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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

KARYN MONDO, on behalf of herself
and all similarly aggrieved employees,

Plaintiff,

v.

THE PAPE' GROUP, INC.; PAPE'
MATERIAL HANDLING, INC.; and DOES 1
through 50, inclusive,

Defendants.

Case No. 20CV001665

(Assigned to the Honorable Robert O'Farrell,
Dept. 13)

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION TO APPROVE
SETTLEMENT AGREEMENT
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: August 24, 2021

Time: 9:00 a.m.

Dept.: 13

Complaint Filed: June 16, 2020

FAC Filed: April 20, 2021

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on August 24, 2021, at 9:00 a.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Robert O’Farrell, judge presiding, in
4 Department 13 of the above referenced Court located at 1200 Aguajito Road, Monterey,
5 California 93940, Plaintiff Karyn Mondo (“Plaintiff”) will seek an Order approving the
6 concurrently filed PAGA Settlement Agreement pursuant to the Private Attorneys General
7 Act, Cal. Labor Code, § 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of
9 points and authorities, the accompanying declarations of B. James Fitzpatrick, Laura L.
10 Franklin, Larry W. Lee, Mai Tulyathan, and Plaintiff Karyn Mondo, upon the oral arguments
11 of counsel (should there be any), and on the complete records and file herein.

12
13 Date: August 2, 2021

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

15 By: /s/ Larry W. Lee
16 B. James Fitzpatrick
17 Larry W. Lee
18 Attorneys for Plaintiff,
KARYN MONDO, on behalf of herself
and all similarly aggrieved employees

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1 **I. INTRODUCTION**

2 Pursuant to the Private Attorneys General Act, Labor Code § 2698, *et seq.* (the
3 “PAGA”), Plaintiff Karyn Mondo (“Plaintiff”) hereby moves the Court for an order approving
4 the settlement as set forth in the concurrently filed PAGA Settlement Agreement¹ (the
5 “Settlement Agreement” or “Settlement”).

6 The operative Complaint in this case alleges that Defendant The Papé Group, Inc. and
7 Defendant Papé Material Handling, Inc. (collectively, “Defendants”) (Defendants and Plaintiff
8 together shall be referred to herein as the “Parties”) violated the PAGA by (i) failing to pay all
9 wages owed based on off-the-clock work; (ii) failure to provide off-duty meal periods or pay
10 premium compensation in lieu thereof; (iii) failure to provide off-duty rest periods or pay
11 premium compensation in lieu thereof; (iv) failure to timely pay wages upon separation of
12 employment; and (v) failure to provide accurate itemized wage statements. With respect to the
13 aforementioned PAGA claims, Plaintiff seeks to recover civil penalties against Defendants on
14 behalf of the State of California and other similarly aggrieved employees.

15 In addition to the PAGA claims above, Plaintiff has also asserted individual claims
16 against Defendants for violations of the Fair Employment and Housing Act (“FEHA”). The
17 Parties have settled Plaintiff’s individual claims separately, under a separate confidential
18 settlement agreement from the PAGA Settlement Agreement. For purposes of this Motion, the
19 Settlement that Plaintiff seeks approval is solely limited to the PAGA claims, and does not
20 pertain to Plaintiff’s individual claims.

21 As will be explained in further detail below, based on the California Supreme Court’s
22 opinion in *Arias v. Superior Court* (2009) 46 Cal. 4th 969 and *Iskanian v. CLS Transportation*
23 *Los Angeles, LLC* (2014) 59 Cal. 4th 348, Plaintiff can seek appropriate civil penalties as
24 called for under PAGA on behalf of the State of California and other similarly situated
25 aggrieved employees, without seeking class certification or meeting the requirements of class
26 certification (i.e. numerosity, typicality, commonality, and adequacy). As such, while the

27
28 ¹ Unless otherwise indicated, capitalized terms used herein have the same meaning as defined
in the Settlement Agreement.

1 PAGA settlement reached herein is on behalf of the State of California and other aggrieved
2 employees, the usual two-step preliminary and final approval process is not required. Rather,
3 as called for under Labor Code § 2699(l), all that is required is an approval by this Court of
4 any settlement of the PAGA claims by the Parties. The Parties have reached such a PAGA
5 settlement, and now seek this Court's approval of their settlement which provides for the
6 payment of civil PAGA penalties.

7 As demonstrated below, the proposed settlement warrants this Court's approval.
8 Significantly, this settlement was reached after the exchange of significant information,
9 including the size of the PAGA group and the number of pay periods at issue, sample of
10 employee time and payroll records, and documents pertaining to Defendants' relevant payroll
11 policies. Pursuant to the terms of the Settlement Agreement, Defendants will pay the gross
12 settlement amount of \$892,500.00 (the "Gross Settlement Fund"). This amount encompasses
13 a service award to Plaintiff in the amount of \$2,000.00, attorneys' fees to Plaintiff's Counsel in
14 the amount of \$297,500.00, Plaintiff's Counsel's actual litigation costs in the amount of
15 \$15,276.45, settlement administration costs in the amount of \$4,150.00, approximately
16 \$430,180.16 in civil penalties to the Labor & Workforce Development Agency ("LWDA")
17 pursuant to the PAGA, and approximately \$143,393.39 to be distributed to the Aggrieved
18 Employees. The proposed settlement also has a limited and tailored release for Aggrieved
19 Employees that does not release any of their substantive claims. Specifically, the Aggrieved
20 Employees are releasing only claims for civil penalties under PAGA predicated on the PAGA
21 violations brought in this action and for violations of Labor Code §§ 201-204, 226, 226.7,
22 227.3, 510, 512, 558, 1194, and 1198.

