

THE LAW OFFICE OF MATT BLUM

Matt Blum (SBN 285944)

mblumlaw@gmail.com

550 W. C Street, Suite 960

San Diego, California 92101

Telephone: (860) 271-6273 / Facsimile: (619) 238-1351

COHELAN KHOURY & SINGER

Isam C. Khoury (SBN 58759)

ikhoury@ckslaw.com

Michael D. Singer (SBN 115301)

msinger@ckslaw.com

Marta Manus (SBN 260132)

mmanus@ckslaw.com

605 C Street, Suite 200

San Diego, California 92101

Telephone: (619) 595-3001 / Facsimile: (619) 595-3000

Attorneys for Plaintiffs Antony M. Smith, Omar Ayala, and the Proposed Class

[Additional Counsel, next Page]

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 ORDER GRANTING
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT AND ENTERING
JUDGMENT**

Hearing Set By Court Order (ROA #31&32)

Date: November 4, 2022

Time: 1:30 p.m.

Dept: N-28

Judge: Hon. Earl H. Maas, III

Filed: October 7, 2020

Trial date: Not set

1 **LAW OFFICES OF SAHAG MAJARIAN II**

2 Sahag Majarian, II (SBN 146621)

3 sahagii@aol.com

4 18250 Ventura Blvd.

5 Tarzana, California 91356

6 Telephone: (818) 609-0807 / Facsimile: (818) 609-0892

7 Attorneys for Plaintiffs Antony M. Smith, Omar Ayala, and the Proposed Class

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	1
II. THE PARTIES	1
A. Plaintiffs	1
B. Defendant	1
C. The Class and Aggrieved Employees	2
III. PROCEDURAL HISTORY	2
IV. INVESTIGATION AND MEDIATION	2
V. SUMMARY OF PROPOSED SETTLEMENT	3
A. Settlement Terms	3
B. Preliminary Approval, Notice to the Class, and Its Response	4
1. Preliminary Approval and Class Notice	4
2. The Class' Response to the Notice	5
VI. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE	5
VII. ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE AWARDED	6
A. The Results Achieved Support the Fee Request	6
B. A Fee Award Based on a Percentage of the Common Fund is Appropriate	6
C. One-Third of the Common Fund is a Reasonable Fee	7
D. Optional Lodestar Cross-Check Confirms Reasonableness of Fee	8
E. Counsel's Hourly Rates Are Reasonable	9
F. Plaintiff's Counsel's Total Hours are Reasonable	10
G. A Multiplier of the Lodestar Should Be Awarded	10
H. Litigation Expenses Are Reasonable	12
VIII. THE PROPOSED PAGA PAYMENT IS REASONABLE	12
IX. THE SERVICE AWARD IS REASONABLE AND SHOULD BE AWARDED	13
X. CONCLUSION	14

TABLE OF AUTHORITIES

PAGE

<i>Barbosa v. Cargill Meat Solutions Corp</i> (E.D. Cal. July 2, 2013) 297 F.R.D. 431.....	8
<i>Beaver v. Tarsadia Hotels</i> (S.D. Cal. Sept. 28, 2017) 2017 U.S. Dist. LEXIS 160214	7
<i>Ceja-Corona v. CVS Pharm., Inc.</i> (E.D. Cal. Jan. 14, 2015) 2015 U.S. Dist. LEXIS 5118.....	12
<i>City and County of San Francisco v. Sweet</i> (1995) 12 Cal.4th 105	7
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal. App. 4th 43	7
<i>Children's Hospital and Med. Center v. Bonta</i> (2002) 97 Cal. App. 4th 740, 783	9
<i>Dennis v. Kellogg Co.</i> (S.D. Cal. Nov. 14, 2013) 2013 U.S. Dist. LEXIS 163118	8
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	5, 6
<i>Earley v. Superior Court</i> (2000) 79 Cal.App.4th 1420	13
<i>Flannery v. California Highway Patrol</i> (1998) 61 Cal. App. 4th 629	9
<i>Franco v. Ruiz Food Prods.</i> (E.D. Cal. Nov. 27, 2012) 2012 U.S. Dist. LEXIS 169057	12
<i>Garcia v. Gordon Trucking</i> (E.D. Cal. 2012) 2012 U.S. Dist. LEXIS 160052	12
<i>Glass v. UBS Fin. Servs.</i> (N.D. Cal. Jan. 26, 2007) 2007 U.S. Dist. LEXIS 8476	8
<i>Hensley v. Eckerhart</i> (1983) 461 U.S. 424	6
<i>Hopson v. Hanesbrands Inc.</i> (N.D. Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900	12

