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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

ARNULDO AVELIO ARGUETA, as an
individual and on behalf of all other
aggrieved employees,

Plaintiff,

vs.

EXCEL LANDSCAPE, INC., a California
Corporation; and DOES 1 through 100,

Defendants.

Case No. CVRI2302720

*[Assigned for all purposes to the Hon.
Harold W. Hopp, Dept. 1]*

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
SETTLEMENT OF CLAIMS BROUGHT
UNDER THE PRIVATE ATTORNEYS'
GENERAL ACT AND REASONABLE
ATTORNEYS' FEES, COSTS, AND
ENHANCEMENT PAYMENT**

Date: October 28, 2024

Time: 8:30 a.m.

Dept.: 1

Reservation ID: 779409554860

Complaint filed: May 24, 2023

Trial Date: None Set.

1 **TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF**
2 **RECORD:**

3 PLEASE TAKE NOTICE that on October 28, 2024, or as soon thereafter as the matter
4 may be heard in Department 1 of the above-entitled Court, located at 4050 Main Street, Riverside,
5 California 92501, Plaintiff Arnuldo Avelio Argueta (“Plaintiff”), individually and on behalf of
6 the State of California and other Aggrieved Employees, will, and hereby does, move this Court
7 for entry of an Order as follows:

- 8 1. Granting approval, pursuant to California Labor Code § 2699(l), of the proposed
9 settlement of claims brought pursuant to the Private Attorneys General Act of 2004
10 (Cal. Labor Code § 2698, *et seq.*) and as set forth in the Parties’ Settlement Agreement,
11 a true and correct copy of which is attached to the Declaration of Sean M. Blakely
12 filed concurrently herewith;
- 13 2. Appointing Phoenix Settlement Administrators as the Settlement Administrator;
- 14 3. Approving the proposed Explanatory Letter (attached as Exhibit A to the Settlement
15 Agreement), and directing that it be distributed to Aggrieved Employees pursuant to
16 the terms of the Settlement Agreement;
- 17 4. Directing the funding and distribution of the Gross Settlement Amount pursuant to the
18 terms of the Settlement Agreement;
- 19 5. Approving an award of attorneys’ fees to Plaintiff’ counsel of \$100,000.00 and an
20 award of litigation costs to Plaintiff’ counsel in the amount of \$11,978.21;
- 21 6. Approving an enhancement payment of \$7,500.00 to Plaintiff for his service to
22 Aggrieved Employees and the State of California;
- 23 7. Approving \$5,250.00 in administration costs to Phoenix Settlement Administrators;
24 and
- 25 8. Approving the payment of \$131,453.84 to the California Labor & Workforce
26 Development Agency (“LWDA”) for its share of PAGA civil penalties.

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1 This Motion is based on this Notice; the attached Memorandum of Points and Authorities;
2 the declaration of Sean M. Blakely and all exhibits attached thereto; the declaration of Paul K.
3 Haines; the declaration of Joel M. Gordon; the declaration of Jodey Lawrence of Phoenix
4 Settlement Administrators and all exhibits attached thereto; the declaration of Plaintiff Arnuldo
5 Avelio Argueta; the Settlement Agreement; all other pleadings and papers on file in this action;
6 and on any further oral or documentary evidence or argument presented at the time of hearing.

7
8
9 Dated: August 30, 2024

Respectfully submitted,

HAINES LAW GROUP, APC

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11 By: 
12 Sean M. Blakely
13 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Arnuldo Avelio Argueta (“Plaintiff”), an “aggrieved employee” under the Private
4 Attorneys’ General Act of 2004 (“PAGA”), respectfully moves this Court for an Order granting
5 approval of the Settlement Agreement (“Settlement”) with Defendant Excel Landscape, Inc
6 (“Excel”).¹ This PAGA representative action seeks civil penalties predicated on Excel’s alleged
7 violations of the California Labor Code from May 24, 2022 through the date of the Court Order
8 granting approval of the PAGA Settlement (the “PAGA Period”). The proposed Settlement, under
9 which Excel has agreed to pay a non-reversionary Gross Settlement Amount (“GSA”) of Three
10 Hundred Thousand Dollars and Zero Cents (\$300,000.00), will resolve Plaintiff’s representative
11 claims filed on behalf of the State of California and all “Aggrieved Employees,” which includes
12 all current and former non-exempt employees who worked for Excel in California at any time
13 during the PAGA Period.

