a stipulated protective order governing the disclosure and exchange of
8 confidential information, on February 8, 2021 Zodiac produced its policies and procedures for
9 the relevant time period for meal periods and rest breaks, its timekeeping and rounding system,
10 and paid sick leave policies and procedures. Zodiac also produced its employee handbook and
11 manual, and for the period through February 8, 2021: (1) the total number of Class Members
12 (323); (2) total number of separated Class Members (175); (3) total number of wage statements
13 issued to Class Members (3,917); (4) total number of pay periods [bi-weekly], (4,618); (5) total
14 number of work weeks (34,020); (6) average hourly rate of pay (\$19.56); and (7) the total
15 amount of meal period premiums paid (\$30,200.99). Zodiac provided Microsoft excel
16 spreadsheets containing over 30,868 lines of data that included time punch details for 12,550
17 shifts worked by Plaintiffs and 33 randomly selected Class Members. Plaintiffs' Counsel also
18 informally interviewed multiple Class Members regarding their experiences with taking
19 compliant meal and rest breaks, rounding of work time, impact on their wages, and use of their
20 cell phones for work. Shortly prior to mediation, Zodiac updated the Class' number of weeks
21 worked and number of PAGA Pay Periods that were extrapolated through to the date of
22 mediation. Khoury Decl. ¶26.

23 **VI. MEDIATION**

24 Following review of the data and information obtained, Plaintiffs' Counsel retained the
25 services of a damages' consultant to evaluate the data for meal and rest periods violations, and
26 the incidence of underpaid wages due to rounding of time worked, and extrapolated those
27 damages to the entire Class. Khoury Decl. ¶27.

28 On May 4, 2021, the Parties attended mediation with the Hon. Michael Latin (Ret.), an

1 experienced wage and hour mediator facilitating the serious, informed, arms'-length and
2 lengthy negotiations. The Parties were not able to reach agreement by the end of the day,
3 however, by May 6, 2021 agreement was reached as to the principle terms of the proposed
4 Settlement, and a memorandum of understanding was executed. In the weeks which followed,
5 the Parties continued to negotiate at arms'-length the balance of terms of the Stipulation of
6 Class and Representative Action Settlement and Release of Claims and its exhibits (Settlement
7 Agreement) submitted herewith for preliminary approval as Exhibit 1. Khoury Decl. ¶28.

8 **VII. SUMMARY OF PROPOSED SETTLEMENT**

9 **A. Settlement Terms**

10 The Parties agreed, subject to Court approval, the Action may be settled for the Gross
11 Settlement Amount (GSA) of \$1,200,000 no part of which may revert to Zodiac under any
12 circumstances. Khoury Dec. ¶29. The GSA includes: (a) attorneys' fees of \$400,000 (one-third
13 of the GSA) to compensate Class Counsel for all work performed and remaining to be
14 performed in documenting and administrating the Settlement, securing final Court approval,
15 and litigation expenses of up to \$18,500; (b) Class Representative Service Payments of \$10,000
16 to each named Plaintiff in consideration of their initiation and prosecution of the Action on
17 behalf of the Class, work performed, risks undertaken for costs if the case had not concluded
18 successfully, the substantial benefits conferred on the Class, and general releases; (c)
19 administration expenses to Simpluris, Inc., of \$7,000; and (d) PAGA Payment of \$24,000 of
20 which \$18,000 (75%) will be paid to the LWDA for PAGA civil penalties, and \$6,000 (25%)
21 will be distributed to PAGA Members on a proportionate basis. SA ¶¶3, 4, 8, 18, 28, 40, 74, 76,
22 78. In addition to the GSA, Zodiac will pay the employer-sided taxes on Participating Class
23 Members' Settlement Payments characterized as wages. Khoury Dec. ¶30; SA ¶4.