1	<i>In re Heritage Bond Litig. v. U.S. Trust Co. of Tex.</i>	
2	(C.D. Cal. June 10, 2005) 2005 U.S. Dist. LEXIS 13627.....	6
3	<i>In re Linerboard Antitrust Litig.</i>	
4	(E.D. Pa. June 2, 2004) 2004 U.S. Dist. LEXIS 10532	11
5	<i>Jones v. Abercrombie & Fitch Trading Co.</i>	
6	(C.D.Cal. Nov. 19, 2018) 2018 U.S.Dist.LEXIS 198001	11
7	<i>Keith v. Volpe</i>	
8	(C.D. Cal. 1980) 501 F.Supp.403	11
9	<i>Ketchum v. Moses</i>	
10	(2001) Cal.4th 1122	9, 11
11	<i>Kullar v. Foot Locker Retail, Inc.</i>	
12	(2008) 168 Cal. App. 4th 116	5
13	<i>Laffitte v. Robert Half International, Inc.</i>	
14	(2016) 1 Cal.5th 480	6, 7
15	<i>Lealao v. Beneficial California, Inc.</i>	
16	(2000) 82 Cal.App.4th 19	6, 11
17	<i>Lopez v. Youngblood</i>	
18	(E.D. Cal. Sep. 1, 2011) 2011 U.S. Dist. LEXIS 99289	8
19	<i>McGrath v. Wyndham Resort Dev. Corp.</i>	
20	(S.D. Cal. 2017) 2018 U.S. Dist. LEXIS 16095	11
21	<i>Magadia v. Wal-Mart Assocs.</i>	
22	(2019) 384 F. Supp. 3d 1058.....	12
23	<i>Moore v. Jas. H. Matthews & Co.</i>	
24	(9th Cir. 1982) 682 F.2d 830	10
25	<i>Nen Thio v. Genji, LLC</i>	
26	(N.D. Cal. 2014) 14 F. Supp. 3d 1324	12
27	<i>Norman v. Housing Auth.</i>	
28	(11th Cir. 1988) 836 F.2d 1292.....	10
	<i>Quinn v. State of California</i>	
	(1995) 15 Cal.3d 162	7
	<i>Serrano v. Priest (Serrano III)</i>	
	(1977) 20 Cal.3d 25	6, 9, 10

1	<i>Smith v. CRST Van Expedited, Inc.</i>	
2	(S.D. Cal. Jan. 14, 2013) 2013 U.S. Dist. LEXIS 6049	8
3	<i>SternwestCorp. v. Ash</i>	
4	(1986) 183 Cal.App.3d 74.....	11
5	<i>Vasquez v. Superior Court</i>	
6	(1971) 4 Cal. 3d 800	13
7	<i>Vincent v. Hughes Air West, Inc.</i>	
8	(9th Cir. 1977) 557 F.2d 759.....	6, 7
9	<i>Vizcaino v. Microsoft Corp.</i>	
10	(9th Cir. 2002) 290 F.3d 1043.....	11
11	<i>Wershba v. Apple Computers, Inc.</i>	
12	(2001) 91 Cal.App.4th 224	6, 11

MISCELLANEOUS AUTHORITIES

		<u>PAGE</u>
	<u>Reagan W. Silber and Frank E. Goodrich, Common Funds and Common Problems; Fee objections and Class Counsel’s Response, (1998): 7 Rev. Litig 525</u>	8
	<u>T. Willging, L. Hooper and R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules, (1996):</u>	8
	<u>William Rubenstein, Alba Conte & Herbert Newberg, Newberg on Class Actions (4th ed. 2009) (“Newberg”): § 14:6</u>	11

1 **I. INTRODUCTION**

2 Plaintiff seeks final approval of a \$1,200,000.00, non-reversionary wage and hour class
3 and Private Attorneys General Act (“PAGA”) settlement with Defendant Zodiac Pool Systems,
4 LLC (“Defendant” or “Zodiac”) for 343 non-exempt California individuals employed by Zodiac
5 at any time from May 27, 2016 through August 2, 2021. Declaration of Isam C. Khoury,
6 (“Khoury Decl.”), ¶ 10. On July 11, 2022, the Court-approved Notice Packet was mailed to 343
7 Class Members informing them of their rights and benefits under the Settlement, including the
8 estimated amount of Settlement Payments, and the right to request exclusion, dispute
9 workweeks, or file a written objection to the Settlement by August 25, 2022. Declaration of
10 Lindsay Kline on behalf of Simpluris (“Simpluris Decl.”), ¶ 8, Ex. A; Khoury Decl., ¶ 33.
11 Support for the Settlement is strong. No Class Member objected or requested exclusion.
12 Simpluris Decl., ¶ 11. Participating Class Members will receive payments averaging \$2,147.23,
13 with a highest payment of \$5,636.23, upon Settlement Approval. Simpluris Decl., ¶ 16; Khoury
14 Decl., ¶ 29.

15 **II. THE PARTIES**

16 **A. Plaintiffs**

17 Plaintiff Antony M. Smith worked for Zodiac in California as a non-exempt “Technical
18 Support Level One Advisor” from August 2018 through August 2020. Khoury Decl. ¶ 12;
19 Declaration of Plaintiff Antony M. Smith (“Smith Decl.”) filed February 28, 2022 (ROA #21), ¶
20 4. Plaintiff Omar Ayala worked for Zodiac in California as a non-exempt “Assembler, Tester,
21 and Builder” from October 2017 through October 2019.¹ Khoury Decl. ¶ 13; Declaration of
22 Plaintiff Omar Ayala (“Ayala Decl.”) filed February 28, 2022 (ROA #22), ¶ 3.