14 Notably, the relief provided for under the Settlement, and the claims released thereunder,
15 are *solely* for the payment of *civil penalties* under the PAGA, and not for any underlying Labor
16 Code violations. The release also encompasses only PAGA civil penalties based upon the factual
17 allegations and theories alleged by Plaintiff in this Action, and only for claims arising during the
18 PAGA Period, which as noted above, ends through the date of the Court Order granting approval
19 of the PAGA Settlement.

20 In deciding whether to grant approval of the Settlement, the primary issue is whether the
21 Settlement is fair, reasonable, and adequate. As set forth herein, the proposed Settlement
22 embodies all of the features of a settlement that is fair, reasonable, and adequate, as it: (1) is the
23 product of arm’s-length negotiations; (2) was negotiated by attorneys experienced in wage-and-
24 hour issues and PAGA litigation with the assistance of an experienced, neutral mediator; (3) was
25 negotiated after undertaking sufficient discovery and investigation to evaluate the relative
26

27 ¹ The proposed Settlement Agreement is attached as **Exhibit 1** to the Declaration of Sean M.
28 Blakely filed herewith. The Explanatory Letter to Aggrieved Employees is attached as **Exhibit A**
to the Settlement Agreement.

1 strength and value of Plaintiff's PAGA claim and Excel's defenses thereto; and (4) reflects a
2 reasoned compromise based on the relative strength and value of the PAGA claim, as well as the
3 risks, expenses, complexity and likely duration of further litigation.

4 As noted, the Settlement provides for a non-reversionary GSA of \$300,000.00. After
5 deducting amounts for requested attorneys' fees (\$100,000.00), litigation costs (\$11,978.21),
6 Plaintiff's Enhancement Payments (\$7,500.00), and settlement administration costs (\$5,250.00),
7 the Settlement provides for distribution of a Net Settlement Amount ("NSA") of approximately
8 \$175,271.79 to be paid to Aggrieved Employees and the California Labor & Workforce
9 Development Agency ("LWDA"). Settlement, § III.4; *see also* Declaration of Sean M. Blakely
10 ("Blakely Decl."), ¶¶ 12, 21, Exhibit 3; Declaration of Jodey Lawrence ("Lawrence Decl."), ¶ 16,
11 Exhibit B.

12 The NSA shall be distributed 75% (approximately \$131,453.84) to the LWDA, and 25%
13 (approximately \$43,817.95) to Aggrieved Employees, pursuant to the requirements of the PAGA
14 as codified in Lab. Code § 2699(i). *See* Settlement, § III.5. There are approximately 389
15 Aggrieved Employees, resulting in average payments of approximately \$112.64 to each
16 Aggrieved Employee. Blakely Decl., ¶ 12.

17 The Settlement represents a positive result for the State of California and Aggrieved
18 Employees. Further litigation may have resulted in a smaller recovery or even no recovery at all,
19 based on the defenses asserted by Excel and significant ongoing litigation risks. Moreover, the
20 GSA is greater than other PAGA penalty awards that have been approved as reasonable. *See, e.g.,*
21 *Penaloza v. PPG Industries Inc.*, Case No. BC471369, 2013 WL 2917624 at *2 (Super. Ct. L.A.
22 County, May 20, 2013) (approving total PAGA set-aside of \$5,000, or \$7.49 per employee);
23 *Cabrera v. Advantage Sale & Marketing, LLC*, Case No. BC485259, 2013 WL 1182822 (Super.
24 Ct. L.A. County, Mar. 12, 2013) (approving PAGA set-aside of \$10,000, or \$3.33 per employee).
25 The amounts requested for attorneys' fees and costs, Plaintiff's Enhancement Payment, and
26 settlement administration costs are all fair, adequate, and reasonable. Thus, Plaintiff respectfully
27 requests that the Court enter the [Proposed] Judgment and Order submitted concurrently herewith.

