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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

FRANK B. HINE, an individual, on his own
behalf, and in his representative capacity on
behalf of all other similarly situated
Aggrieved Employees,

Plaintiff,

v.

XPONENTIAL FITNESS, INC., a Delaware
corporation; XPONENTIAL FITNESS, LLC,
a Delaware limited liability company; and
DOES 1 through 25, inclusive,

Defendants.

Case No. 30-2020-01176106-CU-OE-CXC

*Assigned for all purposes to the Honorable
Judge William Claster in Dept. CX101*

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
APPROVAL OF PAGA SETTLEMENT**

Date: March 7, 2025

Time: 9:00 a.m.

Dept.: CX101

Action Filed: December 23, 2020

Trial Date: None

Reservation No.: 74479414

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1 **I. INTRODUCTION**

2 On behalf of the State of California, Plaintiff Frank B. Hine (“Plaintiff”) has reached a settlement
3 of this action for civil penalties under the Private Attorneys General Act (“PAGA”), Cal. Lab. Code §§
4 2698, *et seq.*, against Defendants Xponential Fitness, Inc.; Xponential Fitness, LLC; Cyclebar
5 Franchising, LLC; AKT Franchise, LLC; Club Pilates Franchise, LLC; Row House Franchise, LLC;
6 YogaSix Franchise, LLC; Stride Franchise, LLC; Pure Barre Franchising, LLC; Stretch Lab Franchise,
7 LLC; BFT Franchise, Holdings, LLC; and Rumble Franchise, LLC (collectively, “Defendants,” together
8 with Plaintiff, the “Parties”). The Parties have memorialized the terms of their settlement in the PAGA
9 Settlement and Release Agreement (“Settlement”) attached as **Exhibit A** to the Declaration of Carolyn
10 H. Cottrell (“Cottrell Decl.”), filed concurrently herewith.¹ In accordance with California Labor Code §
11 2699(s)(2), Plaintiff now respectfully requests that the Court review and approve the Settlement. As
12 shown below, approval is warranted because the Settlement is fair, reasonable, and adequate in view of
13 PAGA’s purposes to remediate and deter violations and maximize enforcement of the Labor Code.

14 **II. FACTUAL AND PROCEDURAL BACKGROUND**

15 **A. Facts**

16 This action is a straightforward PAGA claim for civil penalties based on a failure to provide
17 business-expense reimbursements. Defendants own, operate, and manage a global group of boutique
18 fitness brands. (FAC,² ¶ 2). Plaintiff worked for Defendants at their office in Irvine, California, as a
19 financial analyst from April 29, 2019 to November 22, 2019. (*Id.* at ¶ 5). He and the other “Covered
20 Employees” in this matter are all current and former exempt and non-exempt employees of Defendants
21 who worked for Defendants in California at any time during the period from October 19, 2019 to
22 February 20, 2024 (the “Covered Period”). (Settlement, ¶¶ 2, 4). Defendants have represented that there

23
24 ¹ Unless otherwise indicated, all capitalized terms have the same meaning as defined in the Settlement.

25 ² “FAC” refers to Plaintiff’s First Amended Complaint for Damages for Violation of Labor Code § 2698
26 *et seq.* (Private Attorneys General Act of 2004), filed on September 16, 2024 in connection with the
27 Settlement. The parties stipulated to the FAC for the purpose of including Defendants Cyclebar
28 Franchising, LLC; AKT Franchise, LLC; Club Pilates Franchise, LLC; Row House Franchise, LLC;
YogaSix Franchise, LLC; Stride Franchise, LLC; Pure Barre Franchising, LLC; Stretch Lab Franchise,
LLC; BFT Franchise, Holdings, LLC; and Rumble Franchise, LLC (“Additional Defendants”) in the
Settlement.

1 are approximately 1,743 Covered Employees who worked approximately 47,727 Eligible Pay Periods³
2 in the aggregate during the Covered Period.

3 In the operative FAC, Plaintiff alleges that, during the Covered Period, Defendants regularly
4 required Plaintiff and the Covered Employees to use their personal cell phones and internet data plans
5 to perform their jobs. (FAC, ¶ 32.) That is, Defendants required Plaintiff and the Covered Employees to
6 communicate with supervisors, fellow employees, and clients using their own cell phone and internet
7 data plans, but Defendants did not reimburse Plaintiff and the Covered Employees for this necessary,
8 work-related use despite being fully aware of it. (*Id.* at ¶¶ 25, 26.) Plaintiff alleges that Defendants
9 violated California Labor Code §2802 as a result. (*Id.*)

10 **B. Procedural History**

11 On December 23, 2020, Plaintiff filed his initial complaint against Defendants Xponential
12 Fitness, Inc. (“XFI”) and Xponential Fitness, LLC (“XFL”) in Orange County Superior Court. (Cottrell
13 Decl., ¶ 12.) On March 1, 2021, XFI and XFL filed their Answer. (*Id.*, ¶ 13.) On August 5, 2021, the
14 parties agreed to mediate the matter, but, on June 15, 2022, the United States Supreme Court issued an
15 opinion in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), and the parties agreed to cancel
16 the mediation so XFI and XFL could review the decision and plan accordingly. (*Id.*)

