

1 Alex Asil Mashiri, Esq. (SBN 283798)
alex@mashirilawfirm.com
2 **MASHIRI LAW FIRM APC**
11251 Rancho Carmel Drive #500694
3 San Diego, CA 92150
Tel: (858) 348-4938
4 Fax: (858) 348-4939

5 Tamim Jami, Esq. (SBN 311351)
tamim@jamilaw.com
6 **THE JAMI LAW FIRM P.C.**
3525 Del Mar Heights Rd #941
7 San Diego, CA 92130
Tel: (858) 284-0248
8 Fax: (858) 284-0977

9 Attorneys for Plaintiff
10 ARTURO VAZQUEZ HERNANDEZ

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SAN DIEGO**

13 ARTURO VAZQUEZ HERNANDEZ, an
individual, for the real party in interest, the
State of California

14 Plaintiff,

15 v.

16
17
18 EAGLE PAVING COMPANY, INC.; and
DOES 1 through 50,

19
20 Defendants.
21
22
23
24
25
26
27
28

Case No. 37-2021-00003255-CU-OE-CTL

Judge: Hon. James A Mangione
Dept.: C-75

**PLAINTIFF'S UNOPPOSED NOTICE OF
MOTION AND MOTION FOR APPROVAL
OF PAGA SETTLEMENT**

Judge: Hon. James A Mangione
Dept.: C-75
Date: January 14, 2022
Time: 9:00 a.m.

1 **TO ALL PARTIES HEREIN AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that on **January 14, 2022 at 9:00 a.m.**, or as soon thereafter as
3 the matter may be heard in Department C-75 of the Superior Court of California, County of San
4 Diego, 330 W. Broadway, San Diego, California 92101, Plaintiff ARTURO VAZQUEZ
5 HERNANDEZ, will, and hereby does, move for an order approving the proposed settlement
6 pursuant to the Private Attorneys General Act of 2004. This motion is unopposed by Defendant
7 EAGLE PAVING COMPANY, INC.

8 This motion is based upon this notice, the declaration of Alex Asil Mashiri, the declaration
9 of Tamim Jami, exhibits, all other papers filed in this action, and upon such other evidence and
10 argument as may be presented at the hearing.

11 Date: December 18, 2021

MASHIRI LAW FIRM APC

12
13 By: 
14 Alex Asil Mashiri
15 Attorney for Plaintiff
16 ARTURO VAZQUEZ HERNANDEZ
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a wage and hour case seeking civil penalties under the Private Attorneys General Act pursuant to Labor Code section 2698 *et seq.* (“PAGA”).¹ Plaintiff ARTURO VAZQUEZ HERNANDEZ (“Plaintiff”), brought this enforcement action against Defendant EAGLE PAVING COMPANY, INC. (“Defendant”) on behalf of the real party in interest, the State of California, for Labor Code² violations Defendant allegedly committed against current and former employees who were employed between November 18, 2019 until December 31, 2021 (“PAGA Represented Employees”).

After engaging in informal discovery, including extensive review of sample payroll records and legal research on esoteric prevailing wage issues, the Parties were able to reach a fair, adequate, and reasonable settlement in this case with the assistance of Mr. Tripper Ortman, Esq., a well-regarded mediator of complex class and representative wage and hour actions.

Accordingly, Plaintiff seeks court approval of the PAGA settlement pursuant to section 2699(*l*). Defendant does not oppose this motion.

II. FACTUAL AND PROCEDURAL HISTORY

A. THE PARTIES

Defendant is a paving contractor based in San Diego, California. (Declaration of Tamim Jami [“Jami Decl.”] ¶ 16.) Plaintiff is an ex-employee who worked for Defendant from October of 2019 to November of 2020. (*Id.*)

B. PLAINTIFF’S INVESTIGATION, DISCOVERY, AND CLAIMS

On November 18, 2020, after conferring with Plaintiff regarding his Labor Code claims and grievances, counsel for Plaintiff sent the statutorily required notice to the California Labor and Workforce Development Agency (“LWDA”) and Defendant, declaring Plaintiff’s intent to proceed with the enumerated Labor Code claims on behalf of himself and all other aggrieved employees against Defendants. (Jami Decl. ¶ 15.) Plaintiff’s Counsel also requested Plaintiff’s

¹ This is a PAGA-only action.