28 ///

1 **II. SUMMARY OF THE LITIGATION**

2 **A. Brief Factual Background and Summary of Claims**

3 Excel specializes in residential, commercial, and municipal landscape maintenance and
4 serves locations throughout Southern California. Blakely Decl., ¶ 8. Plaintiff worked for Excel as
5 a non-exempt employee from approximately January 2021 until approximately January 2023. *Id.*;
6 *See* Declaration of Plaintiff Arnuldo Avelio Argueta (“Argueta Decl.”), ¶ 2. Plaintiff, like all
7 Aggrieved Employees, was employed by Excel in California as a non-exempt employee during
8 the PAGA Period and was subject to Excel’s wage and hour policies and practices..

9 Plaintiff’s PAGA claim is predicated primarily on allegations that he and other employees
10 were not paid all wages for all hours worked due to Excel’s allegedly unlawful timekeeping
11 policies/practices, were denied compliant meal and rest periods, did not receive accurate and
12 compliant wage statements, and were not paid all final wages owed at the time of separation of
13 employment. As explained below, Excel denies Plaintiff’s allegations and asserted several
14 affirmative defenses to his claims.

15 **B. Relevant Procedural History**

16 On May 24, 2023, Plaintiff filed the instant action, alleging violations of the California
17 Labor Code for: (1) minimum wage violations; (2) failure to pay all overtime wages; (3) meal
18 period violations; (4) rest period violations; (5) wage statement violations; (6) waiting time
19 penalties; and (7) unfair competition. Blakely Decl., ¶ 9. That same day, Plaintiff submitted his
20 notification letter to the LWDA and Excel regarding Excel’s alleged Labor Code violations and
21 his intent to pursue a PAGA representative action, as required by Labor Code § 2699.3. *Id.*,
22 Exhibit 2.

23 On July 24, 2023, after exhausting his pre-filing PAGA requirements under Labor Code
24 § 2699.3(a)(2)(A), Plaintiff filed the operative First Amended Class and Representative Action
25 Complaint in this Court. Blakely Decl., ¶ 9. Shortly after the class action complaint was filed,
26 Excel produced an arbitration agreement that Plaintiff signed during his employment with Excel.
27 *Id.* In light of this arbitration agreement, Plaintiff requested dismissal of his class claims without
28 prejudice, which the Court ordered on August 31, 2023. *Id.*

On February 15, 2024, the Parties participated in mediation before mediator Steven G. Mehta, Esq. Blakely Decl., ¶ 10. In connection with mediation, Excel informally produced information and documents pertaining to Plaintiff and other Aggrieved Employees, including, but not limited to, payroll and timekeeping records for Plaintiff and a representative sample of Aggrieved Employees during the PAGA Period; several data points including the number of Aggrieved Employees and the number of aggregate pay periods worked by Aggrieved Employees during the PAGA Period; and its employee handbook and other written policies in effect during the PAGA Period, in order for Plaintiff's counsel to investigate Plaintiff's allegations and value the claims prior to mediation. *Id.* Plaintiff conducted a comprehensive analysis and extrapolation of the data produced by Excel to calculate Excel's potential PAGA exposure. *Id.*

During mediation, the parties vigorously debated Plaintiff's ability to proceed on a representative basis, the legal basis for Plaintiff's claims and Excel's defenses, the potential amount of penalties, and the Parties' data analyses and conclusions based thereon. Blakely Decl., ¶ 11. With the assistance of Mr. Mehta, the Parties agreed to fully and finally resolve Plaintiff's PAGA claim. *Id.* Over the following months, the parties negotiated and finalized the Settlement now before the Court. *Id.*