17 The parties then agreed to proceed with mediation and reset a new mediation date for September
18 of 2022. (*Id.* at ¶ 14.) In advance of the mediation, XFI and XFL provided an estimate of the number of
19 aggrieved employees and spreadsheets with information regarding their reimbursements. (*Id.*) However,
20 when Plaintiff assessed the spreadsheets with his retained expert, Plaintiff found that the spreadsheets
21 reflected significantly more employees than XFI and XFL’s estimate. (*Id.*) Because the parties were
22 unable to reach agreement on the fundamental issue of the number and identity of aggrieved employees,
23 they canceled the September 2022 mediation. (*Id.*)

24 Subsequently, the parties engaged in formal discovery. (Cottrell Decl., ¶ 15.) From June of 2022
25 to May of 2023, the parties met and conferred regarding their respective discovery responses and
26 respective positions regarding the identity and number of aggrieved employees. (*Id.*) XFI and XFL had
27

28 ³ Undefined capitalized terms have the meanings given to them in the Settlement.

maintained that their subsidiaries' employees were not their employees. (*Id.*) To address this issue, Plaintiff filed a second amended PAGA notice with the Labor and Workforce Development Agency ("LWDA") on May 4, 2023, explicitly naming XFI's and XFL's subsidiaries (the Additional Defendants (*see supra*, n.1)) as potential defendants to be included in this action. (*Id.*)

On June 6, 2023, the parties attended an informal discovery conference with the Court, during which they continued to discuss their respective positions on the number and identity of aggrieved employees. (Cottrell Decl., ¶ 16.) Around June 26, 2023, Defendants indicated that they were willing to proceed to mediation that included the full scope of employees (*i.e.*, the "additional" employees who worked for the Additional Defendants). (*Id.*) On July 19, 2023, Defendants provided updated data points for the first round of mediation. (*Id.*)

The parties attended a first round of mediation before mediator John Adler on July 31, 2023. (Cottrell Decl., ¶ 17.) The case did not resolve, but the parties agreed after the mediation to exchange further informal discovery and conduct depositions in order to increase the likelihood of a resolution in a second round of mediation. (*Id.*)

On February 8, 2024, Plaintiff took the deposition of Defendants through one of their corporate designees, Senior Vice President Theo Apanco. (*Id.* at ¶ 18.) On February 13, 2024, Plaintiff received updated data points from Defendants and further met and conferred with Defendants regarding the data points. (*Id.*) On February 19, 2024, Defendants took the deposition of Plaintiff Frank Hine. (*Id.* at ¶ 19.)

On February 20, 2024, the Parties participated in a remote mediation before the Hon. Amy Hogue (Ret.), and the Parties thereafter agreed on the main terms of the Settlement. (*Id.* at ¶ 20.) The Parties then spent several weeks negotiating and finalizing the Confidential Memorandum of Understanding and the Settlement, which all Parties executed on June 14, 2024 and September 27, 2024, respectively. (*Id.*)

III. TERMS OF THE SETTLEMENT

A. Monetary Terms

The Settlement provides for a non-reversionary total Settlement Amount of \$675,000.00. (Settlement, ¶ A.22; C.26(a).) From this amount, Plaintiff's counsel seeks fees not to exceed \$236,250.00, or approximately 35% of the Settlement Amount, and actual costs in the amount of

1 \$25,000.00 (Settlement, ¶ C.26(d); Cottrell Decl., ¶ 21.) The Settlement also provides for settlement
2 administration costs to the settlement administrator of \$11,750.00 and 15,000.00 service award to
3 Plaintiff for the effort and risk he undertook on behalf of the Covered Employees and as compensation
4 for Plaintiff’s general release. (Settlement, ¶ C.26(b), (c); Cottrell Decl., ¶¶ 23-24.)

5 The remainder of the total Settlement Amount after these deductions will form the Net
6 Settlement Amount,⁴ which will be paid to the Covered Employees and the Labor and Workforce
7 Development Agency (“LWDA”) as follows. Twenty-five percent (25%) of the Net Settlement Amount
8 (approximately \$96,750.00) will be paid to the Covered Employees. (Settlement, ¶ C.26(e)(i)).
9 Seventy-five percent (75%) of the Net Settlement Amount (approximately \$290,250.00) will be paid
10 by the Settlement Administrator to the LWDA. (*Id.* at ¶ C.26(e)(ii).)

11 **B. Settlement Administration and Distribution of Funds**

12 The parties have agreed to retain Phoenix Class Action Administrators (“Phoenix”) as the
13 Settlement Administrator. (Settlement, ¶ A.20.) Plaintiff’s counsel has used Phoenix to administer
14 dozens of settlements. (Cottrell Decl., ¶ 24).