23 **B. Defendant**

24 Zodiac Pool Systems, LLC, a Delaware limited liability company, does business
25 throughout California, including San Diego County, California. Khoury Decl., ¶ 14.

26 ///

27 _____
28 ¹ On 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.

1 **C. The Class and Aggrieved Employees**

2 The Class is defined as all individuals who were employed by Zodiac in any non-exempt
3 position in California at any time during the time period of May 27, 2016 through August 2,
4 2021 (“Class Period” and/or “Settlement Period”). There are 343 Class Members who worked
5 35,600 workweeks during the Class Period. Simpluris Decl., ¶ 14; Khoury Decl., ¶ 15. PAGA
6 Members means all Class Members that worked any time during the time period of March 20,
7 2019 through August 2, 2021 (“PAGA Period”). The PAGA Members worked a combined
8 6,450 workweeks during the PAGA Period. Khoury Decl. ¶ 16.

9 **III. PROCEDURAL HISTORY**

10 On May 27, 2020, Plaintiff Ayala filed a class and PAGA complaint in the San Diego
11 County Superior Court (Case No. 37-2020-00017229-CU-OE-CTL) naming Zodiac as
12 Defendant after the requisite 65-day waiting period under the Private Attorneys General Act
13 (“PAGA”) – California Labor Code §2698, *et seq.*, had elapsed, (“Ayala Action”). On July 20,
14 2020, Zodiac removed the Ayala Action to the United States District Court for the Southern
15 District of California, Case No. 20 CV01381-H (MSB). Khoury Decl., ¶ 17.

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

23 **IV. INVESTIGATION AND MEDIATION**

24 The Parties agreed to mediate with Hon. Michael Latin (Ret.), an experienced and
25 respected wage and hour class action mediator. Khoury Decl., ¶ 20. To prepare, the Parties
26 exchanged documents and data, including relevant policies and procedures for the period
27 through February 8, 2021; time punch details for 12,550 shifts worked by Plaintiffs and 33
28 randomly-selected Class Members. Khoury Decl., ¶¶ 21-22. Plaintiffs’ Counsel also informally

interviewed multiple Class Members regarding their experiences with taking compliant meal and rest breaks, rounding of work time, impact on their wages, and use of their cell phones for work. Khoury Decl., ¶ 22. Plaintiffs retained the services of a damages' consultant to evaluate the data for meal and rest periods violations, and the incidence of underpaid wages due to rounding of time worked, and extrapolated those damages to the entire Class. Khoury Decl., ¶ 23. After investigation, research, informal discovery, analysis of the data and information by Plaintiffs and their damages consultant, and numerous interviews with the Class Members, the Parties mediated with Judge Latin on May 4, 2021. After a full day of arms'-length negotiations, the Parties were not able to reach agreement by the end of the day; however, by May 6, 2021 agreement was reached as to the principle terms of the proposed Settlement, and a memorandum of understanding was executed and memorialized in the Class Action and PAGA Settlement Agreement ("Agreement"), which was submitted to the Court in Connection with the Motion for Preliminary Approval of Class Action Settlement (ROA #18). Khoury Decl., ¶ 24.

V. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms

The Parties agreed, subject to Court approval, Defendant will pay \$1,200,000, the Gross Settlement Fund ("GSF"), which includes: (a) attorneys' fees up to \$400,000 (one-third of GSF) to compensate Class Counsel for work performed and work remaining to secure final Court approval [Plaintiff consented to apportion fees: 42.5% to Cohelan Khoury & Singer, 42.5 % to Law Offices of Sahag Majarian II, and 15% to Law Office of Matt Blum. Khoury Decl., ¶ 26]; (b) litigation costs of \$13,680.10 (originally estimated in the Agreement to be \$18,500); (c) Class Representative Payments up to \$10,000 to Mr. Smith and Mr. Ayala each, in recognition of bringing the case, work performed, risks undertaken for costs if the case had not successfully concluded, and substantial benefits conferred on absent Class Members, (d) PAGA Payment of \$24,000 [\$18,000 to the LWDA (75%)/ \$6,000 to Aggrieved Employees (25%)]; and (e) Simpluris, Inc.'s ("Settlement Administrator") costs of \$7,000. Khoury Decl., ¶ 25; Simpluris Decl., ¶ 15. Defendant will pay employer's share of payroll taxes in addition to GSF and no portion of the GSF will revert to Defendant. Khoury Decl., ¶ 27.

1 After all Court-approved deductions from the GSF, the remaining Net Settlement Fund
2 (“NSF”) estimated at approximately \$736,500 will be distributed to Participating Settlement
3 Class Members and PAGA Members. Individual Settlement Payments will be calculated on a
4 proportional basis based on the number of Work Weeks each Participating Settlement Class
5 Member was employed by Zodiac in California as a non-exempt employee during the Class
6 Period of May 27, 2016 through August 2, 2021 and the number of Work Weeks each PAGA
7 Member was employed by Zodiac in California as a non-exempt employee during the PAGA
8 Period of March 20, 2019 through August 2, 2021. Khoury Decl., ¶ 28.