III. SUMMARY OF THE SETTLEMENT

A. "Aggrieved Employees" Defined

The "Aggrieved Employees" under the Settlement consist of all current and former non-exempt employees who worked for Excel in California at any time during the PAGA Period. *See* Settlement, § I.2. The number of Aggrieved Employees, including Plaintiff, is estimated to be approximately 389 individuals. *Id.* The PAGA Period is defined as May 24, 2022 through the date of the Court Order granting approval of the PAGA Settlement. *Id.*, § I.11.

B. Monetary Terms

The Settlement provides for Excel's payment of a non-reversionary GSA of \$300,000.00. *See* Settlement, §§ I.8; III.2. After deducting requested attorneys' fees, litigation costs, Plaintiff's Enhancement Payment, and administration costs, the Settlement provides for the NSA to be distributed 75% to the LWDA and 25% to Aggrieved Employees, per Labor Code § 2699(i).

Settlement, §§ III.4-5. The 25% portion to Aggrieved Employees shall be distributed based on each Aggrieved Employee's proportional number of pay periods worked for Excel in California during the PAGA Period. *Id.*, at § III.5.

1. Attorneys' Fees and Costs, Administration Costs, and Plaintiff's Enhancement Payment

Plaintiff counsel requests one-third of the GSA (i.e., \$100,000.00) in attorneys' fees, and \$11,978.21 in litigation costs. *See* Settlement, § III.4(a); Blakely Decl., ¶¶ 20-21, Exhibit 3. As discussed in detail below, a fee award of one-third of the GSA is fair, adequate, and reasonable as a percentage of the settlement fund and is in line with fee awards in other PAGA settlements.

The parties have agreed to engage Phoenix Settlement Administrators ("Phoenix") as the third-party settlement administrator. *See* Settlement, § IV.1. Phoenix will update Aggrieved Employee addresses using the National Change of Address database, calculate and distribute Individual PAGA Payments, mail payments to all Aggrieved Employees together with the Explanatory Letter, and perform other duties that are integral to the effectuation of the Settlement. *Id.*, §§ IV.2-4. Plaintiff requests that the Court approve \$5,250.00 in administration costs to Phoenix, which will cover all costs incurred by Phoenix in connection with the Settlement. *Id.*, at § III.4(c); *see also* Lawrence Decl., Exhibit B.

Finally, Plaintiff requests an enhancement payment of \$7,500.00, in recognition of Plaintiff's contributions to this case and his efforts in bringing this case to successful resolution. *See* Settlement, § III.4(b); Argueta Decl., ¶¶ 6-8.

2. Payment to LWDA and Aggrieved Employees

The NSA will be distributed 75% to the LWDA and 25% to Aggrieved Employees, pursuant to Labor Code § 2699(i); Settlement, § III.5. Based on the above requested distributions, the NSA is estimated to be \$175,271.79, with \$131,453.84 paid to the LWDA and \$43,817.95 distributed to Aggrieved Employees. Blakely Decl., ¶ 12. As noted, there are approximately 389 total Aggrieved Employees. *Id.* Thus, it is anticipated that overall, Aggrieved Employees will receive average Settlement payments of approximately \$112.64. *Id.*

///

1 **3. *Funding of the Settlement***

2 Excel will deposit the GSA with Phoenix, the Settlement Administrator, within thirty (30)
3 calendar days of Court approval of the Settlement. *See Settlement*, § III.2. Within twenty-one (21)
4 calendar days after the Settlement has been fully funded and after receiving approval from
5 Plaintiff’s Counsel and Excel’s Counsel of the payment calculations, Phoenix will mail the
6 Explanatory Letter in English and Spanish, and Individual PAGA Payments, to Aggrieved
7 Employees via First-Class U.S. Mail. *See Settlement*, § IV.3.