15 Within 30 days after the Effective Date,⁵ Defendants will provide Phoenix with a confidential
16 list setting forth the name, last known addresses, Social Security number, and number of Eligible Pay
17 Periods for each Covered Employee. (Settlement, ¶ F.37.) Phoenix will perform a National Change of
18 Address search on all Covered Employees to update their addresses as needed. (*Id.*). Within 20 days after
19 the Effective Date, Defendants will transfer the Settlement Amount to Phoenix, who will deposit the
20 funds into the bank account of the Qualified Settlement Fund established by Phoenix for purposes of the
21 Settlement. (Settlement, ¶ F.38.) All amounts to be paid to Plaintiff, the Covered Employees, Plaintiff’s
22 Counsel, Phoenix, and LWDA will be paid from this Qualified Settlement Fund. (*Id.*)

23 Within 10 days after receiving the Settlement Amount from Defendants, Phoenix will: (1) mail

24 ⁴ The Net Settlement Amount of \$387,000.00 consists of the \$675,000.00 Settlement Amount minus
25 deductions for Plaintiff’s counsel’s attorneys’ fees and costs (\$236,250.00 and \$25,000.00, respectively);
26 settlement administration costs (\$11,750.00); and Plaintiff’s service award (\$15,000.00). (Settlement,
¶ A.13.)

27 ⁵ “Effective Date” means (i) the date that the time to appeal the judgment approving the Settlement has
28 expired; or (2) the date on which any appeal of the judgment approving the Settlement has been fully
resolved in a way that approves and does not alter the terms of the Settlement. (Settlement, ¶ A.8).

1 the settlement checks to the Covered Employees; (2) mail a check for the LWDA Settlement Proceeds
2 to the LWDA; (3) mail a check for Plaintiff for his service award (subject to Court approval); and (4)
3 pay Plaintiff's counsel's approved attorneys' fee and costs award. (Settlement, ¶ F.40.) The settlement
4 checks mailed to each Covered Employee will be accompanied by a notice (similar in form and content
5 to the sample attached as **Exhibit A** to the Settlement) explaining each Covered Employee's payment
6 and the deadline to cash his or her settlement check. (*Id.*)

7 The Covered Employees will have 180 days after mailing to cash their settlement checks.
8 (Settlement, ¶ F.41.) If any Covered Employee's check is not cashed within that period, the check will
9 be void, and a stop-payment will be issued. (*Id.*) In such event, the Covered Employee will be deemed
10 to have irrevocably waived any right in or claim to his or her share, except that the Covered Employee
11 may seek to claim the funds from the Controller of the State of California, where the funds will be held
12 pursuant to the Unclaimed Property Law, Civil Code §§ 1500 *et seq.*, in the name of the Covered
13 Employee to whom the check was issued, until such time that they claim their property. (*Id.*)

14 **C. Tax Treatment**

15 The Covered Employees' share of the Net Settlement Amount will be allocated 100% as alleged
16 penalties and interest, and the Settlement Administrator will issue IRS Forms 1099 in connection with
17 these payments. (Settlement, ¶ F.42.) The Settlement Administrator will also issue an IRS Form 1099 to
18 Plaintiffs' Counsel in connection with the payment of the attorneys' fees and costs award. (Settlement,
19 ¶ C.26(d).) Plaintiffs' Counsel will be solely responsible for paying any and all applicable taxes on this
20 payment. (*Id.*) Finally, the Settlement Administrator will issue an IRS Form 1099 to Plaintiff in
21 connection with the payment of any Court-approved service award. (Settlement, ¶ C.26(b).) Plaintiff
22 will be solely responsible for paying any and all applicable taxes on his service award. (*Id.*)

23 **D. Releases**

24 As of the Effective Date, Plaintiff on behalf of the State of California and the Covered
25 Employees, will release the Released Parties from all claims for civil penalties under PAGA that were
26 alleged or could have been alleged in this action based on the facts in Plaintiff's notices to the LWDA
27 and in the complaints in the action, arising from Plaintiff's and the Covered Employees' employment
28 during the Covered Period, including claims based on alleged violations of Labor Code § 2802 and any

1 applicable Industrial Welfare Commission Order for failure to reimburse work related expenses (the
2 “Released Claims”). (Settlement, ¶ D.27.)⁶

3 In addition, Plaintiff will release the Released Parties from any and all claims, actions, demands,
4 causes of action, suits, debts, obligations, damages, rights, or liabilities of any nature and description
5 whatsoever, known or unknown, that Plaintiff individually may possess against the Released Parties
6 arising from Plaintiff’s employment with Defendants or the renumeration for or termination of such
7 employment. (Settlement, ¶ E.29.) This individual release includes a waiver of rights under California
8 Civil Code § 1542.⁷ (*Id.* at ¶ 30.)