24 Based on anticipated Court-approved deductions for attorneys' fees, litigation costs,
25 Class Representative Service Payments, administration expenses and PAGA Payment, the Net
26 Settlement Amount estimated at \$730,500 will be proportionately distributed to all Class
27 Members who do not request to be excluded from the Class based on the number of weeks
28 worked during the Class Period (May 27, 2016 through August 2, 2021). Khoury Decl. ¶31; SA

¶63. With an estimated 34,982⁴ weeks worked by the Class during the Class Period, a Participating Class Member may expect to receive an estimated \$20.88 for each week worked during the Class Period. If a Class Member worked throughout the entire Class Period, (270 weeks), he/she would receive an estimated \$5,637.60, or on average \$2,261.60 (\$730,500 NSA / 323 Class Members). Additionally, PAGA Members, (those employed during the March 20, 2019 through August 2, 2021 PAGA Period), will receive a proportionate share of the \$6,000 based on the number of Pay Periods worked during the PAGA Period. PAGA Members will receive on average an additional \$31.58 (\$6,000 / 190 PAGA Members). Khoury Decl. ¶32; SA ¶¶42, 63, 78. No part of the GSA will revert to Zodiac under any circumstances. Khoury Decl. ¶33; SA ¶18. Each Participating Class Member's Settlement Payment will be characterized 50% wages for which an IRS Form W-2 will be issued, and 50% penalties and interest for which IRS Forms 1099 will be issued. Khoury Decl. ¶34; SA ¶70.

B. Notice of Class Action Settlement and Administration

Following preliminary approval, Simpluris, Inc.,⁵ the Administrator selected by the Parties and approved by the Court, will mail the Court-approved Notice of Class Action Settlement ("Notice"), Change of Address Form, and preprinted return envelopes, (collectively "Notice Packet") to each member of the Class by first-class U.S. Mail. Khoury Decl. ¶35; SA ¶¶23, 63. The Notice advises the Class: (1) of their right to participate in the Settlement; (2) that Class Members who do not request exclusion will be mailed their Settlement Payments without the need to return a claim form; (3) how to object to and opt-out of the Settlement and the deadlines for doing either; (4) how to challenge the information on which Settlement Payments are based; (5) of the claims to be released; and (6) of the date, time and place set for the Final Approval Hearing. Khoury Decl. ¶36. Class Members will also be informed that if they opt out of the Class, but are eligible PAGA Members, they will still receive their share of the PAGA

⁴This was extrapolated from 34,020 work weeks through the date of mediation. Pursuant to the terms of the settlement, the work weeks covered by the settlement will be no greater than 37,422 (10% greater than 34,020 weeks).

⁵See Declaration of Michael Bui, on behalf of Simpluris, Inc., regarding its experiences and qualifications to administer the Settlement pursuant to the terms of the Settlement Agreement.

1 Payment, and will release only the Released PAGA Claims for civil penalties alleged under
2 PAGA because no right exists under PAGA to opt out of a PAGA Settlement. Khoury Decl.
3 ¶37; SA ¶34.

4 Prior to mailing Notice Packets to the Class, the Administrator will conduct a search of
5 the National Change of Address database to update stale mailing addresses. Once mailed, any
6 Notice Packet returned as undelivered will be skip-traced using the Class Member's social
7 security number to locate a current address, and if one is found, the Notice Packet will be
8 remailed to the updated address. Class Members will have 45 days to return requests for
9 exclusion, submit written objections to the Settlement, or dispute their workweek count
10 identified in the Notice. Class Members may also appear at the Final Approval Hearing to
11 object to the Settlement without first having returned a written objection. Khoury Decl. ¶38; SA
12 ¶¶65, 66.

13 Following distribution of the GSA, Class Members will have 120 days to cash their
14 Settlement Payment checks. If checks are not cashed by the 30th day, the Administrator will
15 mail a postcard reminding Class Members to do so before the void date. Following the void
16 date, all uncashed checks will be cancelled and sums represented by those checks will be
17 forwarded to California's State Controller, Unclaimed Property Division for further handling
18 on behalf of the Class Member. Khoury Decl. ¶39; SA ¶¶83, 84.