9 The 343 Participating Settlement Class Members will receive an average estimated
10 payment of \$2,161.28, with a highest payment of \$5,673.06, upon Approval. Plaintiff Smith’s
11 estimated individual settlement amount is \$2,201.34. Plaintiff Ayala’s estimated individual
12 settlement amount is \$2,180.87. Khoury Decl., ¶ 29; Simpluris Decl., ¶ 16. Checks will be void
13 120 days after issuance, and any unclaimed amounts will be transferred to the State of
14 California Unclaimed Property Fund, to be held in the name of and for the benefit of such Class
15 Members under California’s escheatment laws. Khoury Decl., ¶ 30; Simpluris Decl., ¶ 17.

16 Each Participating Class Member’s Settlement Payment will be characterized 50%
17 wages for which an IRS Form W-2 will be issued, and 50% penalties and interest for which IRS
18 Forms 1099 will be issued. Khoury Decl. ¶ 31; SA ¶ 70.

19 **B. Preliminary Approval, Notice to the Class, and Its Response**

20 **1. Preliminary Approval and Class Notice**

21 On June 10, 2022, the Court preliminarily approved the proposed Settlement and Notice
22 Packet for mailing to the Class. Khoury Decl., ¶ 32. On July 11, 2022, after searching the
23 National Change of Address database, and updating Class Member addresses, the Settlement
24 Administrator mailed Notice Packets to 343 Class Members. The Notice Packet informed them
25 of (1) the pendency of the Action; (2) proposed settlement terms; (3) automatic payment of
26 Settlement shares if exclusion not requested; (4) estimated amount each Participating Settlement
27 Class Members will receive based on eligible weeks worked during the Class and PAGA
28 Period; (5) released claims; (6) right to object or request exclusion, and (7) date, time and place

1 of the final approval hearing. Khoury Decl., ¶ 33; Simpluris Decl., ¶ 8, Ex. A.

2 Class Members were also informed that if they opt out of the Class, but are an eligible
3 PAGA Member, they will still receive their share of the PAGA Payment, and will release only
4 the Released PAGA Claims for civil penalties alleged under PAGA that were asserted in any
5 complaint in the Action or the Ayala Litigation and/or Plaintiffs' letters and communications
6 with the LWDA (including any subsequently amended complaints or letters); and/or that could
7 have been asserted in any complaint in the Action or the Ayala Litigation or Plaintiffs' letters
8 and communications with the LWDA based on the facts and/or allegations alleged in any
9 complaint in the Action or the Ayala Litigation and/or Plaintiffs' letters and communications
10 with the LWDA (the Released PAGA Claims are set forth in Paragraph 34 of the Settlement
11 Agreement) because no right exists under PAGA to opt out of a PAGA Settlement. *Id.*

12 2. The Class' Response to the Notice

13 The Class response to the Settlement was extremely favorable. No objections and no
14 requests for exclusion were received. Khoury Decl., ¶ 34; Simpluris Decl., ¶¶ 11-12.

15 The Court determined the first three *Dunk* factors were met when it granted preliminary
16 approval: (1) the settlement was reached through arm's-length bargaining; (2) investigation and
17 discovery allowed counsel and the court to act intelligently; and, (3) counsel was experienced in
18 similar litigation. The fourth factor could not be known until the Class had notice and an
19 opportunity to respond. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801-1802 (1996).

20 The fourth *Dunk* factor was established when the Class overwhelmingly approved the
21 Settlement.

22 VI. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE

23 The Preliminary Approval Motion thoroughly analyzed the terms of the proposed
24 Settlement in light of *Dunk*, (establishing factors supporting a presumption of fairness); and
25 *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008), (establishing factors
26 determining whether a settlement is in the Class' best interest, is adequate, and reasonable). The
27 Court carefully reviewed and ruled on these analyses and they are fully incorporated here by
28 reference. *See*, Preliminary Approval Motion, at 10:6-12:9, 13:1-18:27 (ROA #17 and #32).

Nothing has changed since Preliminary Approval to negate the presumption of fairness and Class Counsel remains convinced the Settlement is in the Class' best interest.

VII. ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE AWARDED

Class Counsel requests attorneys' fees of one-third of the GSF and actual litigation costs. Class Counsel have expended 477.5 hours, a lodestar of \$289,424.50. Khoury Decl., ¶ 36, Ex. 1–Summary of Class Counsel's Time & Costs; Ex. 2 – Itemized Costs; Declaration of Matt Blum ("Blum Decl."), ¶¶ 17-18; Declaration of Sahag Majarian ("Majarian Decl."), ¶ 9.

A. The Results Achieved Support the Fee Request

The most important factor to consider in granting a fee award is the success obtained. In *re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), 2005 U.S. Dist. LEXIS 13627, at *27 (C.D. Cal. June 10, 2005) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). An excellent result was achieved, enforcing the law and providing benefits to the Class.