9 **IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE**

10 **A. PAGA Settlement Approval Standard**

11 The Labor Code provides that “[t]he superior court shall review and approve any settlement of
12 any civil action pursuant to [PAGA].” Cal. Lab. Code § 2699(s)(2). In seeking approval of a PAGA
13 settlement, parties are not obligated to “satisfy class action requirements” such as commonality and
14 typicality or abide by class action procedures such as notice and opt-out rights. *Arias v. Superior Court*
15 (2009) 46 Cal.4th 969 at 975; *O’Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1133.
16 Instead, the Court’s role in reviewing the settlement of a PAGA claim is to “determine whether it is fair,
17 reasonable, and adequate in view of PAGA’s purposes to remediate present labor law violations, deter
18 future ones, and to maximize enforcement of state labor laws.” *Moniz v. Adecco USA, Inc.* (2021) 72
19 Cal.App.5th 56, 77. The Settlement satisfies this standard.

20 **B. PAGA’s Purpose**

21 PAGA provides a mechanism to enforce the Labor Code by enlisting individual plaintiffs as
22 private attorneys general to recover civil penalties for the State, with a share also going to the plaintiffs
23 and other aggrieved employees. Prior to PAGA, civil penalties for Labor Code violations could only be
24 recovered by the California Department of Labor. *See Arias* at 980–81.

25 _____
26 ⁶ Covered Employees are not eligible to opt out of the Settlement. (Settlement, ¶ D.28.). As a result, the
parties have agreed to the “one-step” approval process common in PAGA settlements. (*Id.*)

27 ⁷ Section 1542 provides: “A general release does not extend to claims that the creditor or releasing party
28 does not know or suspect to exist in his or her favor at the time of executing the release and that, if
known by him or her, would have materially affected his or her settlement with the debtor or released
party.”

1 The Labor Code’s primary purpose is to “ensure employees are not required or permitted to work
2 under substandard unlawful conditions ... and to protect employers who comply with the law from those
3 who attempt to gain a competitive advantage at the expense of their workers by failing to comply with
4 minimum labor standards.” Cal. Lab. Code § 90.5(a). In enacting PAGA, the Legislature expressly stated
5 that “the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of
6 civil penalties as provided in the Labor Code.” Stats. 2003 ch. 906, § 1. The Legislature determined that
7 it was “in the public interest to allow aggrieved employees, acting as private attorneys general, to recover
8 civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies
9 were to retain primacy over private enforcement efforts.” *Arias*, 46 Cal.4th at 980.

10 Within this framework, Plaintiff, acting as a private attorney general and proxy for the State,
11 filed this action seeking civil penalties for Defendants’ alleged violation of the Labor Code. Because the
12 Settlement provides meaningful recovery to the Covered Employees and the State and furthers the above
13 legislative goals, it should be approved.

14 **C. The Settlement Enforces PAGA’s Purpose**

15 PAGA is not a restitution statute, and a PAGA action does not seek damages. “A PAGA action is
16 at heart a civil enforcement action filed on behalf of and for the benefit of the state.” *Baumann v. Chase*
17 *Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1124. The Court’s focus in evaluating a PAGA
18 settlement, therefore, is not the amount aggrieved employees ultimately receive as a result of a
19 settlement, but whether the total settlement achieves PAGA’s objectives, even if it represents only a
20 portion of Defendants’ total exposure. *See* Cal. Lab. Code §§ 2699(m)–(n),(s); *Rosario v. Inter-Con Sec.*
21 *Sys.* (Super. Ct. Alameda Cnty. Jan. 28, 2019) No. RG17849836, 2019 Cal. Super. LEXIS 95638, at *7.

22 If approved by the Court, the \$675,000.00 penalty will achieve PAGA’s objectives by (1) holding
23 Defendants accountable for their violations of the Labor Code; (2) deterring future violations of the
24 Labor Code by Defendants and other employers; (3) collecting penalties from Defendants and
25 recovering 75% of the penalties (*i.e.*, \$290,250.00) on behalf of the State of California for purposes of
26 enforcement and education; and (4) distributing 25% of the penalties (*i.e.*, \$96,750.00) to the Covered
27 Employees as remediation for their injuries.

28 The \$675,000.00 penalty in this case serves as a warning to Defendants and to employers

1 throughout California that failing to ensure strict compliance with the California Labor Code will lead
2 to costly repercussions. The Settlement encourages employers to expend additional resources to ensure
3 that, in policy and practice, they are complying with the law. In doing so, the Settlement will deter
4 Defendants and other employers from failing to reimburse work-related expenses and otherwise
5 violating the Labor Code.

6 In addition, the Settlement is fair, reasonable and adequate as it is consistent with and furthers
7 the purpose of PAGA in its mission of protecting workers, as well as reasonable payments to the Covered
8 Employees, who are not required to release their individual claims. (Cottrell Decl., ¶ 28.) Covered
9 Employees will receive an estimated average net payment of \$55.51 each in civil penalties (25% of the
10 Net Settlement Amount of \$96,750.00 divided by 1,743 Covered Employees), which is within the range
11 of penalties provided by other PAGA settlements approved by courts in California.⁸ (*Id.*, ¶ 30.)