19 **C. The Released Class Claims**

20 Class Members who remain in the Class will release the Released Class Claims for any
21 and all claims which were or could have been asserted against the Released Parties based upon,
22 arising out of, or relating to the facts or allegations set forth in any complaint in the above-
23 captioned Action or the Ayala Action. The Released Class Claims are stated in the Class Notice.
24 Khoury Decl. ¶40; SA ¶¶33, 59, and Exh. A.

25 **VIII. ARGUMENT**

26 **A. Class Action Settlements Are Subject to Court Review and Approval**

27 "Before final approval, the court must conduct an inquiry into the fairness of the
28 proposed settlement." California Rules of Court, Rule 3.769(g). Courts should disapprove

1 settlements “only with considerable circumspection.” *Jamison v. Butcher & Sherrerd* (1975) 68
2 F.R.D. 479, 481.⁶ At preliminary approval, the Court “limits its inquiry to the extent necessary
3 to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by,
4 or collusion between, the negotiating parties.” *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706,
5 723 (2006) (citation omitted).

6 **B. The Settlement is Fair, Reasonable, and Adequate**

7 A Court must find a proposed settlement is “fair, adequate and reasonable.” *Dunk v.*
8 *Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The trial court considers all relevant
9 factors, such as “the strength of Plaintiff’s case, the risk, expense, complexity and likely
10 duration of further litigation, the risk of maintaining class action status through trial, the amount
11 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
12 experience and views of counsel, the presence of a governmental participant, and the reaction of
13 the class members to the proposed settlement.” *Id.* The Court’s primary function is to
14 determine the Settlement is not the product of fraud, overreaching, or collusion, and, taken as a
15 whole, is fair, reasonable and adequate. *Id.*

16 A proposed class action settlement is presumed fair where: (1) the parties reached
17 agreement after extensive arms’-length negotiations; (2) investigation and discovery were
18 sufficient to allow counsel and the Court to act intelligently; (3) counsel is experienced in
19 similar litigation; and, (4) the percentage of objectors is small. *Id.*, at 1802.

20 **1. The Settlement Is the Result of Serious, Informed, Non-Collusive**
21 **Negotiations**

22 On May 4, 2021, the Parties attended mediation with the Hon. Michael Latin (Ret.), a
23 respected, and experienced wage and hour class action mediator facilitating the day long arms’-
24 length negotiations. By May 6, 2021, the Parties had reached agreement upon the principle
25 terms of the settlement and continued to negotiate at arms’-length the balance of terms of the
26

27 ⁶California courts may look to federal authority analyzing class issues under the Federal Rules
28 of Civil Procedure for guidance. *See Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224,
239-40 (2001).

1 agreement and exhibits, and ultimately entered into the long-form Settlement Agreement. All
2 Counsel aggressively pursued their respective positions at all times. Khoury Decl. ¶28.

3 **2. Discovery and Stage of the Proceedings Support Settlement**

4 Plaintiffs investigated the merits of their claims and Zodiac’s defenses before filing the
5 Actions, conducted focused written discovery, exchanged their FRCP Rule 26 initial
6 disclosures, informally interviewed multiple Class Members concerning their experiences with
7 the claims alleged, and once agreement was reached to attend mediation, and subject to a
8 stipulated protective order, Plaintiffs’ counsel requested and Zodiac produced prior to
9 mediation, all relevant information upon which to evaluate Zodiac’s liability and exposure.
10 Proof of the claims asserted by Plaintiffs on behalf of the Class would be based largely on an
11 analysis of time and pay records. Zodiac produced written policies in effect during the relevant
12 time period, specific payroll data and information for Plaintiffs and 33 randomly selected Class
13 Members as well as other relevant information and documents to allow Class-wide liability to
14 be assessed and damages to be calculated on the alleged claims. Khoury Decl. ¶¶24-27.