23 In light of the above, the proposed settlement constitutes an adequate, fair, and
24 reasonable settlement on behalf of the LWDA and Aggrieved Employees, and accomplishes
25 the goals of PAGA.

26 **II. FACTUAL AND PROCEDURAL BACKGROUND**

27 **A. Summary of the Litigation.**

28 Plaintiff asserts claims against Defendant under the PAGA based on Defendants'

1 failure to pay all minimum and overtime wages owed based on off-the-clock work, failure to
2 provide off-duty meal periods or pay premium compensation in lieu thereof, failure to provide
3 off-duty rest periods or pay premium compensation in lieu thereof, failure to timely pay wages
4 upon separation of employment, and failed to provide accurate itemized wage statements.
5 Based on these allegations, Plaintiff asserts violations of California Labor Code §§ 201-204,
6 226, 226.7, 227.3, 510, 512, 558, 1174, 1194, 1197, and 1198 against Defendants.
7 (Declaration of Mai Tulyathan (“Tulyathan Decl.”) at ¶ 2.)

8 On or about April 9, 2020, Plaintiff submitted written notice under Labor Code §
9 2699.3 (the “PAGA Notice”) to the LWDA and Defendants, predicated on the alleged
10 violations of the Labor Code described above. (*Id.* at ¶ 3.) Thereafter, on June 16, 2020,
11 Plaintiff filed her PAGA representative action complaint against Defendants in the Superior
12 Court of California, County of Monterey, alleging a cause of action for violation of Labor
13 Code § 2698, *et seq* (the “Action”). (*Id.* at ¶ 4.)

14 As explained above, in addition to the aforementioned PAGA claims, Plaintiff has also
15 asserted individual claims against Defendants for violations of the FEHA. On April 20, 2021,
16 upon the Parties’ stipulation and Court approval, Plaintiff filed her First Amended Complaint
17 to add individual causes of action for (1) sex/gender discrimination, (2) sexual harassment, (3)
18 failure to investigate and prevent discrimination and harassment, (4) retaliation, (5) wrongful
19 termination, and (6) intentional infliction of emotional distress. The First Amended Complaint
20 is the operative Complaint (“Complaint”). The Parties have settled Plaintiff’s individual
21 claims separately, under a separate confidential settlement agreement from the PAGA
22 Settlement Agreement. (*Id.* at ¶ 9.)

23 **B. The Parties Agree to Mediation and This Settlement.**

24 After initiation of the lawsuit, the Parties commenced formal discovery. Defendants
25 propounded written discovery on September 18, 2020. (Tulyathan Decl. at ¶ 5.) Shortly
26 thereafter, the Parties met and conferred in connection with the Case Management Conference
27 and subsequently agreed to participate in private mediation. (*Id.* at ¶ 6.)

28 On March 17, 2021, the Parties participated in a full-day mediation with mediator

1 Michael Loeb, Esq. (*Id.* at ¶ 7.) In connection with mediation, the Parties engaged in informal
2 discovery. Defendants provided Plaintiff with pay data pertaining to the PAGA aggrieved
3 employees, the number of pay periods at issue, a sample of employee time and payroll records
4 of employees, and Defendants’ pertinent payroll policies and practices. (*Id.*) The data and
5 documents allowed Plaintiff’s counsel to analyze liability and exposure in preparation for the
6 mediation. (*Id.*) Based on the data provided by Defendants, Plaintiff’s Counsel calculated the
7 maximum PAGA penalties at issue at approximately \$14,060,000. (*Id.* at ¶ 13.)

8 Following arm’s-length negotiations and discussions between the Parties facilitated by
9 Mr. Loeb, the Parties ultimately reached the current settlement of Plaintiff’s PAGA claims and
10 individual claims. (Tulyathan Decl. at ¶ 8.) In resolution of Plaintiff’s PAGA claims, the
11 Parties entered into the Settlement Agreement, a true and correct copy of which is attached as
12 Exhibit A to the Declaration of Mai Tulyathan. (*Id.*, Ex. A) With respect to Plaintiff’s
13 individual FEHA claims, the Parties entered into a separate, confidential settlement agreement
14 to separately resolve Plaintiff’s individual claims. (Tulyathan Decl. at ¶ 9.)

15 Based on the foregoing and on their own independent investigation and evaluation,
16 Plaintiff’s Counsel is of the opinion that the PAGA settlement with Defendants for the
17 consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and
18 adequate, and is in the best interests of Plaintiff, the State of California, and the Aggrieved
19 Employees. (Tulyathan Decl. at ¶ 10.) Accordingly, the Parties desire to settle, compromise,
20 and discharge Plaintiff’s PAGA claims as set forth in the Settlement Agreement.

21 **III. SUMMARY OF THE PROPOSED PAGA SETTLEMENT**

22 The material terms of the PAGA settlement are described below and set forth in detail
23 in the concurrently filed Settlement Agreement.

24 **A. The Aggrieved Employees**

25 The aggrieved employees affected by this Settlement are defined as “all current and
26 former non-exempt employees who worked for Defendants in the State of California at any
27 time during the PAGA Period” (“Aggrieved Employees”). (Settlement Agreement ¶ A.1.) The
28 PAGA Period in this matter runs from April 9, 2019, through the date the Court enters an

1 order approving the Settlement. (*Id.* ¶ A.2.)