8 Funds from any settlement checks remaining uncashed after 180 days will be sent by
9 Phoenix to the California State Controller’s Office for deposit in the Unclaimed Property Division
10 in the name of the Aggrieved Employee. *See Settlement*, § IV.4.

11 **IV. LEGAL ARGUMENT**

12 **A. Standards for Approval of a PAGA Settlement**

13 The settlement of a PAGA claim requires court approval pursuant to the PAGA statute,
14 which states that the “court shall review and approve any settlement of any civil action filed
15 pursuant to this part.” Labor Code § 2699(1). Of course, “[s]ettlement is a compromise, which
16 balances the possible recovery against the risks inherent in litigating further.” *See In re TD*
17 *Ameritrade Account Holder Litig.*, 2011 WL 4079226 at *9 (N.D. Cal. Sept. 13, 2011). “[T]he
18 very essence of a settlement is... ‘a yielding of absolutes and an abandoning of highest hopes,’”
19 as “it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive
20 litigation that induce consensual settlements.” *Officers for Justice v. Civil Service Com.*, 688 F.2d
21 615, 624 (9th Cir. 1982). As such, “the settlement or fairness hearing is not to be turned into a
22 trial or rehearsal for trial on the merits” or “judged against a hypothetical or speculative measure
23 of what might have been achieved by the negotiators.” *Id.*

24 Although the PAGA statute does not set forth the criteria by which a PAGA settlement is
25 to be judged, it is presumed that a reviewing court may utilize some of the factors for review of a
26 class action settlement. However, “a PAGA claim asserted on a non-class representative basis...is
27 not considered a class action but a law enforcement action, and therefore does not have to meet
28 the requirements of [a class action].” *Casida v. Sears Holdings Corp.*, 2012 WL 253217 at *3

(E.D. Cal. Jan. 26, 2012); *Mendez v. Tween Brands, Inc.*, 2010 WL 2650571 at *4 (E.D. Cal. Jul. 1, 2010) (“PAGA claims are law enforcement actions, not class actions”). A court’s review of a PAGA settlement implicates the following unique features that render the approval process distinct from approval of a class action settlement.

First, in evaluating a PAGA settlement, the court is not concerned with amount(s) received by “aggrieved employees,” but rather, must focus on the total settlement amount in achieving PAGA’s objective. “The remedy sought in a PAGA suit consists of civil penalties, not individual or class damages.” *Mendez*, 2010 WL 2650571 at *4. “Unlike class actions, these civil penalties are not meant to compensate unnamed employees because the action is fundamentally a law enforcement action.” *Ochoa-Hernandez v. Cjaders Foods, Inc.*, No. C-08-2073-MHP, 2010 WL 1340777 at *4 (N.D. Cal. Apr. 2, 2010). As our Supreme Court confirmed, “PAGA claims are ‘representative’ actions in the sense that they are brought on the state’s behalf. The employee... ‘represents the same legal right and interest as’ those agencies — ‘namely, recovery of civil penalties that otherwise would have been assessed and collected by the [LWDA].’” *ZB, N.A. v. Sup. Ct.*, 8 Cal.5th 175, 185 (2019) (citing *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 380 (2014)).

Moreover, while “[a PAGA] action is ... designed to protect the public and penalize the employer for past illegal conduct” (*Mendez*, 2010 WL 2650571 at *4), a PAGA settlement – like any settlement – involves a compromise that stops short of rendering findings of liability and damages. “Unlike a class action seeking damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.” *Ochoa-Hernandez*, 2010 WL 1340777 at *4.

Second, consistent with the fact that unnamed employees have no property interest in a PAGA claim,² “[u]nnamed employees need not be given notice of the PAGA claim, nor do they

² “The [PAGA] does not create property rights or any other substantive rights” as “[i]t is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies.” *See Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct.*, 46 Cal.4th 993, 1003 (2009).