15 This investigation, discovery, and informal exchange of information and data provided
16 the Parties with a clear understanding of the strengths and weaknesses of their respective
17 positions before negotiations. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186
18 Cal. App. 4th 399, 410 (2010) (settlement approved where “considerable information from
19 which to assess the strength of the class claims” and risks and expense of litigation was
20 exchanged).

21 **3. Counsel are Experienced in Similar Litigation**

22 Counsel for Plaintiffs and the Class have significant experience in litigating employment
23 wage and hour class actions. Khoury Decl. ¶¶3-9, 41; Declaration of Matt Blum ¶¶4-6;
24 Declaration of Sahag Majarian II ¶¶2, 3. Counsel for Zodiac, Winston & Strawn, LLC, are also
25 skilled and experienced wage and hour litigators who defended Zodiac vigorously through
26 mediation and subsequent negotiations to finalize all settlement terms. Khoury Decl. ¶42.
27 Experienced counsel, operating at arms’-length, weighed the case strengths and examined all
28 issues and risks of litigation and endorse the settlement. The view of attorneys actively

conducting the litigation “is entitled to significant weight” in deciding whether to approve the settlement. *Fisher Bros. v. Cambridge Lee Industries, Inc.* (E.D. Pa. 1985) 630 F.Supp. 482, 488. “The recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.” *In re Omnivision Technologies, Inc.*, (N.D. Cal. 2007) 559 F. Supp. 2d 1036, 1043.

At this stage of the proceedings, the Settlement is entitled to a presumption of fairness as three factors of *Dunk* have been met, with the fourth factor, the percentage of objectors, unknown until after the Class has had an opportunity to respond to the Notice of Class Action Settlement.

C. The Settlement is a Reasonable Compromise of Claims Based on the Strengths of Plaintiffs’ Case and the Risks and Costs of Further Litigation

Plaintiffs and their counsel concluded the proposed Settlement is reasonable, recognizing and considering the inherent risks and uncertainty of litigation, including (i) denial of certification; (ii) if certified, decertification may be granted; (iii) summary judgment or summary adjudication; (iv) the possibility of an unfavorable, or less favorable, result at trial; (v) the possibility post-trial motions may result in an unfavorable, or less favorable, result than trial; and, (vi) the possibility of an unfavorable, or less favorable, result on appeal, and the certainty that process would be lengthy and expensive. While Plaintiffs believe in the strength of their claims, Zodiac’s defenses create a significant possibility Class claims would not be certified or would fail on the merits, conferring no Class benefit. By contrast, the proposed Settlement will yield a prompt, certain, and substantial Class recovery, without additional time or judicial resources benefitting an estimated 323 Class Members with payments averaging \$2,262. Khoury Decl. ¶43.

Zodiac firmly disputed liability and contended, among other things, it abided by all of California’s labor laws and provided: proper wages for all hours worked, compliant meal and rest periods, accurate and itemized wage statements, timely final wages, and reimbursements for necessary business-related expenses, if any existed. Khoury Decl. ¶44. Zodiac’s argument in support of each of its defenses to each claim is set forth below.

1 **D. The Settlement is a Reasonable Compromise of Claims**

2 “[T]o ensure that the recovery represents a reasonable compromise, given the magnitude
3 and apparent merit of the claims being released, discounted by the risks and expenses of
4 attempting to establish and collect on those claims by pursuing the litigation,” information is
5 presented to the Court, to review in its role as a fiduciary for absent class members. *Kullar v.*
6 *Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129.

7 A reasonable compromise of class claims considers the actual risks of certification,
8 decertification, dispositive motions, and trial, not merely a prediction of Defendant’s maximum
9 exposure. An explicit statement of maximum class recovery on all claims is not required, only a
10 record which allows “an understanding of the amount that is in controversy and the realistic
11 range of outcomes of the litigation.” *Kullar, supra* at 120.

