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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF STANISLAUS**

DEWEY ANDERSON, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

GRAHAM PACKAGING PET
TECHNOLOGIES, INC., a Delaware
corporation; and DOES 1 through 50,
inclusive,

Defendant.

Case No.: CV-21-005550

(Assigned to the Hon. Sonny S. Sandhu, Dept. 24)

**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: March 29, 2023

Time: 8:30 a.m.

Dept.: 24

Complaint Filed: October 8, 2021
FAC Filed: February 8, 2022
Trial Date: Not Set

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

2 **PLEASE TAKE NOTICE** that on March 29, 2023, at 8:30 a.m., or as soon thereafter as
3 the matter may be heard, before the Honorable Sonny S. Sandhu, Judge presiding in Department
4 24 of the above-referenced Court located at 801 10th Street, Modesto, California 95354, Plaintiff
5 Dewy Anderson (“Plaintiff”) will seek an Order approving the concurrently filed PAGA
6 Settlement Agreement (the “Settlement Agreement” or “Agreement”), pursuant to the procedures
7 set forth in Labor Code § 2698, *et seq.*

8 This motion will be based on this notice of motion, the attached memorandum of points
9 and authorities, the accompanying declarations of Larry W. Lee, Kristen M. Agnew, Nicholas
10 Rosenthal, William L. Marder, and Plaintiff Dewy Anderson, the records and file herein, and on
11 such other evidence as may be presented at the hearing of the motion.

12
13 DATED: March 7, 2023

DIVERSITY LAW GROUP, P.C.

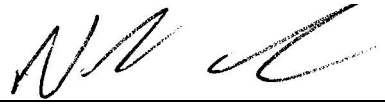
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15 By: 
16 Larry W. Lee
17 Kristen M. Agnew
18 Nicholas Rosenthal
19 Attorneys for Plaintiff and the Class
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1 **I. INTRODUCTION**

2 Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code § 2698, *et*
3 *seq.*, Plaintiff Dewy Anderson (“Plaintiff”) hereby moves the Court for an order approving the
4 non-reversionary PAGA settlement with Defendant Graham Packing Pet Technologies, Inc.
5 (“Defendant”), as set forth in the concurrently filed PAGA Settlement Agreement (the
6 “Settlement Agreement” or “Agreement”).

7 As demonstrated below and in the accompanying declaration of Nicholas Rosenthal, the
8 proposed settlement warrants the Court’s approval. This settlement was reached after extensive
9 investigation and both formal and informal discovery, including Defendant’s production of
10 sample class payroll and timekeeping data, as well as information pertaining to Defendant’s
11 payroll policies and procedures. The Parties also participated in a mediation with Michael J.
12 Loeb, Esq. After months of further protracted negotiations, the Parties were able to arrive at the
13 proposed Settlement.

14 Pursuant to the terms of the Parties’ proposed Agreement, Defendant will pay the gross
15 amount of \$51,000.00 (the “Maximum Settlement Amount”), which includes an estimated
16 payment of approximately \$22,125.00 in civil penalties to the California Labor and Workforce
17 Development Agency (“LWDA”). The proposed release is narrowly tailored to release only
18 claims for civil penalties under PAGA predicated on Labor Code §§ 201, 202, 203, 204, 226(a),
19 510, 558, and 1194, and the applicable Industrial Welfare Commission (“IWC”) Wage Orders.

20 The proposed settlement constitutes an adequate, fair, and reasonable settlement on
21 behalf of the LWDA and aggrieved employees, and accomplishes the goals of the PAGA.

22 **II. PROCEDURAL HISTORY**

23 **A. Summary of the Litigation and Settlement**

24 **1. The History of the Key Pleadings**

25 On September 27, 2021, Plaintiff filed a written notice pursuant to Labor Code § 2699
26 with the LWDA, alleging that Defendant failed to provide accurate itemized wage statements
27 and pay sick pay and overtime wages at the regular rate of pay (“PAGA Notice”). Declaration of
28 Nicholas Rosenthal (“Rosenthal Decl.”) ¶ 3. Thereafter, on October 8, 2021, Plaintiff filed a

1 complaint against Defendant in the Superior Court of the State of California, County of
2 Stanislaus. Rosenthal Decl. ¶ 4. The initial complaint alleges class action claims for: (1) violation
3 of Labor Code §§ 510, 558, and 1194; (2) violation of Labor Code §§ 201-203; (3) violation of
4 Labor Code § 226(a); and (4) violation of Business and Professions Code § 17200, *et seq. Id.*