2 Based upon Defendants' records, there are 740 Aggrieved Employees during the
3 PAGA Period. (*Id.* ¶ A.1.)

4 **B. Settlement Sum and Allocation**

5 The Settlement Agreement requires Defendants to pay the Gross Settlement Fund of
6 Eight Hundred Ninety-Two Thousand Five Hundred Dollars (\$892,500.00). (*Id.* ¶ B.6.) The
7 terms of the Settlement Agreement provide for an award of attorneys' fees and costs, service
8 award to Plaintiff for serving as the PAGA representative, settlement administration costs, and
9 payment to the LWDA pursuant to the PAGA.

10 With respect to attorneys' fees to Plaintiff's Counsel, the Settlement Agreement
11 specifies a payment of one-third of the Gross Settlement Fund, *i.e.* Two Hundred Ninety-
12 Seven Thousand Five Hundred Dollars (\$297,500.00). (Settlement Agreement ¶ B.26.)
13 Although the Settlement provides for a payment of up to Thirty-Five Thousand (\$35,000.00)
14 in actual litigation costs, Plaintiff only seeks \$15,276.45 of that amount. (*Id.*; Declaration of
15 Larry W. Lee ("Lee Decl.") at ¶ 11; Declaration of B. James Fitzpatrick ("Fitzpatrick Decl.")
16 at ¶ 9.) With respect to settlement administration costs, the Settlement Agreement provides
17 for a payment of up to \$4,150.00 to be paid to the Settlement Administrator for the fees and
18 expenses associated with the administration of this PAGA settlement. (Settlement Agreement
19 ¶ B.26.) In addition, the settlement contemplates a service award to Plaintiff in recognition of
20 her efforts in prosecuting this action as the PAGA representative, in the amount of up to
21 \$2,000.00. (Settlement Agreement ¶¶ B.11., B.26.)

22 Assuming the aforementioned amounts are fully awarded by this Court, the remaining
23 sum of \$573,573.55 will be distributed to the LWDA and Aggrieved Employees on a 75
24 percent / 25 percent basis pursuant to the PAGA. (*Id.* ¶ B.3; Tulyathan Decl. at ¶ 11.)
25 Accordingly, 75 percent of \$573,573.55, or approximately \$430,180.16, will be paid to the
26 LWDA, and 25 percent of \$573,573.55, or \$143,393.39, will be distributed to the PAGA
27 Aggrieved Employees. (*Id.*; Tulyathan Decl. at ¶ 11.)

28 The portion of the Civil Penalties distributed to Aggrieved Employees will be

distributed on a *pro rata* basis, based on the number of pay periods each individual Aggrieved Employee was paid wages during the PAGA Period. (*Id.* ¶ B.28.) Based on the number of Aggrieved Employees, employees will be entitled to recover, on a raw average, of approximately **\$193.77** each. (Tulyathan Decl. at ¶ 12.) The amount each Aggrieved Employee will be entitled to recover may be greater or lower than this average depending on the actual number of pay periods he or she was paid wages during the PAGA Period. (*Id.*) This is fair, as it directly allocates greater penalties to individual Aggrieved Employees who have allegedly suffered greater harm. (*Id.*)

C. Scope of the Released Claims

In exchange for the payments described above, Plaintiff, the State of California, and Aggrieved Employees will release the Released Parties from:

All claims for penalties under the Labor Code Private Attorneys General Act (“PAGA”) predicated on off-the-clock violations, failure to pay wages, failure to provide meal periods, failure to provide rest periods, failure to timely pay wages upon separation of employment, failure to provide accurate itemized wage statements, failure to pay vacation wages, violations of Labor Code §§ 201-204, 226, 226.7, 227.3, 510, 512, 558, 1194, 1197, 1198, and all other claims under the PAGA based on the facts as alleged in the Complaint or PAGA letter that accrued during the PAGA Period.

(Settlement Agreement ¶ B.9.) The Settlement, however, does not release Defendants from violations of any predicate statutes other than PAGA, and will not affect a waiver of individual claims by Aggrieved Employees against Defendants for any of the underlying Labor Code claims. The release is expressly limited to claims for civil penalties under PAGA pertaining to the PAGA allegations raised in this lawsuit. (*Id.*)

IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED

A. PAGA Overview.

Prior to the enactment of PAGA, many of the penalties provided against employers for violations of certain Labor Code provisions were solely within the province of the California Department of Labor to seek, enforce, and assess. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.) However, due to the lack of financing to California’s agencies and the potential

1 number of Labor Code violations by California employers, the California Legislature found
2 that it was in the public interest to allow aggrieved employees to act as private attorneys
3 general and to enforce and recover penalties on behalf of other similarly situated aggrieved
4 employees for Labor Code violations committed by their employers. (*Id.*) As such, PAGA
5 was enacted to allow such enforcement and recovery by private individuals who have been
6 aggrieved by their employers. Under the PAGA, 75% of any penalties recovered under PAGA
7 by an aggrieved employee is to be paid to the state agency, the LWDA, and the remaining
8 25% is to be shared amongst the aggrieved employees. (Cal. Lab. Code § 2699, subd. (i).)