1 have the ability to opt-out of the representative PAGA claim.” *Ochoa-Hernandez*, 2010 WL
2 1340777 at *5; *see also Robinson v. Southern Counties Oil Co.*, 53 Cal.App.5th 476, 482 (2020)
3 (recognizing that “there is no mechanism for opting out of the judgment entered on the PAGA
4 claim.”). This renders the approval process of a PAGA settlement distinct from a class action
5 settlement, as the Court need not employ the “two-step approval process” required for class action
6 settlements under Fed. R. Civ. Proc. Rule 23(e) and Cal. Rule of Court 3.769.

7 Finally, unlike a class action settlement under Fed. R. Civ. Proc. Rule 23(e) or Cal. Rule
8 of Court 3.769, the scope of release in a PAGA settlement is limited to *civil penalties*. While
9 “judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on
10 government agencies and any aggrieved employee not a party to the proceeding...the non-party
11 employees, because they were not given notice of the action or afforded any opportunity to be
12 heard, would not be bound by the judgment as to remedies other than civil penalties.” *Arias v.*
13 *Sup. Ct.*, 46 Cal. 4th 969, 986-87 (2009). Thus, the scope of release in a PAGA settlement is
14 strictly confined to PAGA penalties.

15 **1. Factors in Evaluating a Representative PAGA Settlement.**

16 In deciding whether to approve a proposed settlement, a trial court has broad powers to
17 determine if the proposed settlement is fair under the circumstances of the case. *Mallick v. Sup.*
18 *Ct.*, 89 Cal.App.3d 434, 438 (1979). In exercising these powers, the overriding concern is to
19 ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk v. Ford Motor Co.*, 48
20 Cal.App.4th 1794, 1801 (1996) (internal quotations omitted). Relevant factors for the Court to
21 consider include, but are not limited to:

22 [T]he strength of Plaintiff’s case, the risk, expense, complexity and likely
23 duration of further litigation, the risk of maintaining class action status
24 through trial, the amount offered in settlement, the extent of discovery
25 completed and the stage of the proceedings, the experience and views of
counsel, the presence of a governmental participant, and the reaction of the
class members to the proposed settlement.

26 *Id.* These factors require balancing, are non-exhaustive, and trial courts should tailor the factors
27 to each case and give due regard to “what is otherwise a private consensual agreement between
28 the parties.” *Id.* In the context of a PAGA settlement, the third and eighth factors (risk of

maintaining class action status and reaction of class members to settlement) are inapplicable.

Because settlements inherently involve compromise, even a settlement providing for substantially narrower relief than might be obtained if the suit were successfully litigated can be reasonable because “the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001) (quoting *Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972)). In addition, courts review the discovery process and information received through it to aid them in assessing whether the parties sufficiently developed the claims and their supporting factual bases before reaching settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 129-31 (2008). Information is sufficient where it allows the parties and the court to form “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Clark v. Am. Residential Serv. LLC*, 175 Cal.App.4th 785, 801 (2009). This requirement exists so that the parties can provide the court with “a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated.” *Kullar*, 168 Cal.App.4th at 132.

a. The Strength of Plaintiff’s Case

Although Plaintiff steadfastly maintains his claims are meritorious, Plaintiff acknowledges that there are substantial risks and uncertainty in proceeding to trial. For example, with respect to Plaintiff’s claim that Excel utilized a timekeeping policy/practice that resulted in a systematic underpayment of wages, Excel counters that its timekeeping policies/practice complied with California law and that it has always properly compensated Aggrieved Employees for all hours worked throughout the PAGA Period. Blakely Decl., ¶ 13. Excel further argues no pre-shift or post-shift work was actually being performed, and therefore, employees were paid for all hours actually worked. *Id.* Finally, Excel also asserts that Plaintiff’s minimum wage and overtime claims are not suited for representative treatment, as its timekeeping policies/practices are facially neutral and individualized inquiries would be necessary as to whether employees were in fact underpaid or overpaid for each workday in question (including whether they were actually working when they were clocked in). *Id.*