5 On February 8, 2022, Plaintiff filed a first amended complaint adding a cause of action
6 for violation of California Labor Code § 2698, *et seq.*, the Private Attorneys General Act
7 (“PAGA”). *Id.* ¶ 5. The first amended complaint is the operative Complaint (“Complaint”). *Id.*

8 As alleged in the operative Complaint, Plaintiff’s class and representative action claims
9 arise from Defendant’s failure to pay all overtime and sick pay wages owed and provide
10 compliant wage statements. Specifically, Plaintiff contends that while employees regularly
11 earned non-discretionary incentive wages, Defendant failed to calculate such wages into the
12 regular rate of pay for the purposes of paying overtime wages and sick pay. Thus, employees
13 were underpaid and are owed additional overtime wages and sick pay. As a result of the
14 underpayment of wages, Plaintiff contends that the wage statements issued to employees
15 identified inaccurate rates of pay for overtime wages and sick pay, and gross and net wages
16 earned. In addition, Plaintiff alleges that whenever shift premium wages were paid, the wage
17 statements failed to identify the applicable rates of pay and number of hours worked. *Id.* ¶ 6. As
18 a result of the alleged violations, Plaintiff seeks statutory and civil penalties under the California
19 Labor Code and the PAGA, as well as attorneys’ fees, and costs. *Id.*

20 Defendant disputes and denies Plaintiff’s allegations and claims asserted in the operative
21 Complaint. *Id.* ¶ 7.

22 2. The Parties Participate in Private Mediation

23 In about April 2022, the Parties agreed to explore the possibility of settlement. Rosenthal
24 Decl. ¶ 8. The Parties subsequently engaged in informal discovery in order for Plaintiff to assess
25 the claims, as well as the maximum exposure of damages and penalties. *Id.* Defendant provided
26 Plaintiff’s counsel with sample class payroll and timekeeping data, as well as information
27 pertaining to Defendant’s payroll policies and procedures. *Id.* ¶ 8.

28 On June 30, 2022, the Parties participated in an all-day mediation session with mediator

1 Michael J. Loeb, Esq. Rosenthal Decl. ¶ 9. While a settlement was not reached at mediation, the
2 Parties continued settlement discussions facilitated by Mr. Loeb. *Id.* After thorough investigation
3 and evaluation of the facts and claims, including further formal written discovery, and as a result
4 of arm's-length negotiation, the Parties and their counsel ultimately reached the current
5 settlement. *Id.*

6 In resolution of Plaintiff's representative action claims, the Parties entered into the PAGA
7 Settlement Agreement. *Id.* ¶ 10. Plaintiff's class action claims were resolved in the separate Joint
8 Stipulation of Class Action Settlement and Release of Claims. *Id.* ¶ 11.

9 The Parties recognize the risk, expense, and delay in continuing litigation, and believe the
10 Settlement to be fair, reasonable, and adequate. Accordingly, the Parties desire to settle,
11 compromise, and discharge all disputes and claims arising from or relating to the PAGA claims
12 as set forth in the Settlement Agreement.

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

14 The material terms of the Settlement are described below and set forth in detail in the
15 concurrently filed PAGA Settlement Agreement, a true and correct copy of which is attached as
16 **Exhibit A** to the Declaration of Nicholas Rosenthal.

17 **A. The Aggrieved Employees**

18 The Settlement includes: (a) all current and former non-exempt employees of Defendant
19 in the State of California who earned non-discretionary incentive wages, including but not
20 limited to wellness pay and referral bonuses, and overtime wages during the same workweek, at
21 any time from September 24, 2020, through August 31, 2022; (b) all current and former non-
22 exempt employees of Defendant in the State of California who earned non-discretionary
23 incentive wages, including but not limited to, shift premiums and wellness pay, and sick pay
24 during the same workweek, and whose employment ended at any time from September 24, 2020,
25 through August 31, 2022; and/or (c) all current and former non-exempt employees of Defendant
26 in the State of California who earned shift premium wages at any time from September 24, 2020,
27 through August 31, 2022 ("Aggrieved Employees"). Agreement ¶ 2. Based upon Defendant's
28 records, Defendant represented that there are 10,770 pay periods worked during the PAGA

1 Period in which an employee either received a wage statement reflecting shift differential
2 wages or was paid an alleged non-discretionary wages in the same pay period as receiving
3 overtime or sick pay wages. *Id.* ¶¶ 14, 21.