12 **D. The Settlement is fair, reasonable, and adequate**

13 It is well-settled that a proposed settlement is not to be measured against a hypothetical ideal
14 result that might have been achieved. *See, e.g., 7-Eleven Owners for Fair Franchising v. Southland*
15 *Corp.* (2000) 85 Cal.App.4th 1135, 1150 (quoting *Linney v. Cellular Alaska P'ship* (9th Cir. 1998) 151
16 F.3d 1234, 1242 with approval: “This court has aptly held that ‘it is the very uncertainty of outcome in
17 litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The
18 proposed settlement is not to be judged against a hypothetical or speculative measure of what might
19 have been achieved by the negotiators.”). A settlement that represents only a fraction of the potential
20 recovery is still reasonable. *See, e.g., In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454,
21 459 (“It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery
22 does not per se render the settlement inadequate or unfair.”) (internal quotation marks omitted).

23
24 ⁸ *See Hartley v. On My Own, Inc.* (E.D. Cal. Aug. 25, 2020) No. 2:17-cv-00353-KJM-EFB, 2020 U.S.
25 Dist. LEXIS 154315, at *11 (approving settlement of PAGA claims resulting in \$61.18 per PAGA
26 settlement group member); *Whitworth v. Solarcity Corp.* (N.D. Cal. May 1, 2023) No. 16-cv-01540-
27 JSC, 2023 U.S. Dist. LEXIS 75564, at *12–13 (approving PAGA settlement resulting in approximately
28 \$35.00 per aggrieved employee); *Patel v. Nike Retail Servs.* (N.D. Cal. May 8, 2019) No. 14-cv-04781-
RS, 2019 U.S. Dist. LEXIS 77988 (approving settlement award amounting to an average of
approximately \$30 per aggrieved employee); *Ducote v. HSS, Inc.*, Alameda County Superior Court, Case
No. HG19036564, February 13, 2024 Order (approving PAGA settlement resulting in approximately
\$60 per aggrieved employee).

1 That said, the Settlement Amount compared to Defendants’ estimated exposure further supports
2 the reasonableness of the Settlement. Based on data provided by Defendants, Plaintiff estimated
3 Defendants’ undiscounted total exposure to be \$4,772,700.00. (Cottrell Decl., ¶ 31.) This estimate is
4 based on Defendants’ representation that 1,743 Covered Employees worked 47,727 Eligible Pay Periods
5 during the Covered Period. (*Id.*) This undiscounted exposure number is unrealistic, however,
6 considering Class Counsel’s factual and legal analyses in this case.

7 Throughout this litigation, Defendants have vigorously denied the allegations in Plaintiff’s
8 complaint and has denied any and all liability. Defendants have asserted numerous legal and factual
9 grounds available to defend this action, all of which present difficult hurdles for Plaintiff. For example,
10 Defendants contend that they provided Covered Employees’ resources like laptops and office landline
11 phones that employees could utilize to perform any necessary job tasks. Thus, Defendants assert that
12 Covered Employees’ use of their own cell phones and internet data plans were based on personal
13 preference and therefore, are not “necessary expenditures or losses” as required under Labor Code
14 §2802. (Cottrell Decl., ¶ 33.)

15 Plaintiff is aware that courts have explained that: “Ascertaining what was a necessary
16 expenditure will require an inquiry into what was reasonable under the circumstances....Section 2802
17 focuses not on whether an employee makes a request for reimbursement but rather on whether the
18 employer knows or has reason to know that the employee has incurred a reimbursable expense.” *Prado*
19 *v. Wal-Mart Stores* (C.D. Cal., Dec. 18, 2018, No. CV 17-05630 AB (KKx)) 2018 U.S. Dist. LEXIS
20 244193, *8–9 (internal quotations and citations omitted). Under these circumstances, there is a
21 significant risk that a factfinder may agree with Defendant that Covered Employees voluntarily used
22 their own cell phones and internet data plans – resulting in **zero** recovery in this case. *See id.*, at *13
23 (finding no injury and no violation under §2802: “Accordingly, it is not Wal-Mart’s duty to reimburse
24 employees for the voluntary use of their phones—for convenience, or other reasons—on the sales floor.