12 “*Kullar* is clear that the most important factor ‘is the strength of the case for plaintiffs
13 on the merits, balanced against the amount offered in settlement.’” (internal punctuation
14 omitted) *Munoz*, 186 Cal. App. 4th at 409. *Munoz* had “no doubt that the trial court had ‘an
15 understanding of the amount ... in controversy,’” based on number of class members, payroll
16 data, variances in class member experiences, and a companion action alleging damages less
17 than twice the *Munoz* settlement. *Id.*, at 406. This was “an adequate basis from which to garner
18 a reasonably adequate understanding of the amount that is in controversy within the meaning of
19 *Kullar.*” *Id.*, at 410.

20 Plaintiffs’ counsel relied on similar types of data as in *Kullar* and *Munoz*, including time,
21 pay, employment records, and other data, and retained a damages’ consultant to review and
22 analyze such time and pay records to identify violation rates and to calculate a Class-wide
23 damage model for use at mediation. Khoury Decl. ¶45.

24 **1. Plaintiffs’ Claims, Applicable Wage and Hour Law, and Damages**

25 **a) Failure to Pay All Wages - Labor Code §§ 510, 1194**

26 Plaintiffs contend rounding to the nearest quarter of an hour was neither fair nor neutral
27 on its face or in practice. Time records analyzed reveal that on average, 1.9 minutes per shift
28

1 were unpaid due to rounding⁷. Khoury Decl. ¶46. At an average hourly rate of \$19.56, each
2 Class Member was unpaid \$460⁸ during the Class Period. Plaintiffs estimated Zodiac’s
3 exposure on this claim, without interest, at \$148,059 (\$460 x 323 Class Members). For purposes
4 of negotiation, Plaintiffs reduced the exposure by 50% to **\$74,029.50** based on recent case law
5 suggesting a court might uphold the rounding policy.⁹ *Id.* Furthermore, as Class Counsel has
6 litigated rounding claims through appellate review, Zodiac could defeat certification by
7 successfully arguing it is Plaintiffs’ burden to prove employees were actually working during
8 the rounded “windows”, which would require individual inquiry. This is especially problematic
9 when factual disputes exist as to the nature of the rounded (deleted) time and the concept of a
10 communicated “grace period”. *Id.*

11 **b) Meal Periods - Labor Code §§ 226.7, 512**

12 Employers must provide “an uninterrupted 30-minute period during which the employee
13 is relieved of all duty.” “[F]irst meal periods must start after no more than five hours.” 53 Cal.
14 4th 1004, 1042 (2012). Otherwise, the employer owes one hour of pay to the employee at their
15 regular rate of pay. Labor Code §§ 226.7, 512. If records show a missed, late, short, or
16 interrupted meal period there is a presumption of liability, which the employer may rebut.
17 *Donohue v. AMN Servs., LLC* (2021) 11 Cal. 5th 58, 77.

18 Zodiac’s exposure for missed, late or short¹⁰ meal periods was estimated at \$2,274,569,

19 _____
20 ⁷ The shift data analyzed prior to extrapolation, revealed 725.7 hours were underpaid due to
rounding, and 325.6 hours were overpaid, with a net number 400.1 underpaid hours.

21 ⁸ This is a substantial sum. See, e.g. *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 847
22 explaining that the \$102.67 that an employee was underpaid over 17 months was not de
minimis, as it was “enough to pay a utility bill, buy a week of groceries, or cover a month of
bus fares.”

23 ⁹ See *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239, 1255, reversed on
24 other grounds, 11 Cal.5th 858 (upholding nearest quarter-hour rounding with grace period
policy; “a system can be fair or neutral even where a small majority loses compensation”);
25 *Donohue v. AMN Servs., LLC* (2018) 29 Cal.App.5th 1068, 1085, reversed on other grounds, 11
Cal.5th 58 (granting summary judgment for employer); *Utne v. Home Depot U.S.A., Inc.* (N.D.
26 Cal., Dec. 4, 2017) 2017 WL 5991863 at *3 (granting summary judgment for employer; noting
“rounding contemplates the possibility that in any given time period some employees will have
27 net overcompensation and some will have net under compensation”).

28 ¹⁰ The data showed that 41.5% of all first meal breaks (in shift greater than 5 hours) were short
due to rounding.