² All further statutory references will be to the California Labor Code unless otherwise noted.

1 employment/personnel file and subsequently, researched and investigated all of Plaintiff's concerns.
2 (Declaration of Alex Asil Mashiri [Mashiri Decl.] ¶ 13; Jami Decl. ¶ 17.)

3 On January 22, 2021, Plaintiff filed his complaint under the PAGA in this matter. (Mashiri
4 Decl. ¶ 14; Jami Decl. ¶ 18.) The complaint alleged representative claims for civil penalties under
5 the PAGA for (1) violation of Labor Code sections 1720 et seq., 1771, 1774, 1776, 1815; (2)
6 violation of Labor Code sections 510 and 1194; (3) violation of Labor Code section 226(a)(1); (4)
7 violation of Labor Code section 226(a)(5); (5) violation of Labor Code section 226(a)(2); (6)
8 violation of Labor Code section 226(a)(9); (7) violation of Labor Code section 226(a); (8) violation
9 of Labor Code sections 512, 226.7 and the IWC Wage Order; (9) violation of Labor Code section
10 226.7 and the IWC Wage Order; (10) violation of Labor Code section 246; (11) violation of Labor
11 Code sections 233 and 234; (12) violation of Labor Code section 227.3; (13) violation of Labor
12 Code section 204; (14) violation of Labor Code sections 201, 202, and 203; and (15) violation of
13 Labor Code sections 226(b), 1198.5, and 432. (*Id.*)

14 After service of the complaint, the Parties, through counsel, engaged in several discussions
15 regarding the claims in this case. (Mashiri Decl. ¶ 15; Jami Decl. ¶ 19.) The Parties ultimately
16 agreed to attend a mediation. (*Id.*) The Parties filed a stipulated protective order with the Court and
17 Defendant agreed to produce a sample of payroll records which consist of 21 randomly-selected
18 employees (which make up a 20% representative sample based on the 104-total population of
19 employees employed during the PAGA period) ("Sample Set") prior to mediation.

20 **C. SETTLEMENT NEGOTIATIONS**

21 On September 24, 2021, the Parties attended a full day mediation with Mr. Tripper Ortman,
22 Esq., a well-regarded mediator of complex class and representative wage and hour actions. (Mashiri
23 Decl. ¶ 16; Jami Decl. ¶ 20.)

24 The Parties were able to resolve this matter with the assistance of Mr. Ortman and ultimately
25 reached a proposed settlement in the gross amount of \$325,000.00. (Mashiri Decl. ¶ 17; Jami Decl. ¶
26 21.)

27 Prior to negotiating a settlement at the mediation, Plaintiff's counsel conducted a thorough
28 investigation into the facts and claims in this case and conducted extensive legal research as to the

1 claims and applicable laws. (Mashiri Decl. ¶ 18; Jami Decl. ¶ 22.) Plaintiff's counsel also had
2 several discussions with defense counsel regarding the claims alleged in this case. (*Id.*)

3 Additionally, prior to mediation, Defendant provided a Sample Set of approximately 21
4 randomly selected employees who have worked for Defendant. (Mashiri Decl. ¶ 19; Jami Decl. ¶
5 23.) These payroll records were produced by way of PDF documents, consisting of thousands of
6 documents, which Plaintiff's counsel had to manually go through in detail. (*Id.*) Using the
7 information in the PDF documents, Plaintiff's counsel created an Excel spreadsheet outlining the
8 systemic violations, resulting claims, and civil penalty exposure in preparation of the Parties'
9 September 24, 2021 mediation. (*Id.*) Plaintiff's counsel also provided a detailed mediation brief to
10 Mr. Ortman's office. (*Id.*)

11 As a result of the successful mediation, the parties entered into a long-form settlement
12 agreement ("Settlement Agreement") outlining the terms of the Parties' agreement. (Mashiri Decl. ¶
13 20; Jami Decl. ¶ 24.) A copy of the Settlement Agreement is attached to the Declaration of Alex
14 Asil Mashiri as Exhibit 3. A copy of the Settlement Agreement was provided to the LWDA on
15 November 9, 2021. (Mashiri Decl. ¶ 20.)