25 Although Plaintiff believes his case is strong, trials are inherently risky, and fees and costs would
26 increase significantly if the Action were to go to trial. Plaintiff’s claims would require substantial
27 additional preparation and discovery. They would require depositions of experts, the presentation of
28 percipient and expert witnesses at trial, as well as the consideration, preparation, and presentation of

1 voluminous documentary evidence and the preparation and analysis of expert reports. (*Id.*, ¶ 36.)
2 Plaintiff is aware of the risk that ultimately, the Court may impose limitations on trial that would make
3 it difficult for him to prove his case. Defendants contend that the factual circumstances under which
4 Covered Employees worked for Defendants were varied so that Plaintiff would not be able to overcome
5 manageability issues. Although manageability is not a basis for the Court to dismiss the action, Plaintiff
6 still faces the risk that the Court may limit the evidence in these circumstances. *See e.g., Estrada v.*
7 *Royalty Carpet Mills, Inc.*, 15 Cal. 5th 582, 619 (2024) (“We also emphasize that our holding that trial
8 courts lack inherent authority to strike a PAGA claim on manageability grounds does not preclude trial
9 courts from limiting the types of evidence a plaintiff may present or using other tools to assure that a
10 PAGA claim can be effectively tried.”) Moreover, there is a significant risk that even if liability is found,
11 the Court may choose to exercise its discretion to reduce PAGA penalties. *See* Cal. Lab. Code §
12 2699(e)(2) (“a court may award a lesser amount than the maximum civil penalty amount ...if, based on
13 the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,
14 arbitrary and oppressive, or confiscatory”). *See also, e.g., Fleming v. Covidien, Inc.*, 2011 U.S. Dist.
15 LEXIS 154590, *2 (C.D. Cal., Oct. 13, 2011) (reducing penalties by approximately 82% from
16 \$2,800,000 to \$500,000). By contrast, resolving this case by means of the Settlement will yield a prompt,
17 certain, and substantial recovery for the Covered Employees and the State. Such a result will benefit the
18 parties and the court system and will bring finality to over four years of litigation.

19 Accordingly, in light of the expense and risk of continued litigation, the Settlement is fair,
20 reasonable, and adequate.

21 **V. THE REQUESTED ATTORNEYS’ FEES AND COSTS ARE REASONABLE**

22 For their efforts and the substantial contingency risk Plaintiff’s counsel undertook in obtaining
23 a common-fund settlement to benefit the LWDA and the Covered Employees, the parties allocated 35%
24 of the Settlement Amount to Plaintiff’s counsel for reasonable attorneys’ fees, plus litigation costs. These
25 fees and costs are warranted under the law and within the range commonly awarded in similar cases.

26 PAGA provides that a plaintiff is entitled to recover reasonable attorneys’ fees, expenses, and
27 costs. Cal. Lab. Code § 2699(k)(1) provides that “[a]ny employee who prevails in any action shall be
28 entitled to an award of reasonable attorney’s fees and costs.” As discussed below, in a *qui tam* action

(which PAGA actions have been compared to), reasonable attorneys' fees and costs are typically awarded under the common-fund doctrine where, as here, the litigation creates a common fund of money in a specific amount for the benefit of others.

A. Plaintiff's Counsel Should Be Awarded the Requested Fees

The California Supreme Court held that "[a] PAGA representative action is ... a type of *qui tam* action." *Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, 382. A *qui tam* action allows a private person to sue to recover damages or penalties, all or part of which will be paid to the government. *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 501. A PAGA action is a type of *qui tam* action because the statute allows a plaintiff, acting as the proxy of the State's labor law enforcement agency, to sue his employer for Labor Code violations and recover civil penalties that otherwise would have been assessed and collected by the LWDA. *See Iskanian*, 59 Cal.4th at 382. Indeed, a majority of the civil penalties recovered in a PAGA action are paid to the State, with a smaller portion paid to the employees. *See* Cal Lab. Code § 2699(m).

Where a common fund is created in a *qui tam* action by the successful litigation of a plaintiff, the plaintiff's attorneys are entitled to recover their fees from the common fund:

Those benefiting from the recovery of the fund, in this case some depositors and eventually the People of the State of California, must bear their share of the cost of litigation. Fees for taxpayers' attorneys will be deducted from the judgment, and each claimant's share reduced proportionately. To the extent the judgment relies upon section 1021.5 for recovery of attorney fees, it must be modified to confine the award of fees to the common fund theory.

Bank of America v. Cory (1985) 164 Cal.App.3d 66, 91 (authorizing common fund fees in a *qui tam* taxpayer suit against certain banks). Likewise, in this case, through the successful efforts of Plaintiff and his attorneys, a common fund was created in the amount of \$675,000.00 for the benefit of the Covered Employees and the State. Thus, these beneficiaries must bear their share of the costs and attorneys' fees, to be deducted from the Settlement Amount under the common fund theory. *See id.* Such fees are deducted as a percentage of the settlement amount. *See, e.g., Boeing Co. v. Van Gemert* (1980) 444 U.S. 772, 478–82; *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967.