The Class was provided notice of all settlement terms, including that Counsel would request an award of attorneys' fees up to one-third of the GSF, \$400,000. Simpluris Decl., ¶ 8, Ex. A. No Class Member objected to the attorneys' fees award. *Id.* at ¶ 12.

B. A Fee Award Based on a Percentage of the Common Fund is Appropriate

The California Supreme Court recognized it is appropriate to award attorneys' fees based on a percentage of the total value of benefits to Class Members from the settlement, also known as the "common fund" method. *Laffitte v. Robert Half International, Inc.*, 1 Cal.5th 480, 503 (2016); see also, *Serrano v. Priest*, 20 Cal.3d 25, 34 (*Serrano III*) (1977); *Vincent v. Hughes Air West, Inc.* 557 F.2d 759, 769 (9th Cir. 1977). (California courts may look to federal authority analyzing class issues for guidance. See *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 239-40 (2001))

"Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 27 (2000); *Dunk*, at 1808 (attorneys' fees may be calculated as percentage of common fund where settlement amount is certain or easily calculable).

A common fund fee award is proper here as it spreads the attorneys' fees among all

1 beneficiaries of the fund, aligns the incentives between Plaintiffs' counsel and the class, better
2 approximates market conditions in a contingency case, and encourages class counsel to seek
3 early settlement and avoid unnecessarily prolonging litigation. *Laffitte*, 1 Cal.5th at 503.

4 A lodestar "cross-check" is not required, but may be used at the trial court's option to
5 double check "reasonableness of the percentage fee through a lodestar calculation." *Id.* at 504.

6 With the guiding principle that early class action settlements are favored and may not
7 diminish an award of attorneys' fees, Class Counsel submits the fee request should be awarded,
8 based on substantial hours expended, risks and complexities of prosecuting the action, the
9 contingent nature of any fee, their experience in handling cases of this type, fees commonly
10 awarded in these cases, and vindication of the Class' rights.

11 The purpose of the common fund approach is to "spread litigation costs proportionally
12 among all the beneficiaries so that the active beneficiary does not bear the entire burden alone."
13 *Vincent, supra*, 557 F.2d at 769. "[O]ne who expends attorneys' fees in winning a suit which
14 creates a fund from which others derive benefits may require those passive beneficiaries to bear
15 a fair share of the litigation costs." *Quinn v. State of California*, 15 Cal.3d 162, 167 (1995). The
16 common fund doctrine has been applied "consistently in California when an action brought by
17 one party creates a fund in which other persons are entitled to share." *City and County of San*
18 *Francisco v. Sweet*, 12 Cal.4th 105, 110 (1995).

19 Class Counsel undertook representation at their own expense, with compensation wholly
20 contingent upon providing a Class benefit. Class Members will benefit from the proposed
21 Settlement and receive monetary payments. Based on the defined and clearly traceable Class
22 benefit, the Court may award a percentage of the common fund as attorneys' fees.

23 **C. One-Third of the Common Fund is a Reasonable Fee**

24 "California courts routinely award attorneys' fees of one-third of the common fund."
25 *Beaver v. Tarsadia Hotels*, 2017 U.S. Dist. LEXIS 160214, *28 (S.D. Cal. Sept. 28, 2017).
26 Several studies of class action fee awards have found the median common fund fee award is
27 approximately one-third of the total settlement fund. See, e.g., *Chavez v. Netflix, Inc.*, 162 Cal.
28 App. 4th 43, 66, n.11 (2008) ("fee awards in class actions average around one-third of the

1 recovery.”); Reagan W. Silber and Frank E. Goodrich, Common Funds and Common Problems:
2 Fee Objections and Class Counsel’s Response, 17 Rev. Litig. 525, 546 (1998); T. Willging, L.
3 Hooper and R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final
4 Report to the Advisory Committee on Civil Rules, 90 (1996) (attorneys’ fees in class litigation
5 “were generally in the traditional range of approximately one-third of the total settlement”).

6 Counsel’s request for one-third of the common fund is in the mid-range of awards which
7 commonly range from 20% to 50%, and is fair compensation for undertaking complex, risky,
8 litigation on a contingent basis, and for the result achieved for the Class. Khoury Decl., ¶ 37.

9 Some courts have found an award of 33% of a common fund is the “benchmark” in
10 California. *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 U.S. Dist.
11 LEXIS 6049, *14 (S.D. Cal. Jan. 14, 2013) (“These percentages compare favorably with” the
12 California (33%) benchmark.); *Dennis v. Kellogg Co.*, No. 09-CV-1786-L (WMC), 2013 U.S.
13 Dist. LEXIS 163118, at *7 (S.D. Cal. Nov. 14, 2013). Class Counsel’s fee request is in line with
14 awards in similar California cases, consistent with market rates, and is reasonable. Khoury
15 Decl., ¶¶ 38-39.