1 which factored in the \$30,000 meal period premiums paid by Zodiac to certain Class Members
2 during the Class Period. Khoury Decl. ¶47. However, recognizing only one meal period
3 premium may be owed to a Class Member per shift, regardless of the number of meal period
4 violations suffered in a day, and that a second meal period may be waived if the first meal
5 period is taken, together with the difficulties of obtaining certification and success at trial,
6 Plaintiffs discounted this claim by 50% to **\$1,137,284**. *Id.*

7 **c) Rest Periods - Labor Code § 226.7**

8 Plaintiffs contend Class Members' heavy workloads resulted in non-compliant late,
9 short or missed rest periods. Based on Plaintiffs' anecdotal experiences, Plaintiffs assumed a
10 50% violation rate (79,291 violations) giving rise to \$1,550,929 in rest period premiums. Given
11 that rest periods are not recorded and that Class Members may likely not remember which, if
12 any, shifts were non-compliant or experienced missed, late or short rest periods, and the lack of
13 rest period records, and difficulties of certifying such claims and success at trial, Zodiac's
14 potential exposure was reduced by 80% to **\$310,186**. Khoury Decl. ¶48.

15 **d) Reimbursement of Business Expenses – Labor Code § 2802**

16 An employer must indemnify its employees for all their necessary expenditures or
17 losses incurred in the discharge of their duties. Labor Code § 2802. A reasonable percentage of
18 an employee's cell phone charges, which vary in each case, must be reimbursed. *Cochran v.*
19 *Schwan's Home Services, Inc.* (2014) 228 Cal. App. 4th 1137, 1145 (2014).

20 Maximum exposure was estimated at \$100,130 (\$5 a month x 62 months during Class
21 Period x 323 Class Members). Zodiac contends none of the Class Members' job duties required
22 use of a personal cell phone. Zodiac's exposure was reduced by 90% to **\$10,013**. Khoury Decl.
23 ¶49.

24 **e) Inaccurate Wage Statement - Labor Code § 226 - Derivative**

25 Plaintiffs contend the wage statements were inaccurate because they did not show all
26 hours worked, and the gross wages earned during the pay period. Labor Code §226 (e)(1),
27 provides an employee suffering injury due to a knowing and intentional failure by an employer
28 to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty

dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000). Here, maximum exposure was estimated at \$597,900.¹¹ To recover, Plaintiffs must prove the underlying violations and prove Zodiac intentionally and willfully withheld such wages. *Pedroza v. PetSmart, Inc.* (C.D. Cal. June 14, 2012) 2012 U.S. Dist. LEXIS 189530 *20. Further, the good faith defense to willfulness is clearly established under California law. *In Re Nordstrom Comm'n Cases* (2010) 186 Cal. App. 4th 576, 584 ("There is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether and when the wages were due."). Zodiac would also assert that to the extent this claim depends on unpaid rest and meal period premiums, it has no value.¹² In light of the proof required to establish this violation, the good faith defense, and the obstacles to certification, and success at trial, the realistic exposure was reduced by 75% to **\$149,475**. Khoury Decl. ¶50.

f) Untimely Final Wages - Labor Code § 203 - Derivative

An employer must pay all wages due to an involuntarily terminated employee at the time of termination, or within 72 hours to one voluntarily terminating. Labor Code § 203. If an employer willfully fails to timely pay all wages to separated employees, the wages continue at the same rate for up to 30 days. The statute of limitations is three years. Labor Code § 203(b). Zodiac's exposure on this claim was estimated at \$872,865.¹³ Khoury Decl. ¶51.

To prevail, Plaintiffs must prove the underlying claims, and to prove the failure to pay final wages was "willful." To extent this claim depends on the failure to pay rest and meal period premium wages, it also fails. *Naranjo, supra*. This claim is also subject to Zodiac's good faith defense, precluding imposition of waiting time penalties under Labor Code § 203. *In Re Nordstrom Comm'n Cases, supra*. In light of the foregoing, proving the underlying claims,

¹¹ 194 Class Members in the one-year statute of limitations period, and 6,076 pay periods, multiplied by the \$50 for the first violation and \$100 for each subsequent violation.