The California Supreme Court upheld the use of the common-fund theory of recovery for attorneys' fees in *Laffitte v. Robert Half Int'l. Inc.* (2016) 1 Cal.5th 480, 506. In *Laffitte*, the settlement created a common fund of \$19,000,000.00. The Court approved attorneys' fees in the amount of one

1 third of the gross settlement (*i.e.*, \$6,333,333.33) under the common-fund theory. *Id.* By awarding
2 counsel a percentage of the total recovery, rather than fees based on hours worked, the common-fund
3 method encourages attorneys to efficiently litigate to achieve the best results possible for the class. *See*
4 *Laffitte*, 1 Cal.5th at 492–94. Indeed, the “percentage-of-recovery method is generally favored in
5 common fund cases because it allows courts to award fees from the fund ‘in a manner that rewards
6 counsel for success and penalizes it for failure.’” *Id.* at 493 (quoting *In re Rite Aid Corp. Sec. Litig.* (3d
7 Cir. 2005) 396 F.3d 294, 300).

8 California state and federal courts routinely award attorneys’ fees in the range of 35% of the
9 common fund. *See, e.g., Roos v. Honeywell Int’l, Inc.*, 241 Cal. App. 4th 1472, 1489 (2015) (affirming
10 award of 37.5% of the common fund), disapproved on other grounds by *Hernandez v. Restoration*
11 *Hardware, Inc.*, 4 Cal. 5th 260, 287 (2018); *Martin v. Ameripride Servs., Inc.* (S.D. Cal. June 9, 2011)
12 No. 08cv440-MMA (JMA), 2011 U.S. Dist. LEXIS 61796, at *23 (“[C]ourts may award attorneys’ fees
13 in the 30–40% range in wage and hour ... actions that result in recovery of a common fund under \$10
14 million.”); *Gomez v. H & R Gunlund Ranches*, No. CV F 10-1163 LJO MJS, 2011 U.S. Dist. LEXIS
15 135424, at *6, 14–16 (E.D. Cal. Nov. 22, 2011) (awarding fees representing 45% of the common fund);
16 *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 297–98 (N.D. Cal. 1995) (“Class Counsel have
17 also cited 73 district court opinions in which fees in the range of 30–50 percent of the common fund
18 were awarded.”); *Pena v. Taylor Farms Pac., Inc.*, No. 2:13-cv-01282-KJM-AC, 2021 U.S. Dist. LEXIS
19 45326, at *13 (E.D. Cal. Mar. 10, 2021) (awarding fees amounting to 35% of the common fund).

20 **B. The requested fee award is fair and reasonable under the relevant factors.**

21 Among the factors considered in determining whether a requested fee percentage is reasonable
22 are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of counsel and the
23 quality of the work performed; (4) the contingent nature of the fee and the financial burden carried by
24 the plaintiffs; and (5) awards made in similar cases. *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290
25 F.3d 1043, 1048–50. For the reasons below, all these factors support an award here of 35% of the
26 common fund.

27 First, Plaintiffs’ counsel’s efforts resulted in a total Settlement Amount of \$675,000.00. This is a
28 fair and reasonable settlement and an especially favorable result in light of the number of Covered

1 Employees and the challenges Plaintiffs may have faced at trial. (Cottrell Decl., ¶ 41.) This result was
2 achieved by the work and success of Plaintiffs’ counsel, who negotiated the Settlement after extensive
3 preparation. (*Id.*) Second, Plaintiff faced risks and expense going forward with this litigation and
4 Plaintiffs’ counsel are experienced representative-action litigators. (Cottrell Decl., ¶42.). This
5 experience and expertise, combined with the high quality of work performed in this case by Plaintiffs’
6 counsel, resulted in the Settlement. (*Id.* at ¶ 41). Third, Plaintiff’s counsel has been representing Plaintiff
7 and the State in this matter on strictly contingency-fee basis. (Cottrell Decl., ¶ 42.) Plaintiff’s counsel
8 have exposed themselves to the risk of zero recovery after a substantial investment of time, money, and
9 resources, and have done so since the inception of the case without any payment or compensation. (*Id.*)

10 Although courts generally find it reasonable to award fees in contingency cases reflecting a
11 multiplier to lodestar, here, the requested fees are a *negative* multiplier to Plaintiff’s counsel’s lodestar.
12 The lodestar for SWCK in this Action, as of December 19, 2024, is \$340,589.50, reflecting 481.4 hours
13 of work. A true and correct copy of detailed breakdown of SWCK’s lodestar as of that date. (Cottrell
14 Decl., ¶ 43.) The lodestar for the W Employment Law, APC firm is \$54,960.00, reflecting 123.90 hours
15 of work. Declaration of Jacob Whitehead In Support of Motion for Approval of PAGA Settlement
16 (“Whitehead Decl.”) Together Plaintiff’s counsel’s lodestar is \$395,549.50. The requested fees are only
17 60% of lodestar. A cross-check of Plaintiff’s counsel’s lodestar results in a negative multiplier and
18 confirms that the requested fee award is a reasonable and fair payment. *see Wershba v. Apple Computer,*
19 *Inc.* (2001) 91 Cal.App.4th 224, 255; *see also Vizcaino*, 290 F.3d at 1047 (noting that multipliers
20 “ranging from one to four are frequently awarded ... when the lodestar method is applied” and
21 affirming fees where the cross-check multiplier was 3.65).