16 **D. Optional Lodestar Cross-Check Confirms Reasonableness of Fee**

17 Courts are not required to cross-check a common fund fee award against a lodestar
18 increased by a risk multiplier, and many Courts decline to do so. See, *Glass v. UBS Financial*
19 *Services, Inc.*, No. 06-4066-MMC, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. Jan. 26, 2007) (“no
20 need to conduct a lodestar cross-check [as] [c]lass counsel’s prompt action in negotiating a
21 settlement while the state of the law remained uncertain should be fully rewarded”); *Lopez v.*
22 *Youngblood*, No. 07-0474-DLB, 2011 U.S. Dist. LEXIS 99289 (E.D. Cal. Sep. 1, 2011)
23 (“lodestar cross-check is not required in this circuit, and in a case such as this, is not a useful
24 reference.”)

25 When it is used, the cross-check “calculation need entail neither mathematical precision
26 nor bean-counting,” is not intended to be a “full-blown lodestar inquiry,” and “can be
27 performed with a less exhaustive cataloguing and review of counsel’s hours.” *Barbosa v.*
28 *Cargill Meat Solutions Corp*, 297 F.R.D. 431, 451 (E.D. Cal. July 2, 2013).

1 Under the lodestar method, a base fee amount is calculated from a compilation of time
2 reasonably spent on the case and the reasonable hourly compensation of the attorneys. *Serrano*
3 *v. Priest, supra*, at 48. The court then enhances the lodestar by a “multiplier” to account for a
4 range of factors, such as the novelty and difficulty of the case, its contingent nature, and the
5 degree of success achieved. *Id.*, at 49; see also *Ketchum v. Moses*, Cal.4th 1122, 1132-36
6 (2001).

7 If the fee award were calculated using the lodestar, rather than the common fund
8 method, a multiplier of 1.38 would be applied. ($\$400,000/\$289,424.50 = 1.38$). Class Counsel’s
9 work to obtain a class settlement was reasonable and necessary and is reflected in the excellent
10 result achieved for Class Members. Khoury Decl., ¶ 41.

11 **E. Counsel’s Hourly Rates Are Reasonable**

12 Class Counsel is entitled to hourly rates charged by attorneys of comparable experience,
13 reputation, and ability for similar litigation. *Ketchum, supra* at, 1133; *Children’s Hospital and*
14 *Med. Center v. Bonta*, 97 Cal. App. 4th 740, 783 (2002) (affirming rates as “within the range of
15 reasonable rates charged by and judicially awarded comparable attorneys for comparable
16 work”). When determining reasonable rates, Courts may consider the attorney’s skill and
17 experience, the nature of the work performed, and the relevant area of expertise and the
18 attorney’s customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th
19 629, 632 (1998).

20 Class Counsel’s skill and experience support their hourly rates and are in line with rates
21 typically approved in California wage and hour class actions. Cohelan Khoury & Singer’s
22 practice is limited to litigating class and representative actions on behalf of employees and
23 consumers, and has been appointed Class Counsel or co-Class Counsel in over 200 such cases.
24 Khoury Decl., ¶¶ 42-43. The Law Office of Matt Blum’s vast majority of cases consists of wage
25 and hour class actions filed in California. Blum Decl., ¶¶ 4-6. Mr. Majarian has devoted a
26 significant portion of his practice to employment law and class actions, and has been appointed
27 co-class counsel in no less than 300 wage and hour class actions. Majarian Decl., ¶¶ 3, 4.

28 As leading attorneys in the field, Class Counsel monitors prevailing market rates and

sets billing rates to follow attorneys and staff of comparable skill, qualifications and experience. Class Counsel's skill and experience support their hourly rates ranging from \$350 to \$900. (Cohelan Khoury & Singer: Founding Partner, Timothy D. Cohelan - \$900; Founding Partner, Isam C. Khoury - \$900; Managing Partner, Michael D. Singer - \$900; Partner, Diana M. Khoury - \$750; Former Partner, J. Jason Hill - \$600; Associate, Mart Manus - \$550; Associate, Rosemary C. Khoury - \$350. Law Offices of Sahag Majarian II: Managing Attorney, Sahag Majarian - \$795. The Law Office of Matt Blum: Managing Attorney, Matt Blum - \$525). These rates are in line with those typically approved in wage-and hour class action litigation in California, and Cohelan Khoury & Singer attorneys working on this case have recently been approved at these rates in the Superior Courts for the Counties of Alameda (*Bandril/Reyes v. Plastikon Industries*, Case No. RG19038227), Los Angeles (*Torres v. Mercury Plastics, Inc.*, Case No. BC723631), Orange (*Crandall, et al. v. Maxim Healthcare Services, Inc.*, Case No. 2017-00940239), San Diego (*Babouchian, et al. v. Soleil Communications, Inc., et al.*, Case No. 2017-00044756; *Phillips, et al. v. So-Cal Dominoids, et al.*, Case No. 2013-00056664; *Ramirez v Town Park, LLC*, Case No. 2020-00003942), and Santa Clara (*Kebede, et al. v. Wrike, Inc.*, Case No. 20CV366599). Khoury Decl., ¶ 44.

F. Plaintiff's Counsel's Total Hours are Reasonable

Hours are reasonable if, "at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982). *Norman v. Housing Auth.*, 836 F.2d 1292, 1306 (11th Cir. 1988) ("The measure of reasonable hours is determined by the profession's judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done").