1 With respect to Plaintiff's meal period claims, Excel counters that it maintained compliant
2 written meal period policies throughout the PAGA Period and provided compliant meal periods
3 in line with those policies. Blakely Decl., ¶ 14. Excel further contends that it always provided
4 employees with the opportunity to take meal periods and is not required to ensure they are taken.
5 *Id.*; see *Brinker Restaurant Corporation v. Superior Court*, 53 Cal.4th 1004, 1034 (2012)
6 (rejecting "ensure" standard). Thus, Excel argues, any non-compliant meal periods were the result
7 of lawful employee choice, rather than any policy and/or practice of Excel. Blakely Decl., ¶ 14.
8 As for second meal periods, Excel asserts many employees choose to waive their second meal
9 periods on shifts over 10.0 hours but less than 12.0 hours, as they may do under Labor Code §
10 512(a), so that they do not need to stay at work for an extra unpaid 30 minutes. *Id.* Finally, Excel
11 maintains Plaintiff's meal period claim is not suited for representative treatment, since individual
12 inquiries would be needed to assess which employees, if any, took non-compliant or missed meal
13 periods, how many meal periods were non-compliant or missed, the reasons why a particular
14 employee did not take a meal period on a particular shift, and (for second meals) whether they
15 waived the meal period. *Id.*

16 With respect to Plaintiff's rest period claim, Excel contends that it has maintained and
17 enforced compliant written rest period policies/practices and has always authorized and permitted
18 employees a 10-minute rest period for each four (4) hours worked, or major fraction thereof, as
19 required under the Wage Order, and that any failure to take rest periods was a result of employee
20 choice rather than any Excel policy and/or practice. Blakely Decl., ¶ 15. Excel further argues that
21 Plaintiff's rest period claim is not amenable to representative treatment, since individual inquiries
22 would be required to determine which employees failed to take rest periods, how many rest
23 periods they failed to take, and the reasons why each employee failed to take rest period(s) on a
24 particular shift. *Id.* These manageability concerns are especially present with respect to rest period
25 claims, Excel argues, given that rest periods are not, and need not, be recorded. *Id.*

26 As a result of Excel's alleged failure to pay all wages and all meal and rest period
27 premiums, Plaintiff alleges derivative PAGA claims for failure to issue accurate and itemized
28 wage statements and failure to pay all wages owed at separation. See Labor Code §§ 226(a), 201-

203; Blakely Decl., ¶ 16 . In response, Excel argue that Plaintiff’ underlying claims will fail and, as a result, the derivative claims will also fail. *See Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) (“Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail”). Excel also maintains that any “derivative” PAGA claims for violations of Labor Code Sections 226 or 203 would be entirely duplicative and would be unlikely to be awarded in any significant manner by a Court. Blakely Decl., ¶ 16.

Excel further maintains that even if the Court awarded PAGA penalties for any of the alleged violations, it would substantially reduce the penalties based on the discretionary factors in Labor Code § 2699(e)(2) (authorizing reduction in penalties “if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”). Blakely Decl., ¶ 17. Indeed, Excel argues, many courts have reduced PAGA penalties drastically where, as here, the employer presented good-faith defenses and attempted to comply with the law. *See Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties because “Defendant took their obligations...seriously and attempted to comply with the law”); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK, 2011 WL 7563047 at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties by over 82%, in part because employer “not aware” of violations); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just \$5 per pay period where employer made “good faith attempts” to comply with the law).

While Plaintiff was prepared to litigate his claims through trial, Plaintiff faced substantial challenges in prevailing in this matter and obtaining a better result than will be provided through the Settlement. Thus, this factor supports approval.

b. Risk, Expense, Complexity, and Duration of Further Litigation

Although the Parties engaged in significant informal discovery prior to mediation, the Parties still had much formal discovery to conduct if the case did not settle. Substantive motion work and trial preparation also remained for the Parties, as well as potential appeals. As a result, the Parties would likely incur considerably more attorneys’ fees and costs through trial and

possible appeal. The Settlement avoids those risks and the accompanying expense.

c. Amount Offered in Settlement Given Realistic Value of Claims

The proposed Settlement provides a fair and reasonable monetary recovery for the State of California and Aggrieved Employees in the face of hotly disputed claims. Based on data provided by Excel, there were approximately 10,014 Pay Periods worked by the Aggrieved Employees during the PAGA Period. Blakely Decl., ¶ 18; Settlement, § III.3.