9 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
10 employee must first provide written notice to the LWDA and the employer of the particular
11 Labor Code violation(s) alleged to have been violated by the employer. (*See* Cal. Labor Code
12 § 2699.3, subd. (a)(1).) Once the LWDA notifies the aggrieved employee that it does not
13 intend to investigate the alleged violations or the time for the LWDA to investigate the
14 violations passes, the aggrieved employee is allowed to proceed in a civil action against the
15 employer on behalf of all other similarly aggrieved employees. (*See* Cal. Labor Code §
16 2699.3, subd. (a)(2)(A).)

17 In 2009, the California Supreme Court considered the issue of whether an aggrieved
18 employee who brings a PAGA claim needs to meet class certification requirements. (*Arias*, 46
19 Cal. 4th at p. 976.) After a substantial review of the legislative history of PAGA, the
20 California Supreme Court held that an aggrieved employee's representative action brought on
21 behalf of other similarly aggrieved employees against an employer for PAGA violations do
22 not need to meet the requirements for class certification. (*Id.* at pp. 975; 980-88.) As held by
23 the California Supreme Court, a plaintiff bringing suit under PAGA does so as the proxy or
24 agent of California's labor law enforcement agencies. (*Id.* at p. 986.) Because an employee's
25 PAGA action functions as a substitute for an action brought by the government itself, a
26 judgment in the PAGA action binds all those who would be bound by a judgment in an action
27 brought by the government. (*Id.*)

28 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the
Superior Court must "review and approve any settlement of any civil action filed pursuant to"

1 PAGA. (Cal. Lab. Code § 2699, subd. (l)(2).) As the Parties to this current PAGA action
2 have reached such an agreement, the Parties now seek this Court’s approval as to the
3 settlement of the penalties amount.

4 **B. Class Action Settlement Standards Do Not Govern the Settlement Approval**
5 **Process for PAGA Claims.**

6 In class action cases, the purpose of the Court’s preliminary evaluation of the
7 settlement is to determine whether it is within the “range of reasonableness,” and thus whether
8 notice to the class of the terms and conditions of the settlement, and the scheduling of a formal
9 fairness hearing, are worthwhile. (*See* Alba Conte & Herbert B. Newberg, *4 Newberg on*
10 *Class Actions* § 11.25 *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004) (“*Newberg*”).) The
11 “judge must make a preliminary determination on the fairness, reasonableness, and adequacy
12 of the settlement terms and must direct the preparation of notice of the certification, proposed
13 settlement, and date of the final fairness hearing.” (*Manual for Complex Litigation, Fourth* §
14 21.632 (Fed. Jud. Ctr., 4th ed. 2004).) To make the preliminary fairness determination, courts
15 may consider several relevant factors, including “the strength of the plaintiff’s case; the risk,
16 expense, complexity, and likely duration of further litigation; the risk of maintaining class
17 action status through trial; the amount offered in settlement; the extent of discovery completed
18 and the stage of the proceedings; [and] the experience and views of counsel...” (*See Hanlon*
19 *v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026.)

20 By contrast, court approval of PAGA settlements is governed by section 2699(1) of the
21 Labor Code, which provides, in relevant part: “The court shall review and approve any
22 penalties sought as part of a proposed settlement agreement pursuant to this part.” The Parties
23 are not obligated to “satisfy class action requirements,” including the standards for class action
24 settlement approval. (*Arias*, 46 Cal.4th at pp. 980-988 (affirming lower court’s holding that
25 “plaintiff need not satisfy class action requirements” to assert a PAGA claim).)

26 Notably, unlike the class action settlement approval process, there is also no statutory
27 mechanism for this Court to conduct a two-step settlement approval review. (Cal. Lab. Code §
28 2699, subd. (1).) In addition, “[u]nnamed employees need not be given notice of the PAGA

1 claim, nor do they have the ability to opt-out of the representative PAGA claim” or “contest a
2 settlement, if any, reached between the parties.” (*Ochoa-Hernandez v. Cjaders Foods, Inc.*
3 (N.D. Cal. 2010) 2010 WL 1340777, p. *13.)

4 **C. The Settlement is Reasonable and Effectuates PAGA’s Objectives.**

5 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
6 ultimately receive as a result of a settlement, but instead, on whether the total settlement
7 amount achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to
8 supplement agency funding for purposes of education of employers and employees and
9 enforcement of labor laws and rights. (*See* Cal. Lab. Code § 2699, subd. (i).) Here, the
10 settlement represents an extraordinary recovery for the Aggrieved Employees and the State
11 and accomplishes PAGA’s primary objective to enforce the Labor Code, and thus the
12 Settlement certainly effectuates PAGA’s purpose. (*See O’Connor v. Uber Techs, Inc.* (N.D.
13 Cal. August 18, 2016) 2016 WL 4398271, at p. *18 (noting that deterring noncompliance with
14 the Labor Code is one of PAGA’s objectives).)

15 The Settlement is also consistent with the State’s public policy favoring resolution of
16 disputes. “California law favors the settlement of disputes as our high court clarified in
17 *Neary*[]. Settlement is efficient; it reduces costs, saves resources, and minimizes court
18 congestion. [] The parties are best positioned to understand their interests and resolve a dispute
19 in a mutually beneficial manner without court intervention into the settlement.” (*Consumer*
20 *Advocacy Group, Inc. v. Kintetsu* (2006) 141 Cal.App.4th 46, 62-63 (citing *Neary v. Regents*
21 *of Univ. of Cal.* (1992) 3 Cal.4th 273, 277- 278).)