G. A Multiplier of the Lodestar Should Be Awarded

A lodestar amount may be enhanced by a multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal.3d at 48. Pertinent factors determining the level of enhancement include the difficulty of the questions involved and the skill in presenting them, the contingent nature of the fee award, the extent to which the litigation precluded other employment, and the

1 percentage-of-the-fund the attorney would have received on the fair market. *Lealao* at 49. This
2 list is not exhaustive and the Court can consider other factors it deems important in setting the
3 multiplier. *Id.* at 40; *Ketchum, supra* at 1139. “Multipliers ranging from one to four frequently
4 are awarded in common fund cases when the lodestar method is applied.” (Newberg on Class
5 Actions §14.03 (4th ed. 2009)). Counsel pursued difficult claims, presented them with skill
6 based on experience prosecuting employment class actions, and achieved an excellent result, on
7 a contingent basis.

8 A 1.38 multiplier is reasonable and in line with those used in other cases. Multipliers
9 may range “from 2 to 4 or even higher.” *Wershba v. Apple Computer, Inc., supra*, 91 Cal. App.
10 at 255. *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 U.S. Dist. LEXIS 10532, *16
11 (E.D. Pa. June 2, 2004) (finding from 2001 to 2003, a 4.35 average multiplier in common fund
12 cases). *See McGrath v. Wyndham Resort Dev. Corp.*, (S.D.Cal. Jan. 30, 2018, No. 15cv1631 JM
13 (KSC)) 2018 U.S.Dist.LEXIS 16095*24 [Hon. Jeffrey T. Miller – approving attorneys’ fees of
14 \$ 2,416,666.67 and 4.8 multiplier to Cohelan Khoury & Singer, one-third of \$ 7,250,000
15 settlement in a pre-certification wage and hour class action], and, *Jones v. Abercrombie & Fitch*
16 *Trading Co.*, (C.D.Cal. Nov. 19, 2018, No. CV 15-0105 JGB (Ex)) 2018 U.S.Dist.LEXIS
17 198001 *24-25 [Hon. Jesus G. Bernal – approving attorneys’ fees of \$ 2,400,000 and 3.7
18 multiplier to Cohelan Khoury & Singer, one-third of \$ 9,600,000 settlement in a pre-
19 certification wage and hour class action].

20 In *Lealao*, the Court held a trial court’s refusal to enhance the lodestar was an abuse of
21 discretion, opining a multiplier more than 3.5 was reasonable and not ruling out the original
22 request for 8.0. *Lealao, supra*, 82 Cal. App. 4th at 24, 52. *See SternwestCorp. v. Ash*, 183
23 Cal.App.3d 74, 76 (1986) (case remanded with directions “to enhance the lodestar award by
24 such factor (two, three, four or otherwise) that the court, in its discretion shall deem proper”);
25 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (multiplier of 3.65); *Keith v.*
26 *Volpe*, 501 F.Supp.403, 414 (C.D. Cal. 1980) (multiplier of 3.5).

27 To the extent a lodestar could be used to set the fee, a multiplier is supported by the
28 difficulty of the questions involved, the skill displayed by Class Counsel in addressing them,

1 and the contingent nature of any recovery.

2 Most importantly, the excellent result achieved for the Class supports a significant
3 multiplier. Without the risk and delay of litigation, the Class is receiving a substantial
4 percentage of the value of its claims, and average individual payments of \$2,147.23, with a
5 highest payment of approximately \$5,636.23. *Simpluris Decl.*, ¶ 16.

6 **H. Litigation Expenses Are Reasonable**

7 The Settlement allows Class Counsel to request up to \$18,500.00 in costs. Counsel seeks
8 reimbursement of actual costs of \$13,680.10. These costs were reasonable and necessary.
9 *Khoury Decl.*, ¶ 45, Ex. 2 - Itemized Costs.

10 **VIII. THE PROPOSED PAGA PAYMENT IS REASONABLE**

11 The settlement of PAGA penalties for \$24,000, of which \$18,000 (75%) will be paid to
12 the LWDA and \$6,000 (25%) to aggrieved employees, is reasonable and appropriate. The
13 Parties negotiated a good faith amount for PAGA penalties, which was not the result of self-
14 interest at the expense of Class Members. *Khoury Decl.*, ¶ 46. Where a “good faith amount” is
15 negotiated and “there is no indication that this amount was the result of self-interest at the
16 expense of other Class Members,” it is generally considered reasonable. *Hopson v.*
17 *Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 U.S. Dist. LEXIS 33900, at *25 (N.D. Cal. Apr.
18 3, 2009).