¹² "[W]e hold that section 226.7 actions do not entitle employees to pursue the derivative penalties in sections 203 and 226." *Naranjo v. Spectrum Security Services, Inc.*, 40 Cal. App. 5th 444, 474 (2019).

¹³ 8.5 hrs / day (x) \$19.56/hr (x) 30 days (x) 175 separated employees.

1 Zodiac’s good faith defense, and the difficulties of obtaining certification, the realistic exposure
2 on this claim was reduced by 75% to **\$218,216.25**. *Id.*

3 **g) PAGA Penalties – Labor Code § 2699**

4 Labor Code § 2699(f)(2) provides for civil penalties for violations of the Labor Code
5 for which there is no corresponding civil penalty. The civil penalty is \$100 for the initial
6 violation and \$200 for each subsequent violation for each underpaid employee. Labor Code §
7 2699(f)(2). Plaintiffs seek PAGA penalties for all violations of the Labor Code that include
8 failure to pay all wages due, pay rest and meal period premiums, furnish accurate itemized
9 wage statements, and pay all wages due upon separation of employment. Of the PAGA
10 penalties recovered, 75% is paid to the LWDA and 25% is paid to all PAGA Members based
11 on their number of pay periods worked during the PAGA Period. Thus, in wage and hour class
12 action cases that settle, “[] very little of the total settlement is paid to PAGA penalties in order
13 to maximize payments to class members.” *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d
14 1058, 1101 (2019), disapproved on other grounds, *Magadia v. Wal-Mart Assocs.*, 999 F.3d 668
15 (9th Cir., November 19, 2020).

16 With 6,132 pay periods in the PAGA period, Plaintiffs estimated PAGA penalties at
17 \$3,315,500 for the following violations: Labor Code §510 (unpaid wages) at \$613,200; Labor
18 Code §§226.7, 512 (rest breaks) at \$613,200; Labor Code §226.7 (meal periods) at \$547,100;
19 Labor Code §203 (waiting time) at \$9,000; Labor Code §226 (wage statements) at \$1,533,000.
20 Khoury Decl. ¶52.

21 Maximum exposure was discounted given the risk of not proving the underlying
22 violations and the Court’s authority to reduce penalties, as long as not to “zero.” *Thurman v.*
23 *Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135; *see also Carrington*
24 *v. Starbucks*, *supra*, (imposing \$5 penalty per pay period, noting \$50 would be unjust, arbitrary
25 and oppressive; reducing penalty from \$1.5 million to \$150,000); *see also In Re Nordstrom*
26 *Commission Cases* (2010) 186 Cal. App. 4th 576, 589 (holding trial court did not abuse its
27 discretion in approving settlement attributing \$0 to PAGA penalties.) Plaintiffs considered the
28 court may deem a PAGA trial unmanageable given the need to interview Class Members as to

1 rest and meal period violations and cell phone usage. Based on the risks of not proving the
2 underlying claims, and the discretionary nature of PAGA penalties, Plaintiffs' realistic
3 exposure was discounted for purposes of Settlement by 90% to **\$331,500**. Khoury Decl. ¶53.

4 The class action resolution provides substantially more tangible and realistic benefits to
5 the Class than would be received through a PAGA action. Generally, when dealing with
6 judgments in favor of a class based on Labor Code violations, courts are more reluctant to
7 award substantial additional PAGA civil penalties.

8 **h) The Settlement is Fair, Adequate and Reasonable**

9 Plaintiffs and their Counsel gave serious consideration to all facts and arguments and
10 concluded the Settlement is fair and reasonable. The GSA, discounted for the risks of proving
11 liability on each claim, obtaining certification and success at trial represents 53.7% of the value
12 of the Class and PAGA claims. (\$1,200,000/\$2,230,704). Khoury Decl. ¶54.