4 **B. Settlement Terms, Sum, and Allocation**

5 The Settlement Agreement requires Defendant to pay the gross amount of Fifty-One
6 Thousand Dollars (\$51,000.00) (the “Maximum Settlement Amount”). Agreement ¶ 17. The
7 balance of the Maximum Settlement Amount remaining after deduction of the approved Fee and
8 Expense Award to Plaintiff’s counsel and Settlement Administration Costs (the “Net Settlement
9 Amount”), will be available for distribution to the LWDA and Aggrieved Employees. *Id.* ¶ 18.

10 The Net Settlement Amount will total approximately \$29,500.00. Rosenthal Decl. ¶ 20.
11 Seventy-five percent (75%) of the Net Settlement Amount, or approximately \$22,125.00, will be
12 paid to the LWDA for PAGA penalties. Agreement ¶ 16; Rosenthal Decl. ¶ 20. The remaining
13 twenty-five percent (25%), or approximately \$7,375.00, will be distributed to Aggrieved
14 Employees (“Aggrieved Employees Payment”). Agreement ¶ 3; Rosenthal Decl. ¶ 20.

15 Based on the number of pay periods encompassed by the Settlement, the Maximum
16 Settlement amounts to an award of approximately \$4.76 per pay period (\$51,000.00 ÷ 10,053
17 pay periods.) Rosenthal Decl. ¶ 21. The Aggrieved Employees will receive 25% of the Net
18 Settlement Amount and each employee’s portion will be allocated based on the number of pay
19 periods in which he or she worked during the PAGA Period, with some entitled to receive more,
20 and others less. *Id.*; Agreement ¶ 44.b.ii. This is fair, as it directly allocates greater penalties to
21 individual Aggrieved Employees who have allegedly suffered greater harm. Rosenthal Decl. ¶
22 21.

23 As part of the Settlement, Defendant does not object to Plaintiff’s Counsel’s request for
24 attorneys’ fees of approximately one-third of the Maximum Settlement Amount, *i.e.*, Seventeen
25 Thousand Dollars (\$17,000.00) (“Fee and Expense Award”), subject to the Court finally
26 approving this Settlement. Agreement ¶ 13.

27 The Settlement Agreement provides for the payment of the fees and expenses reasonably
28 incurred by the Settlement Administrator. Agreement ¶ 28. The Parties have agreed to utilize

Phoenix Settlement Administrators to administer the settlement, with the administration costs estimated to be Four Thousand Five Hundred Dollars (\$4,500.00). *Id.* ¶¶ 28, 29.

Individual Settlement Payments to Aggrieved Employees shall be categorized as penalties and interest for tax purposes and the Settlement Administrator shall provide IRS Form 1099-MISC, as required by law. Agreement ¶ 42.b. If any checks from the Settlement remain uncashed after 180 days, the Settlement Administrator will remit the checks to the California Department of Industrial Relations' Unpaid Wage Fund. *Id.* ¶ 44.f.

C. Scope of the Released Claims

In exchange for the payments described above, Plaintiff, the State of California, and Aggrieved Employees will release Defendant and Released Parties from “all claims that were or could have been alleged in the Action or PAGA Letter [“Released Claims”]. The Released Claims are released by both the State of California and the Aggrieved Employees as part of this Settlement. The period of the Release shall extend to the limits of the PAGA Period.” Agreement ¶ 25.

IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED

A. PAGA Overview

In 2004, California enacted PAGA, which allows aggrieved employees, on behalf of the LWDA and other aggrieved employees, to bring suit against their employers for alleged violations of the California labor laws and to obtain penalties that previously could only be obtained by the State. The PAGA was enacted because the Legislature determined that it was “in the public interest to allow Aggrieved Employees, acting as private attorneys general, to recover civil penalties for Labor Code violations,” since the State had not been able to fully or adequately enforce its labor laws. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009); *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, *4 (N.D. Cal. April 2, 2010) (“The act’s declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves. Unlike class actions, these civil penalties are not meant to compensate unnamed employees because the action is fundamentally a law enforcement action.” [citations omitted].)