16 The proposed PAGA settlement amount is \$325,000.00. (Mashiri Decl. ¶ 21; Jami Decl. ¶
17 25.) The Parties' proposed settlement includes PAGA civil penalties, administration costs, litigation
18 costs, and attorney's fees. (*Id.*) The proposed PAGA civil penalties are \$204,644.10 of which 75%
19 (or \$153,483.07) will be paid to the LWDA and the remaining 25% (or \$51,161.03) will be
20 allocated to the approximately 110 PAGA Represented Employees. (*Id.*) Of the remaining balance,
21 \$10,130.90 will be allocated towards litigation costs incurred in this case, \$2,000 will be allocated
22 towards the Settlement Administrator's costs, and the remaining amount of \$108,225 will be
23 allocated towards Plaintiff's attorneys' fees incurred as a result of the PAGA lawsuit. (*Id.*)

24 **III. THE PRIVATE ATTORNEYS GENERAL ACT (PAGA)**

25 "In September 2003, the Legislature enacted the Labor Code Private Attorneys General Act
26 of 2004." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980 (*Arias*)). PAGA is the acronym for
27 the Private Attorneys General Act of 2004, which is codified under California Labor Code sections
28 2698 - 2699.6. (Labor Code § 2698.)

1 “[T]he Legislature ‘declared that adequate financing of labor law enforcement was necessary
2 to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement
3 agencies had declined and were unlikely to keep pace with the future growth of the labor market,
4 and that it was therefore in the public interest to allow aggrieved employees, acting as private
5 attorneys general, to recover civil penalties for Labor Code violations, with the understanding that
6 labor law enforcement agencies were to retain primacy over private enforcement efforts.’”
7 (*Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1125–26, citation
8 omitted disapproved on other grounds in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175.)

9 Thus, the PAGA is a type of *qui tam* action, “authorizing a private party to bring an action
10 to recover a penalty on behalf of the government and receive part of the recovery as compensation.”
11 (*Huff v. Securitas Sec. Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 753 (*Huff*) review denied (Aug.
12 8, 2018) citing *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 379.)
13 When an employee brings a representative action under the PAGA, he or she does so as the proxy or
14 agent of state labor law enforcement agencies, representing the same legal right and interest as those
15 agencies, in a proceeding that is designed to protect the public, not to benefit private parties.”
16 (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct.* (2009) 46 Cal. 4th 993, 1003.)
17 Thus, “[e]very PAGA claim ‘is a dispute *between an employer and the state.*’” (*Kim v. Reins Int’l*
18 *California, Inc.* (2020) 9 Cal.5th 73, 81 (*Kim*), citation omitted.)

19 While a case under the PAGA is representative in nature, it is **not** a class action, and
20 therefore, may be brought *without* the procedural requirements involved in a class action, *i.e.*, class
21 certification. (*Kim, supra*, 9 Cal.5th at pp. 86-87.)

22 Lastly, non-party aggrieved employees in a PAGA action are not entitled to notice and have
23 no right to opt out. (*Arias, supra*, 46 Cal.4th at p. 986.)

24 IV. ARGUMENT

25 A. CONTROLLING LAW REGARDING PAGA APPROVAL

26 Labor Code section 2699(i) mandates that PAGA penalties shall be allocated as follows:

27 75 percent to the Labor and Workforce Development Agency for
28 enforcement of labor laws and education of employers and employees about
their rights and responsibilities under this code, to be continuously

1 appropriated to supplement and not supplant the funding to the agency for
2 those purposes; and 25 percent to the aggrieved employees.

3 Under Labor Code section 2699(l)(2), the court is required to review and approve any PAGA
4 settlement. (Lab. Code § 2699(l)(2).) “PAGA settlements are subject to trial court review and
5 approval, ensuring that any negotiated resolution is fair to those affected.” (*Williams v. Superior*
6 *Court* (2017) 3 Cal.5th 531, 549.)