22 **D. The Scope of the Release is Appropriately Limited.**

23 The limited scope of the release supports approval of this PAGA settlement. If
24 approved, the Settlement would release the Released Parties from PAGA claims predicated on
25 the violation of Labor Code §§ 201-204, 226, 226.7, 227.3, 510, 512, 558, 1194, 1197, and
26 1198, during the PAGA Period, and nothing more. The Settlement would not impact the
27 Aggrieved Employees’ ability to pursue PAGA claims predicated on other allegations aside
28 from those raised in this lawsuit or any Labor Code claims not predicated on PAGA.

1 Because an aggrieved employee's PAGA action is a substitute for an action brought by
2 the government, "judgment in [a PAGA] action is binding not only on the named employee
3 plaintiff but also on government agencies and any aggrieved employee not a party to the
4 proceeding." (*Arias*, 46 Cal.4th at p. 986.) However, "the nonparty employees, because they
5 were not given notice of the action or afforded any opportunity to be heard, would not be
6 bound by the judgment as to remedies other than civil penalties." (*Id.* at p. 987; *see also*, Cal.
7 Lab. Code § 2699(g)(1) (non-party aggrieved employees retain all rights "to pursue or recover
8 other remedies available under state or federal law, either separately or concurrently with an
9 action taken under this part").

10 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly
11 confined to the statutory penalties available under PAGA for violations of Labor Code §§ 201-
12 204, 226, 226.7, 227.3, 510, 512, 558, 1194, 1197, and 1198. (Settlement Agreement ¶ B.9.)
13 The release is therefore appropriately tailored and the settlement should be approved.

14 **E. The Settlement is Fair and Reasonable as it Recognizes the Inherent Risk of**
15 **Litigation.**

16 Although Plaintiff is reasonably confident that she would prevail at trial, proceeding in
17 litigation entails significant risk on the underlying merits of Plaintiff's theory, in addition to
18 the still-developing law under PAGA. (Tulyathan Decl. at ¶ 16.)

19 **1. Plaintiff's Claims are Contested**

20 Plaintiff asserts that her representative PAGA claims are based on the allegations that
21 Defendants failed to pay all wages owed based on off-the-clock work, failed to provide off-
22 duty meal periods or pay premium compensation in lieu thereof, failed to provide off-duty rest
23 periods or pay premium compensation in lieu thereof, failed to timely pay wages upon
24 separation of employment, and failed to provide accurate itemized wage statements.
25 (Tulyathan Decl. at ¶ 2.)

26 Defendants have denied violations of any applicable laws and liability for any claims
27 asserted in the Action, as Defendants claim that their wage and hour policies complied with
28 California law. Defendants also argued that even if the Court ultimately found their

1 employment practices violative of the Labor Code, the Court has discretion under PAGA to
2 reduce the maximum allowable PAGA penalties at its discretion. Defendants may have also
3 sought summary judgment or proceeded to trial. Should Defendants have prevailed, the State
4 of California and Aggrieved Employees would have been left with zero recovery.

5 **2. Recovery of Penalties After Trial.**

6 Based on the data provided by Defendants, Plaintiff's Counsel calculated the maximum
7 PAGA penalties for the Labor Code violations at issue at approximately \$14,060,000.
8 (Tulyathan Decl. at ¶ 13.) However, even if Plaintiff were to prevail on the merits of the
9 PAGA claim, the potential recovery is uncertain.

10 Pursuant to Labor Code § 2699(f)(2), the Court can decline to award the full amount of
11 PAGA penalties where "if, based on the facts and circumstances of the particular case, to do
12 otherwise, would result in an award that is unjust, arbitrary and oppressive, or
13 confiscatory." Indeed, as shown in the Court of Appeal's decision in *Carrington v. Starbucks*
14 *Corp.* (2018) 30 Cal.App.5th 504, 517, while the plaintiff prevailed on his PAGA claim upon
15 trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the
16 employer's good faith attempt at complying with the law. Upon review, the Court of Appeal
17 found such reduction to be proper. (*Id.* at p. 539; *see O'Connor*, 2016 WL 4398271, at p. *17
18 (noting that even if PAGA penalties amounted to \$1 billion, such award "could well be
19 reduced, as a court may reduce the penalty when to do otherwise would result in an award that
20 is unjust, arbitrary and oppressive, or confiscatory").)

21 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
22 penalties. However, Plaintiff is aware that Defendants could make a compelling argument to
23 the contrary. Even if there was any finding of liability, Defendants have argued that they did
24 not act willfully, intentionally, or in bad faith. As such, the Court may be disinclined to award
25 full PAGA penalties. On this basis, the Court again may find there is reason to significantly
26 reduce the PAGA penalties awarded.

27 The Court's assessment of the proposed Settlement must take into account that any
28 penalties awarded may be subject to substantial reduction. When this is considered, in

1 conjunction with the history of PAGA case law and settlements, and the fact that Plaintiff may
2 recover nothing, the proposed settlement is patently reasonable. Settlement for this reduced
3 value allows for the distribution of penalties in an amount which accounts for the risk of
4 continued litigation, and Defendants' likely arguments that higher penalties would have been
5 confiscatory. It also sufficiently deters Defendants from engaging in similar conduct in the
6 future, which is one of the primary goals of PAGA.