1 Labor Code § 2699(a) states that any Labor Code provision “that provides for a civil
2 penalty to be assessed and collected by the [LWDA] may, as an alternative, be recovered through
3 a civil action brought by an aggrieved employee on behalf of himself or herself and other current
4 or former employees pursuant to the procedures specified in Section 2699.3.” An “aggrieved
5 employee” means “any person who was employed by the alleged violator and against whom one
6 or more of the alleged violations was committed.” Lab. Code § 2699(c). Prior to commencing an
7 action, the allegedly aggrieved employee must provide notice to the LWDA and the employer
8 setting forth the “specific provisions of [the Labor Code] alleged to have been violated, including
9 the facts and theories to support the alleged violation.” Lab. Code § 2699.3(a)(1). If the LWDA
10 decides not to investigate the allegations or issue a citation to the employer, the proposed
11 representative plaintiff is entitled to commence a PAGA action after 65 days. Lab. Code §
12 2699.3(a)(2).

13 The California Supreme Court has explained that a plaintiff who brings a PAGA claim
14 “represents the same legal right and interest as state labor law enforcement agencies,” and brings
15 PAGA claims “as the proxy or agent” of the State. *Arias*, 46 Cal. 4th at 986. Of the civil
16 penalties recovered, 75 percent goes to the LWDA, and the remaining 25 percent goes to the
17 “aggrieved employees” for collecting the penalties on behalf of the State Lab. Code § 2699(i);
18 *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) (a PAGA
19 representative’s recovery is “an incentive to perform a service to the state, not restitution for
20 wrongs done to members of the class”).

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

23 In class action cases, the purpose of the Court’s preliminary evaluation of the settlement
24 is to determine whether it is within the “range of reasonableness,” and thus whether notice to the
25 class of the terms and conditions of the settlement, and the scheduling of a formal fairness
26 hearing, are worthwhile. *See* Alba Conte & Herbert B. Newberg, 4 *Newberg on Class Actions* §
27 11.25, *et seq.* and § 13.64 (4th ed. 2002 and Supp. 2004) (“*Newberg*”). The “judge must make a
28 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms

1 and must direct the preparation of notice of the certification, proposed settlement, and date of the
2 final fairness hearing.” *Manual for Complex Litigation, Fourth* § 21.632 (Fed. Jud. Ctr., 4th ed.
3 2004). To make the preliminary fairness determination, courts may consider several relevant
4 factors, including “the strength of the plaintiff’s case; the risk, expense, complexity, and likely
5 duration of further litigation; the risk of maintaining class action status through trial; the amount
6 offered in settlement; the extent of discovery completed and the stage of the proceedings; [and]
7 the experience and views of counsel....” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th
8 Cir. 1998).

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

15 Notably, unlike the class action settlement approval process, there is also no statutory
16 mechanism for this Court to conduct a two-step settlement approval review. Cal. Lab. Code §
17 2699(i). In addition, “[u]nnamed employees need not be given notice of the PAGA claim, nor do
18 they have the ability to opt-out of the representative PAGA claim” or “contest a settlement, if
19 any, reached between the parties.” *Ochoa-Hernandez*, 2010 WL 1340777 at *13.

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

21 The Court’s focus in a PAGA case is not the amount that aggrieved employees will
22 ultimately receive as a result of a settlement, but instead, on whether the total settlement amount
23 achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to supplement
24 agency funding for education and enforcement purposes. *See* Lab. Code § 2699(i). Here, the
25 Settlement represents an extraordinary recovery for the Aggrieved Employees and the State, and
26 thus the Settlement certainly effectuates PAGA’s purpose.

27 The Settlement is also consistent with the State’s public policy favoring resolution of
28 disputes. “California law favors the settlement of disputes as our high court clarified in *Neary*[].

1 Settlement is efficient; it reduces costs, saves resources, and minimizes court congestion. [] The
2 parties are best positioned to understand their interests and resolve a dispute in a mutually
3 beneficial manner without court intervention into the settlement.” *Consumer Advocacy Group,*
4 *Inc. v. Kintetsu*, 141 Cal. App. 4th 46, 62-63 (2006) (citing *Neary v. Regents of Univ. of Cal.*, 3
5 Cal. 4th 273, 277- 278 (1992)).