7 Civil penalties recovered under the PAGA “are intended to ‘*remediate present violations*
8 *and deter future ones,*’ **not to redress employees’ injuries.**” (*Kim, supra*, 9 Cal.5th at p. 86) Indeed,
9 the share of civil penalties (25%) distributed to the aggrieved employees are designed as a “financial
10 incentive” to enforce the labor laws under the PAGA, not to compensate them for any damages or
11 injuries suffered. (*Kim, supra*, 9 Cal.5th at p. 86; *Brown v. Ralphs Grocery Co.* (2011) 197
12 Cal.App.4th 489, 501[stating that “the purpose of the PAGA is not to recover damages or
13 restitution...”]; *Huff, supra*, 23 Cal.App.5th at p. 753 [same]; *Provost v. YourMechanic, Inc.* (2020)
14 55 Cal.App.5th 982, 992 [stating that the Legislature provided the 25% share of civil penalties to
15 aggrieved employees as an “financial incentive” to pursue PAGA cases].)

16 **B. THIS PAGA SETTLEMENT IS FAIR UNDER LABOR CODE SECTION 2699(L)(2)**

17 While Labor Code section 2699(l)(2) requires a court to “review and approve any settlement
18 of any civil action filed pursuant to [the PAGA],” it does not provide any guidance as to what is
19 considered “fair.” However, at the lower end of the spectrum, the California Court of Appeal has
20 held that an allocation of **zero dollars** to resolve PAGA claims may be appropriate in certain
21 circumstances:

22 The Nordstrom Commission Cases settlement agreement identifies liability
23 for PAGA penalties as a claim against Nordstrom and includes the following
24 language: “The Parties allocate \$0 to any Private Attorneys General Act
25 penalty claim under Labor Code § 2699 *et seq.*, for penalty claims based on
26 the Released Claims. During the Class Period, Nordstrom paid Putative Class
27 Members' commissions pursuant to a commission plan that it contends was
28 approved by the United States District Court in *Rios*, and consequently,
Nordstrom contends no claim for penalties of any nature is valid.” Thus, the
PAGA penalty claims were at issue, and were resolved as a part of the overall
settlement of the case. We find no abuse of discretion in the trial court's
approval of the settlement agreement containing these terms.

(*Nordstrom Com’n Cases* (2010) 186 Cal.App.4th 576, 589.)

Moreover, courts in California have routinely approved settlements which allocate less than 2% of the overall settlement amount to PAGA penalties. (*See e.g., Haji v. be.group*, San Diego Superior Court Case No: 37-2017-00025918-CU-OE-CTL (Taylor T.) [approving allocation of \$20,000.00 to civil penalties under PAGA out of \$1,693,000.00 settlement]; *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL 672645, at *1 [approving allocation of \$10,000.00 to PAGA penalties out of \$6,900,000.00 settlement]; *see also Schiller v. David's Bridal, Inc.* (E.D. Cal., June 11, 2012) 2012 WL 2117001, at * 14 [approving allocation of \$7,500.00 to PAGA penalties out of \$518,245.00 settlement].)

The Parties seek to allocate \$204,644.10 in civil penalties under Labor Code section 2699(i). From that amount, 75% (or \$153,483.07) will be paid to the LWDA and the remaining 25% (or \$51,161.03) will be allocated to the 110 PAGA Represented Employees.

The Parties reached the terms of their proposed settlement after informal discovery, including the production of payroll records on approximately 20% of the PAGA Represented Employees, research on esoteric legal issues, and a full day of mediation with Mr. Ortman.

Notably, the Parties proposed settlement is limited in scope to a release of civil penalties under the PAGA. In other words, the proposed settlement does not seek to release any individual claims that the PAGA Represented Employees may have in their individual capacity.

Based on counsel's professional experience, the circumstances of this case, and the work performed, the Parties contend that the PAGA penalty of \$204,644.10 under Labor Code section 2699(i) is fair, adequate, and reasonable.

V. CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court approve the proposed PAGA settlement.

Respectfully submitted,

Date: December 18, 2021

MASHIRI LAW FIRM APC

By: 

Alex Asil Mashiri

Attorney for Plaintiff Arturo V. Hernandez