7 Here, the proposed settlement amounts to approximately **6.35%** of the total potential
8 liability in this matter, which exceeds the percentage of the overall settlement value of other
9 PAGA settlements that have been approved by other courts—including those that provide for
10 less than the one percent allocation to PAGA penalties. (*See, e.g., Hopson v. Hanesbrands*
11 *Inc.* (N.D. Cal. Apr. 3, 2009) 2009 WL 928133, *9 (approving total PAGA allocation that was
12 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.* (N.D. Cal. Aug. 4, 2015)
13 2015 WL 5439000, *8 (approving total PAGA allocation that was 0.5% of \$10,000,000 gross
14 settlement); *Lusby v. Gamestop Inc.* (N.D. Cal. 2013) 97 F.R.D. 400, 407 (approving total
15 PAGA allocation that was 0.67% of \$750,000 gross settlement).

16 A PAGA allocation need not represent any particular percentage of the overall
17 settlement value in order to secure court approval, and courts routinely approve PAGA
18 settlements representing only a tiny fraction of the overall settlement value. Here, the
19 proposed settlement sum in this case significantly exceeds the typical percentage of the overall
20 settlement value of other PAGA settlements and should be approved by the Court.

21 **F. The Attorneys' Fees are Reasonable.**

22 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. (Cal. Lab. Code
23 § 2699, subd. (g).) Similar to awarding fees in a class action, California state and federal
24 courts have recognized that an appropriate method for determining award of attorneys' fees for
25 representative actions is to use a percentage of the total value of benefits to class members by
26 the settlement. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254; *Serrano*
27 *v. Priest* (1977) 20 Cal. 3d 25, 34 ("*Serrano III*"); *Boeing Co. v. Van Gemert* (1980) 444 U.S.
28 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1997) 557 F. 2d 759, 769.) The purpose

1 of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation
2 costs proportionally among all the beneficiaries so that the active beneficiary does not bear the
3 entire burden alone.” (*Vincent*, 557 F. 2d at p. 769.)

4 The Common Fund doctrine is predicated on the principle of preventing unjust
5 enrichment. When a litigant’s efforts create or preserve a fund from which others derive
6 benefits, he may require the passive beneficiaries to compensate those who created the fund.
7 Both California state and federal courts have embraced this doctrine. (*Serrano III*, 20 Cal. 3d
8 at p. 35; *Vincent*, 557 F.2d at p. 769.) Similarly, in *City and County of San Francisco v. Sweet*
9 (1995) 12 Cal. 4th 105, 110, the California Supreme Court recognized that the common fund
10 doctrine has been applied “consistently in California when an action brought by one party
11 creates a fund in which other persons are entitled to share.” The reasons for applying the
12 common fund doctrine include: “fairness to the successful litigant, who might otherwise
13 receive no benefit because his recovery might be consumed by the expenses; correlative
14 prevention of an unfair advantage to the others who are entitled to share in the fund and who
15 should bear their share of the burden of its recovery; encouragement of the attorney for the
16 successful litigant who will be more willing to undertake and diligently prosecute proper
17 litigation for the protection or recovery of the fund if he is assured that he will be properly and
18 directly compensated should his efforts be successful.” (*Id.*)

19 Indeed, most recently, the California Supreme Court has also held that the award of
20 attorneys’ fees in common fund wage and hour class action settlements should start with the
21 percentage method. (*See Laffitte v. Robert Half Int’l* (2016) 1 Cal. 5th 480, 503 (“We join the
22 overwhelming majority of federal and state courts in holding that when class action litigation
23 establishes a monetary fund for the benefit of the class members, and the trial court in its
24 equitable powers awards class counsel a fee out of that fund, the court may determine the
25 amount of a reasonable fee by choosing an appropriate percentage of the fund created.”).)

26 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
27 percent of the fund. (*Laffitte*, 1 Cal.5th at p. 506.) And this was based on a lodestar amount
28 that required a multiplier of 2.13. (*Id.* at p. 487.) As the Court held, only when the multiplier
is “extraordinarily high or low [should] the trial court [] consider whether the percentage

1 method should be adjusted so as to bring the imputed multiplier within a justifiable range.”
2 (*Id.* at p. 505.)

3 As a secondary support for the percentage of the fund method, when fees are allocated
4 by percentage method, courts have discretion to “cross-check” the fees awarded through the
5 lodestar method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation,
6 when used in this manner, does not override the trial court’s primary determination of the fee
7 as a percentage of the common fund and thus does not impose an absolute maximum or
8 minimum on the potential fee award.” (*Laffitte*, 1 Cal.5th at p. 505 (emphasis added); *In re*
9 *Rite Aid Corp. Secs. Litig.* (3d Cir. 2005) 396 F.3d 294, 306-307 (“[The lodestar cross-check
10 does not trump the primary reliance on the percentage of common fund method”).)

11 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a
12 lodestar cross-check is extraordinarily high or low, the trial court should consider whether the
13 percentage used should be adjusted so as to bring the imputed multiplier within a justifiable
14 range, but the court is not necessarily required to make such an adjustment.” (*Id.*) Thus, a
15 lodestar cross-check is aimed at astronomical multipliers. Indeed, cross-checks are not
16 required; in many cases, performing a cross-check “undermines” one of the primary reasons
17 for using the percentage method: aligning counsel’s incentives with the benefits delivered to
18 the class and discouraging protracted litigation. (*Id.* at p. 506 (finding trial courts “retain the
19 discretion to forgo a lodestar cross-check”); *Report of the Third Circuit Task Force, Court*
20 *Awarded Attorney Fees* (1985) 108 F.R.D. 237, 258; *Lealao*, 82 Cal.App.4th 19, pp. 29-30
21 (citing the recommendations of the Third Circuit Task Force with approval and observing that
22 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
23 authorities, who have been most vocal about the manner in which it exacerbates the problem
24 of ‘cheap settlements’ and burdens already overworked trial judge”).)