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

7 If approved, the Settlement would release Defendant and Released Parties from all claims
8 identified in the Action or PAGA Letter— namely, Labor Code §§ 201, 202, 203, 204, 226(a),
9 510, 558, 1194, and 2698, *et seq.*, and the applicable IWC Wage Orders—and nothing more.
10 Agreement ¶¶ 25, 26, 40. The Settlement would not impact any aggrieved employee’s ability to
11 pursue PAGA claims predicated on other Labor Code violations. Because an aggrieved
12 employee’s PAGA action is a substitute for an action brought by the government, “judgment in
13 [a PAGA] action is binding not only on the named employee plaintiff but also on government
14 agencies and any aggrieved employee not a party to the proceeding.” *Arias*, 46 Cal. 4th at 986.
15 However, “the nonparty employees, because they were not given notice of the action or afforded
16 any opportunity to be heard, would not be bound by the judgment as to remedies other than civil
17 penalties.” *Id.* at 987; *see also*, Lab. Code § 2699(g)(l) (non-party aggrieved employees retain all
18 rights “to pursue or recover other remedies available under state or federal law, either separately
19 or concurrently with an action taken under this part”).

20 Accordingly, the Aggrieved Employees will be subject to only a limited release strictly
21 confined to violation of Labor Code §§ 201, 202, 203, 204, 226(a), 510, 558, 1194, and 2698, *et*
22 *seq.*, and the applicable IWC Wage Orders.**Error! Bookmark not defined.** Therefore, the
23 limited scope of the release also supports approval.

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

26 Though Plaintiff is reasonably confident that he would prevail at trial, proceeding in
27 litigation entails significant risk on the underlying merits of Plaintiff’s theories, in addition to the
28 still-developing law under PAGA.

1 **1. Plaintiff’s Claims are Contested**

2 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each
3 of the underlying Labor Code violations. *See Cardenas v. McLane Foodservice, Inc.*, 2011 U.S.
4 Dist. LEXIS 13126, *10 (C.D. Cal. 2011) (“Given the statutory language [of PAGA], a plaintiff
5 cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of
6 the Labor Code by the defendant”). Here, Plaintiff would need to prove that each aggrieved
7 employee suffered a violation for each period the employee worked in relation to failure to pay
8 overtime wages and sick pay at the regular rate of pay and failure to provide accurate itemized
9 wage statements. Defendant, however, disputes and denies Plaintiff’s allegations and claims
10 asserted in the operative Complaint. Rosenthal Decl. ¶ 22.

11 Defendant responded to the complaint alleging various defenses. For one, Defendant
12 argued that any of the alleged non-discretionary bonuses that formed the basis for Plaintiff’s
13 overtime and sick pay claims were actually not non-discretionary bonuses and therefore did not
14 need to be factored into overtime or sick pay. Further, case law is ambiguous at best that an
15 employee could collect waiting time penalties under Labor Code § 203 based on unpaid sick pay.
16 Moreover, Plaintiff would have a difficult time establishing that any failure to pay wages was
17 “willful” as required by § 203. As for Plaintiff’s wage statement claim, Defendant argued that a
18 total wages was included for shift premiums and that employees knew the applicable rate, so
19 determining the hours was just a matter of “simple math.”

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

21 Even if Plaintiff were to prevail on the merits of the PAGA claim, the potential recovery
22 is uncertain. Under PAGA, trial courts have considerable discretion to reduce the penalty award.
23 Pursuant to Labor Code section 2699(f)(2) the Court can decline to award the full amount of
24 PAGA penalties where “if, based on the facts and circumstances of the particular case, to do
25 otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”
26 Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks Corp.*, while the
27 plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA
28 penalty amount by 90%, citing the employer’s good faith attempt at complying with the law. 30

1 Cal. App. 5th 504, 517 (2018). Upon review, the Court of Appeal found such reduction to be
2 proper and affirmed a judgment which only provided for a PAGA penalty of \$5 per pay period.
3 *Id.* at 539; *see O'Connor*, 2016 WL 4398271, at *17 (noting that even if PAGA penalties
4 amounted to \$1 billion, such award “could well be reduced, as a court may reduce the penalty
5 when to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
6 confiscatory”).