19 The amount allocated to PAGA is within the range, or higher, than other settlements.
20 See *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d at 1101, citing, among others, *Ceja-Corona*
21 *v. CVS Pharm., Inc.*, 2015 U.S. Dist. LEXIS 5118 (E.D. Cal. Jan. 14, 2015) (\$10,000 PAGA
22 penalties in settlement of \$900,000), recommendation adopted, 2015 U.S. Dist. LEXIS 25730
23 (E.D. Cal. Mar. 3, 2015); *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1330 (N.D. Cal.2014)
24 (\$10,000 PAGA penalties, \$1.25m settlement); *Franco v. Ruiz Food Prods.*, 2012 U.S. Dist.
25 LEXIS 169057, *5-6 (E.D. Cal. Nov. 27, 2012) (\$10,000 PAGA penalties, \$2.5m settlement);
26 *Garcia v. Gordon Trucking*, 2012 U.S. Dist. LEXIS 160052 (E.D. Cal. 2012) (\$10,000 PAGA,
27 \$3.7m settlement).

28 Class Counsel provided the LWDA with the Motion for Preliminary Approval and the

1 fully-executed Agreement. The LWDA raised no objection. Khoury Decl., ¶ 48, Ex. 3 – LWDA
2 February 28, 2022 Confirmation of Receipt. The LWDA was served with this Final Approval
3 Motion when filed. Khoury Decl., ¶ 49, Ex. 4 – LWDA Confirmation.

4 **IX. THE SERVICE AWARD IS REASONABLE AND SHOULD BE AWARDED**

5 Service awards “are fairly typical in class action[s],” “to compensate class
6 representatives for work done on behalf of the class, to make up for financial or reputational
7 risk undertaken in bringing the action.” *Cellphone Termination Fee Cases* (2010) 186
8 Cal.App.4th 1380, 1394. The Court preliminarily granted a \$10,000.00 service award to each
9 Plaintiff.

10 “Modern society seems increasingly to expose men to . . . group injuries for which
11 individually they are in a poor position to seek legal redress, either because they do not know
12 enough or because such redress is disproportionately expensive. If each is left to assert his
13 rights alone if and when he can, there will at best be a random and fragmentary enforcement, if
14 there is any at all. This result is not only unfortunate in the particular case, but it will operate
15 seriously to impair the deterrent effect of the sanctions which underlie much contemporary law.
16 The problem of fashioning an effective and inclusive group remedy is thus a major one.”
17 *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807 (1971).

18 Enforcement of laws protecting California employees would be “random and
19 fragmentary,” or non-existent, if no one was willing to come forward and spend time to work on
20 behalf of others, and perhaps most importantly, take risks those others do not bear.

21 Courts have concluded class action plaintiffs, not class members, take the risk of a
22 judgment for defendant’s costs. “Those who choose to take the risks of litigation should be the
23 ones who bear the cost when they are unsuccessful.” *Earley v. Superior Court*, 79 Cal.App.4th
24 1420, 1433 (2000). The *Earley* court contended this risk was balanced by potential reward.

25 “While imposition of the entire cost burden on the named plaintiffs may have a chilling
26 effect on the willingness of plaintiffs to bring class action suits, this effect easily may be
27 outweighed by the potential recovery.” *Id.* The recovery for a plaintiff in a class action will
28 always be less than an individual action, and take much longer to obtain, with no potential for

1 early settlement, as in some individual cases, which may settle even before filing a public
2 complaint.

3 So, if “[t]hose who choose to take the risks of litigation should be the ones who bear the
4 cost when they are unsuccessful,” how can that risk be offset? *Id.* An adequate Service Award.

5 Both Mr. Smith and Mr. Ayala have more than satisfied their obligation to be available
6 when asked and work with counsel to protect the interests of the Class and place them above
7 their own. Smith Decl. (ROA #21), ¶¶ 2-3, 7-15; Ayala Decl. (ROA #22), ¶¶ 6-16. Accepting
8 the risk of judgment for Defendant’s costs, the potential loss of employment opportunities, or
9 achieving an excellent result for the Class, are each sufficient to support a Class Representative
10 Service Award of \$10,000 to each named Plaintiff. Considered together, they are more than
11 sufficient.

12 It is impossible to know, or intervene, each time a class action plaintiff loses an
13 employment opportunity, making it essential to compensate them adequately at final approval,
14 the only time that the risk they accepted on behalf of the Class can be at least slightly offset and
15 they can be rewarded for their contribution.

16 The Class received notice Plaintiffs would request \$10,000 for “for initiation of the
17 Action, their work and efforts in prosecuting the Class action, for undertaking the risks of
18 payment of costs in the event of an unsuccessful outcome, and general releases.” No Class
19 Member objected. Khoury Decl., ¶ 47; Simpluris Decl., ¶ 12.

20 **X. CONCLUSION**

21 The Settlement favorably resolves what would otherwise be uncertain litigation. Class
22 Counsel respectfully requests the Court grant final approval of the proposed Settlement,
23 approve the Service Award, attorneys’ fees and costs, and administration expenses as requested.

24 THE LAW OFFICE OF MATT BLUM
25 COHELAN KHOURY & SINGER
26 LAW OFFICES OF SAHAG MAJARIAN II

27 Dated: October 25, 2022

28 By: 
Marta Manus
Attorneys for Plaintiffs Antony M. Smith, Omar
Ayala, and the Proposed Class

- 14 -