25 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2
26 to 4 or even higher.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255; *see*
27 *also, e.g., Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (applying
28 a 2.52 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal.App.4th at 60

1 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*
2 (1988) 203 Cal.App.3d 78 (affirming a 2.34 multiplier without remand).)

3 With respect to Plaintiff's Counsel's lodestar, to date, approximately 332.65 hours
4 have been expended by Plaintiff's Counsel this matter. (Fitzpatrick Decl. at ¶ 4, Ex. A; Lee
5 Decl. at ¶ 8, Ex. A; Tulyathan Decl. at ¶ 23, Ex. B.) Plaintiff's Counsel expects to incur
6 approximately 18 additional hours of attorney time in handling post-approval matter and any
7 settlement issues. (Lee Decl. at ¶ 9; Tulyathan Decl. at ¶ 24.) Mr. Lee requests an hourly rate
8 of \$750.00 per hour. (Lee Decl. at ¶ 10.) Ms. Tulyathan requests an hourly rate of \$500.00
9 per hour. (Tulyathan Decl. at ¶ 25.) Mr. Fitzpatrick and Ms. Franklin request an hourly rate of
10 \$550.00 per hour of attorney time, and an hourly rate of \$185.00 per hour for paralegal work.
11 (Fitzpatrick Decl. at ¶ 8.) The courts are quite liberal in the evidence required to prove an
12 attorney's hours. Detailed time records are not required. An attorney's testimony alone may
13 suffice: "Testimony of an attorney as to the number of hours worked on a particular case is
14 sufficient evidence to support an award of attorney fees, even in the absence of detailed time
15 records." (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559.

16 Reasonable hours include, in addition to time spent during litigation, the time spent
17 before the action is filed, including time spent interviewing the clients, investigating the facts
18 and the law, and preparing the initial pleadings. (*New York Gaslight Club, Inc. v. Carey*
19 (1980) 447 U.S. 54, 62.) Further, the fee award should include fees incurred to establish and
20 defend the attorneys' fee claim. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639 [*Serrano IV*].)

21 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
22 experience in the relevant community. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084,
23 1095.) The court may consider other factors when determining a reasonable hourly rate, e.g.,
24 the attorney's skill and experience, the nature of the work performed, the relevant area of
25 expertise and the attorney's customary billing rates. (*Flannery v. California Highway Patrol*
26 (1998) 61 Cal.App.4th 629, 632-33.)

27 Plaintiff's Counsel's skill and experience justify the requested rate. As shown in the
28 supporting declarations, Plaintiff's Counsel have significant experience in the area of

1 employment and wage and hour class actions. Specifically, Plaintiff's Counsel's practice
2 focuses on representing employees in employment matters, particularly wage and hour cases.
3 (Lee Decl. at ¶¶ 6-7; Tulyathan Decl. at ¶¶ 20-22; Fitzpatrick Decl. at ¶ 7, Ex. B; Franklin
4 Decl. at ¶ 3.) As such, based on the hours and applicable rate, the total lodestar to be
5 expended by Plaintiff's Counsel through finalizing this Settlement will be approximately
6 \$187,748.75, based on 350.65 total hours. (Lee Decl. at ¶¶ 8-9, Ex. A; Tulyathan Decl. at ¶¶
7 23-24, Ex. B; Fitzpatrick Decl. at ¶¶ 4 and 8, Ex. A.)

8 Once the court establishes the lodestar amount, it may enhance the fee award by a
9 multiplier in order to make an appropriate fee award. (*Serrano III*, 20 Cal.3d at p. 48.) The
10 pertinent factors include the difficulty of the questions involved and the skill in presenting
11 them, the contingent nature of the fee award, the extent to which the litigation precluded other
12 employment, and the percentage-of-the-fund the attorney would have received on the fair
13 market. (*Id.*; *Lealao*, 82 Cal.App.4th at p. 49.) However, this list is not exhaustive and the
14 court can consider other factors it deems important in setting the multiplier. (*Ketchum v.*
15 *Moses* (2001) 24 Cal.4th 1122, 1139.)

16 It is also critical to note that prompt settlement cannot be used to diminish the fee or
17 the enhancement based on a percentage-of-the-fund. (*Lealao*, 82 Cal.App.4th at p. 52 (the
18 promptness of settlement "cannot be used to justify the refusal to apply a multiplier").)
19 According to *Lealao*, courts placed "an extraordinarily high value" on settlement, and counsel
20 should be rewarded, not punished, for achieving this goal in a timely fashion. (*Id.*)

21 Here, based upon Plaintiff's Counsel's lodestar of \$187,748.75, Plaintiff's request for a
22 multiplier of **1.58** is reasonable and fair, particularly based on the factors described above and
23 that it is below the typical range of multipliers awarded by the court. (*Wershba, supra*, at p.
24 224 (noting that courts using the lodestar method to calculate attorney fees awards in class
25 actions typically apply multipliers in the range of 2 to 4); *Boyd v. Bank of Am. Corp.* (C.D.
26 Cal. Nov. 18, 2014) 2014 U.S. Dist. LEXIS 162880 (awarding 33% of the common fund,
27 based on a multiplier of 2.58, in a wage and hour class action settlement); *Vandervort v.*
28 *Balboa Capital Corp.* (C.D. Cal. 2014) 8 F.Supp.3d 1200, 1210 (awarding 33% of the

1 common fund, based on a multiplier of 2.52).)