7 Courts routinely award far less than the statutory maximum amount of civil penalties,
8 even where an underlying violation of the Labor Code is found. Just very recently, in the matter
9 of *Magadia v. Wal-Mart Assocs., et al.*, while the trial court imposed substantial PAGA penalties
10 upon the defendant, such amount still represented reductions of 67% and 80% of the potential
11 PAGA penalties at issue. 2019 U.S. Dist. Lexis 91792 at *87-*100 (N.D. Cal. May 31, 2019).
12 Moreover, this was only after the plaintiff in *Magadia* had prevailed after trial. Thereafter, the
13 Ninth Circuit reversed the trial court’s ruling, which demonstrates the significant risk presented
14 in moving forward with litigation. *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 677 (9th
15 Cir. 2021).

16 3. Settlement is Reasonable When Compared to the Value of the 17 Underlying Labor Code Claim

18 The Court’s assessment of the proposed Settlement must take into account that any
19 penalties awarded may be subject to substantial reduction. When this is considered, in
20 conjunction with the history of PAGA settlements, and the fact that Plaintiff may recover
21 nothing, the proposed settlement is patently reasonable.

22 Indeed, Plaintiff estimates that the maximum amount of PAGA civil penalties is
23 approximately \$1,770,000.00 based on 10,770 pay periods (10,053 pay periods x \$100 per pay
24 period). Rosenthal Decl. ¶24.

25 Thus, assuming the Court were to award \$100 penalty for every pay period, the penalties
26 are being assessed at a rate equivalent to just under 5% of the potential value of the claims in the
27 case. *See* Rosenthal Decl. ¶ 25.

28 Settlement for this reduced value allows for the distribution of penalties in an amount

1 which accounts for the risk of continued litigation, and Defendant’s likely arguments that higher
2 penalties would have been confiscatory. *Id.* ¶ 26. It also sufficiently deters Defendant from
3 engaging in similar alleged conduct in the future, which is one of the primary goals of PAGA.

4 Significantly, the proposed settlement sum in this case exceeds, as a percentage of overall
5 settlement value, the typical PAGA settlement—including those that provide for less than the
6 one percent allocation to PAGA penalties. *See, e.g., Hopson v. Hanesbrands Inc.*, 2009 WL
7 928133, *9 (N.D. Cal. Apr. 3, 2009) (approving total PAGA allocation that was .49% of
8 \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.*, 2015 WL 5439000, *8 (N.D. Cal. Aug.
9 4, 2015) (approving total PAGA allocation that was .5% of \$10,000,000 gross settlement); *Lusby*
10 *v. Gamestop Inc.*, 97 F.R.D. 400, 407 (N.D. Cal. 2013) (approving total PAGA allocation that
11 was .67% of \$750,000 gross settlement). For example, in *Cotter v. Lyft, Inc.*, the plaintiff alleged
12 that drivers who use Lyft were misclassified as independent contractors. 2016 WL 3561742
13 (N.D. Cal. June 23, 2016). The parties’ settled all Labor Code and PAGA claims for \$27 million,
14 with a PAGA allocation of \$1 million – or 3.7% of the total settlement. *Id.* at *2. In granting
15 preliminary approval to the proposed settlement in *Cotter*, the court noted that the PAGA
16 allocation “might seem low when compared to the maximum PAGA penalties,” but
17 acknowledged that it was in fact “quite high compared to the typical amount apportioned to
18 claims for PAGA penalties in wage and hour settlements.” *Id.* at *5.

19 Given Defendant’s potential defenses to the alleged violations at issue, the risks and costs
20 of continued litigation, Plaintiff and his attorneys believe that the Settlement is fair and
21 reasonable. Rosenthal Decl. ¶ 27; Declaration of Larry W. Lee (“Lee Decl.”) ¶ 3; Declaration of
22 Kristen M. Agnew (“Agnew Decl.”) ¶ 3; Declaration of William L. Marder (“Marder Decl.”) ¶ 2.
23 The Settlement proposes a payment of approximately \$22,125.00 in penalties to the LWDA and
24 approximately \$7,375.00 in penalties to the Aggrieved Employees, which is an outstanding result
25 in a PAGA only case. Rosenthal Decl. ¶ 20. Plaintiff’s Counsel have significant experience
26 litigating wage and hour claims including claims for PAGA penalties, and the Settlement here is
27 similar to or greater than similar settlements that courts have approved. *Id.* ¶¶ 29-31.