13 A settlement is not judged solely against what might have been recovered had plaintiff
14 prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be
15 fair and reasonable. (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250;
16 *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App. 3d 1117, 1139-1140; "Compromise is
17 inherent and necessary in the settlement process...even if the relief afforded by the proposed
18 settlement is substantially narrower than it would be if the suits were to be successfully
19 litigated, this is no bar to a class settlement because the public interest may indeed be served by
20 a voluntary settlement in which each side gives ground in the interest of avoiding litigation"
21 *Wershba, supra*, at p. 250; *Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d
22 615, 628 ["It is well-settled law that a cash settlement amounting to only a fraction of the
23 potential recovery does not . . . render the settlement inadequate or unfair"]; see also *In re*
24 *Omnivision Technologies, Inc.*, (N.D. Cal. 2007), 559 F. Supp. 2d 1036, 1042, noting that
25 certainty of recovery in settlement of 6% of maximum potential recovery after reduction for
26 attorney's fees was higher than median percentage for recoveries in shareholder class action
27 settlements, averaging 2.2%-3% from 2002 through 2006.)

28 ///

1 **IX. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

2 When an ascertainable and sufficiently numerous class exists, with a well-defined
3 community of interest, and class litigation would be superior to alternate means, certification is
4 appropriate. See *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012).
5 Ascertainability is determined by examining class definition, size, and means for identifying
6 members. *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). The 323-member
7 class is ascertainable from Zodiac’s records and joinder is impracticable.

8 Conditional certification of the proposed Settlement Class is particularly warranted here
9 given the relatively relaxed standard for certification at the preliminary approval stage. See
10 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794 (1996) (courts can apply a “lesser standard of
11 scrutiny” for class certification in settlement cases).

12 There is a community of interest if common legal or factual questions predominate,
13 Plaintiffs’ claims are typical of the class, and Plaintiffs can adequately represent the class.
14 *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069, 1089.

15 Each Class Member was subject to the Zodiac’s policies which Plaintiffs allege caused
16 damages to them and to the Class, including the failure to pay wages for all time worked during
17 to Zodiac’s rounding policies, and failure to pay premium wages for noncompliant rest breaks
18 and meal periods. Where the same alleged conduct forms the basis for claims of Plaintiffs and
19 the Class, they are common for settlement purposes, and here, Plaintiffs’ claims are typical of
20 the claims of the Class. See, Declarations of Antony Smith and Omar Ayala. Plaintiffs can
21 adequately protect the interests of the Class. See *Wershba*, 91 Cal. App. 4th at 238. Plaintiffs’
22 attorneys are qualified and Plaintiffs’ interests are not antagonistic to those of the Class.
23 *McGhee v. Bank of Am.* (1976) 60 Cal. App. 3d 442, 450. See Declarations of Matt Blum, Diana
24 M. Khoury, and Sahag Majarian, II.

25 **X. CONCLUSION**

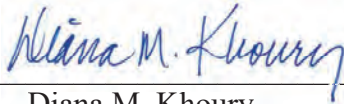
26 Plaintiffs request the Settlement be preliminarily approved, the Notice of Class Action
27 Settlement be approved and ordered disseminated to the Class, that Simpluris, Inc., be
28 appointed the settlement Administrator, the Law Office of Matt Blum and Cohelan, Khoury &

1 Singer, and Law Office of Sahag Majarian II be appointed Class Counsel, Plaintiffs Antony M.
2 Smith and Omar Ayala be appointed as the Class Representatives, and a Final Approval
3 Hearing date be set.

4 Respectfully Submitted,

5 THE LAW OFFICE OF MATT BLUM
6 COHELAN KHOURY & SINGER
7 LAW OFFICES OF SAHAG MAJARIAN II

8 Dated: February 28, 2022

9 By: 
10 Diana M. Khoury
11 Attorneys for Plaintiffs Antony M. Smith and Omar
12 Ayala, and the Proposed Class
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