2 Should the Court be inclined to apply a flat rate of \$550.00 per hour to all of Plaintiff's
3 Counsel time, the lodestar would be \$183,093.75. Thus, the multiplier requested would still
4 be 1.62, which is well within the range of acceptability.

5 As such, the requested fee award is fair and reasonable, and should be awarded in its
6 entirety. Plaintiff's Counsel risked not only a great deal of time, but also a great deal of
7 expense to ensure the successful litigation of this action on behalf of all Class Members. For
8 such reasons, Plaintiff's Counsel's request for attorneys' fees in the amount of \$297,500.00 is
9 fair, reasonable, and adequate.

10 **G. The Costs Are Reasonable.**

11 Additionally, Plaintiff's Counsel's reimbursement of actual litigation costs in the
12 amount of \$15,276.45 is also reasonable, especially in light of the fact that the Parties agreed
13 that Plaintiff's counsel may seek up to \$35,000.00 as reimbursement for litigation costs under
14 the Settlement Agreement. (See Settlement Agreement at ¶ B.26; Lee Decl. at ¶ 11, Ex. B;
15 Fitzpatrick Decl. at ¶ 9.) As set forth in Plaintiff's Counsel's declarations, the costs were all
16 directly incurred in the prosecution of this action, including, but not limited to, filing and
17 service fees, postage fees, and costs associated with mediation. (Lee Decl. at ¶ 11; Fitzpatrick
18 Decl. at ¶ 9.) As such, the requested costs should be awarded as fair and reasonable.

19 **H. The Settlement Administration Costs Should be Approved.**

20 The Parties have agreed to pay actual costs of administration, which will not exceed
21 \$4,150.00, to the Settlement Administrator, Phoenix Settlement Administrators, to administer
22 this Settlement. (Settlement Agreement ¶ B.26.d.; Tulyathan Decl. at ¶ 17.) The Parties
23 believe that the administration fee is reasonable and should be approved.

24 **I. Plaintiff's Service Award Should Be Approved.**

25 Courts have held that named Plaintiff in class, or private attorney general actions can
26 request a service award. (*Rodriguez v. W. Publ'g Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59
27 (explaining that service awards "are intended to compensate class representatives for work
28 done on behalf of the class, to make up for financial or reputational risk undertaken in bringing

1 the action, and, sometimes, to recognize their willingness to act as a private attorney
2 general”) (emphasis added).)

3 Here, Plaintiff seeks \$2,000.00 for the service award, which is intended to compensate
4 Plaintiff for the efforts in prosecuting this case and her time spent on this case. (Declaration of
5 Karyn Mondo (“Mondo Decl.”) at ¶ 7.) As Plaintiff’s requested service award is a modest
6 amount, the Court should approve this service award as requested.

7 **J. Notice to the LWDA Has Been Provided.**

8 Concurrent with the filing of this Motion, Plaintiff uploaded the instant motion, the
9 Settlement Agreement, and Proposed Order to the LWDA’s website. (Tulyathan Decl. at ¶
10 26.)

11 **V. CONCLUSION**

12 Based on the above, Plaintiff requests that the Court approve the current PAGA
13 settlement.

14
15 Date: August 2, 2021

FITZPATRICK & SWANSTON
DIVERSITY LAW GROUP, P.C.

17 By: /s/ Larry W. Lee

18 B. James Fitzpatrick
19 Larry W. Lee
20 Attorneys for Plaintiff,
KARYN MONDO, on behalf of herself
21 and all similarly aggrieved employees
22
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

7 I am employed in the County of Los Angeles, State of California. I am over the age of
8 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite
9 1250, Los Angeles, California 90071.

10 On August 2, 2021, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE**
12 **SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS**
13 **GENERAL ACT; MEMORANDUM OF POINTS AND AUTHORITIES IN**
14 **SUPPORT**
- 15 **2. DECLARATION OF MAI TULYATHAN IN SUPPORT OF PLAINTIFF'S**
16 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE**
17 **PRIVATE ATTORNEYS GENERAL ACT**
- 18 **3. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
19 **TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE**
20 **ATTORNEYS GENERAL ACT**
- 21 **4. DECLARATION OF B. JAMES FITZPATRICK IN SUPPORT OF PLAINTIFF'S**
22 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE**
23 **PRIVATE ATTORNEYS GENERAL ACT**
- 24 **5. DECLARATION OF LAURA L. FRANKLIN IN SUPPORT OF PLAINTIFF'S**
25 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE**
26 **PRIVATE ATTORNEYS GENERAL ACT**
- 27 **6. DECLARATION OF KARYN MONDO IN SUPPORT OF PLAINTIFF'S**
28 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE**
PRIVATE ATTORNEYS GENERAL ACT
- 7. [PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION TO APPROVE**
SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS
GENERAL ACT

on the interested parties in this action as follows:

Ryan L. Eddings
REddings@littler.com

Julia G. Remer
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Littler Mendelson, P.C.
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Fresno, California 93704

Attorney for Defendant The Papé Group, Inc. & Papé Material Handling, Inc.

 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the filing receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this office.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 2, 2021, at Los Angeles, California.


Erika Mejia