28 Furthermore, as set forth in the accompanying Rosenthal Declaration, the LWDA has

1 been provided notice of this motion and the PAGA settlement. *Id.* ¶ 33. The decision of the
2 LWDA to accept the Settlement and not oppose the motion should be given considerable weight.

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

4 Labor Code § 2699(g)(1) provides for the recovery of attorneys' fees and costs in any
5 successful action brought under PAGA. Although this is not a class action, in class actions
6 California state and federal courts have recognized that an appropriate method for determining
7 award of attorneys' fees is based on a percentage of the total value of benefits to class members
8 by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano*
9 *v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
10 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this
11 equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
12 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
13 burden alone." *Vincent*, 557 F. 2d at 769.

14 The common fund doctrine is predicated on the principle of preventing unjust
15 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,
16 he may require the passive beneficiaries to compensate those who created the fund. Both
17 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35;
18 *Vincent*, 557 F. 2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th
19 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
20 been applied "consistently in California when an action brought by one party creates a fund in
21 which other persons are entitled to share." The reasons for applying the common fund doctrine
22 include: "fairness to the successful litigant, who might otherwise receive no benefit because his
23 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to
24 the others who are entitled to share in the fund and who should bear their share of the burden of
25 its recovery; encouragement of the attorney for the successful litigant who will be more willing
26 to undertake and diligently prosecute proper litigation for the protection or recovery of the fund
27 if he is assured that he will be properly and directly compensated should his efforts be
28 successful." *Id.*

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

8 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
9 percent of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that
10 required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is
11 "extraordinarily high or low [should] the trial court [] consider whether the percentage method
12 should be adjusted so as to bring the imputed multiplier within a justifiable range." *Id.* at 505.

13 **G. The Settlement Administration Costs Should be Approved**

14 The Parties have agreed to pay actual costs of administration, or \$4,500.00, to the
15 Settlement Administrator, Phoenix Settlement Administrators, to administer this Settlement.
16 Agreement ¶28, 29. The Parties believe that the administration fee is reasonable and should be
17 approved.

18 **H. Notice to the LWDA Has Been Provided**

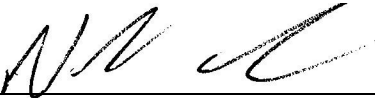
19 As discussed above, and concurrent with the filing of this Motion, Plaintiff uploaded the
20 instant motion to the LWDA's website. Rosenthal Decl. ¶ 33.

21 **V. CONCLUSION**

22 Based on the above, Plaintiff requests the Court approve the current PAGA settlement.

23 DATED: March 7, 2023

DIVERSITY LAW GROUP, P.C.

24
25 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class

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 March 7, 2023, 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 LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
16 **TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE**
17 **ATTORNEYS GENERAL ACT**
- 18 **3. DECLARATION OF NICHOLAS ROSENTHAL IN SUPPORT OF PLAINTIFF'S**
19 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE**
20 **PRIVATE ATTORNEYS GENERAL ACT**
- 21 **4. DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFF'S**
22 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE**
23 **PRIVATE ATTORNEYS GENERAL ACT**
- 24 **5. DECLARATION OF WILLIAM L. MARDER IN SUPPORT OF PLAINTIFF'S**
25 **MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE**
26 **PRIVATE ATTORNEYS GENERAL ACT**
- 27 **6. DECLARATION OF DEWY ANDERSON IN SUPPORT OF PLAINTIFF'S**
28 **MOTION PAGA APPROVAL**
- 7. [PROPOSED] ORDER APPROVING SETTLEMENT AND JUDGMENT**
THEREON

on the interested parties in this action as follows:

Jason E. Murtagh
jason.murtagh@bipc.com
Mary R Hackett

1 mary.hackett@bipc.com

2 Stephanie G. Klinko

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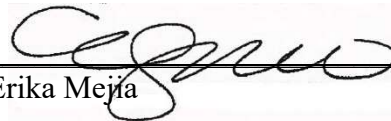
6 600 West Broadway, Suite 1100

7 San Diego, CA 92101

8 *Attorneys for Defendant Graham Packaging PET Technologies, Inc.*

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

15 I declare under penalty of perjury under the laws of the State of California that the
16 above is true and correct. Executed on March 7, 2023, at Los Angeles, California.

17 
18 Erika Mejia