22 For the above reasons, a fee award in the amount of 35% of the Settlement Amount (or
23 \$236,250.00) is fair and reasonable.

24 **C. The requested litigation costs are reasonable.**

25 Plaintiff’s counsel also seeks to recover their expenses incurred in the prosecution of this action,
26 in the amount of \$25,000.00. Reasonable litigation expenses are ordinarily included with an award of
27 attorneys’ fees pursuant to California wage-and-hour law. (Cottrell Decl., ¶ 46.); *see Serrano v. Priest*
28 (1977) 20 Cal.3d 25, 35; *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1424. Attorneys are

1 also permitted to recover their litigation costs under PAGA. *See* Cal. Lab. Code § 2699(k)(1). Here,
2 Plaintiff’s counsel’s expenses were reasonable, necessary to the prosecution, and of the type customarily
3 billed to fee-paying clients. Accordingly, the requested attorneys’ fees and costs are reasonable
4 compensation for the successful result achieved and should be approved.

5 **VI. THE REQUESTED SERVICE AWARD IS REASONABLE**

6 Service awards “are intended to compensate ... representatives for work done on behalf of the
7 class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes,
8 to recognize their willingness to act as a private attorney general.” *Cellphone Termination Fee Cases*
9 (2010) 186 Cal.App.4th 1380, 1393–94.

10 Here, Plaintiff has substantially contributed his time and efforts over a period of nearly four years
11 in pursuing claims on behalf of the Covered Employees and the State, and Plaintiff’s role was crucial
12 in this case. (Cottrell Decl., ¶ 48; Declaration of Frank B. Hine (“Hine Decl.”), ¶ 8.) Plaintiff had
13 discussions with his counsel, worked with his counsel to review facts and answer questions, prepared
14 for a deposition and was deposed, assisted his counsel in their mediation efforts, and has generally
15 remained apprised of the case. (Cottrell Decl., ¶ 49; Hine Decl., ¶ 8.) Further, in agreeing to serve as
16 PAGA representative, Plaintiff formally agreed to accept the responsibilities of representing the
17 interests of all Covered Employees and the risks of having his name associated with a wage-and-hour
18 action. (Cottrell Decl., ¶ 50; Hine Decl., ¶ 11.) In addition, as set forth in the Settlement, Plaintiff agreed
19 to an individual release that covers potential claims that exceed the scope of the claims asserted in the
20 FAC and released by the Covered Employees. (Cottrell Decl., ¶ 51; Hine Decl., ¶ 12; Settlement,
21 ¶ 26(b).)

22 Plaintiff’s requested service award in the amount of \$15,000.00 is reasonable considering the
23 efforts he made and the risks he took and is consistent with service awards approved by courts in
24 California. *See, e.g., Amaraut v. Sprint/United Mgmt. Co.*, No. 19-cv-411-WQH-AHG, 2021 U.S. Dist.
25 LEXIS 147176, at *16–22 (S.D. Cal. Aug. 5, 2021) (approving \$15,000 and \$10,000 service awards);
26 *Villalpando v. Exel Direct, Inc.* (N.D. Cal. Dec. 9, 2016) No. 3:12-cv-04137-JCS, 2016 WL 7785852,
27 at *2 (approving \$15,000 service awards to each of three class representatives); *Schneider v. Catholic*
28 *Healthcare W.* (Super. Ct. S.F. Cnty. Jan. 13, 2017) No. CGC-10-506243, 2017 Cal. Super. LEXIS

1 2077, at *2 (approving \$15,000 service awards to two plaintiffs).

2 Accordingly, in light of these comparable awards and the efforts and risk undertaken by Plaintiff,
3 the Court should approve the requested service award.

4 **VII. CONCLUSION**

5 For the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion and
6 enter an order consistent with the proposed order submitted herewith.

7
8 Dated: January 30, 2025

**SCHNEIDER WALLACE
COTTRELL KONECKY LLP**



10 Carolyn H. Cottrell

11 Esther Bylsma

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13 Jacob N. Whitehead, Esq.

14 Gursimrat K. Singh, Esq.

15 *Attorneys for Plaintiff and the*
16 *Aggrieved Employees*

PROOF OF SERVICE

I, Melisa Flores, declare the following:

I am over the age of eighteen years and not a party to the within entitled action. I am employed at Schneider Wallace Cottrell Konecky LLP located at 2000 Powell Street, Suite 1400, Emeryville, California 94608.

On January 30, 2025, I served the following document(s) described as: **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR APPROVAL OF PAGA SETTLEMENT** on the following interested party(s):

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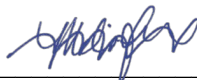
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☒ **BY ELECTRONIC SERVICE** by electronically mailing a true and correct copy in PDF format through SWCKW's electronic mail system to the email address(s) set forth above from my email: mflores@schneiderwallace.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 30, 2025, at Apple Valley, California.



Melisa Flores