Labor Code § 2699(f)(2) provides for PAGA civil penalties in the amount of \$100 for each aggrieved employee per pay period for the initial violation, and \$200 for each aggrieved employee per pay period for each subsequent violation. *See* Labor Code § 2699(f)(2). However, courts have interpreted section 2699(f)(2) to only impose the \$200 subsequent penalty after an employer has been notified that its conduct violates the Labor Code. *See, e.g., Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1207 (2008) (finding “initial” violation rate applies until employer is notified that it is violating a Labor Code provision); *Trang v. Turbine Engine Components Technologies Corp.*, No. CV 12–07658 DDP (RZx), 2012 WL 6618854, at *5 (C.D. Cal. Dec. 19, 2012) (“courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code”); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, No. 05cv1199–IEG–CAB, 2009 WL 2448430, at *9 (S.D. Cal. 2009) (finding that California law imposes the “subsequent violation penalty” only after an employer has been notified its conduct violates the Labor Code). Therefore, assuming that Plaintiff could prove at least one Labor Code violation in each pay period, Plaintiff calculated Excel’s maximum PAGA exposure at \$1,001,400 (10,014 pay periods * \$100 per violation). Blakely Decl., ¶ 18.

In light of Excel’s arguments and defenses described above, Plaintiff discounted that figure by 40% for a risk of losing on the merits and/or not recovering a PAGA penalty in each and every pay period, and by an additional 45% for risk of the Court reducing penalties, to arrive at a realistic exposure of approximately \$330,462. Blakely Decl., ¶ 18; *see also, e.g., Thurman*, 203 Cal.App.4th at 1136 (affirming reduction of PAGA penalties); *Fleming*, 2011 WL 7563047 at *5 (reducing PAGA penalties by over 82%); *Carrington*, 30 Cal.App.5th at 529 (affirming

1 PAGA civil penalty of just \$5 per pay period).

2 In the face of Excel's defenses on the merits and the Court's discretion to reduce PAGA
3 penalties, Plaintiff felt that the negotiated settlement of \$300,000.00, which represents
4 approximately 90.1% of Plaintiff's reasonably forecasted total recovery, was clearly in the best
5 interests of the LWDA and the aggrieved employees and was well within the range of
6 reasonableness. Blakely Decl., ¶ 18; *See Linney v. Cellular Alaska Partnership*, 151 F.3d 1234,
7 1242 (9th Cir. 1998) ("The fact that a proposed settlement may only amount to a fraction of the
8 potential recovery does not, in and of itself, mean that the proposed settlement is grossly
9 inadequate and should be disapproved.") (internal quotations omitted).

10 Approval of the Settlement is appropriate, as the Settlement will provide tangible
11 monetary relief to Aggrieved Employees and the State of California while avoiding the risks and
12 costs of continued litigation and trial.

13 **d. Discovery Completed and the Status of Proceedings**

14 As noted, the parties engaged in substantial informal discovery to evaluate the value of
15 Plaintiff's PAGA claim. Excel provided Plaintiff with, *inter alia*, a sampling of timekeeping and
16 payroll records for non-exempt employees, additional relevant data points, and its relevant written
17 policies. Blakely Decl., ¶ 10. Only after engaging in mediation and in adversarial discussions
18 about the likelihood of proceeding on a representative basis and prevailing on the merits, did the
19 parties reach the proposed Settlement. Thus, this factor supports settlement approval.

20 **e. The Experience and Views of Counsel**

21 "Parties represented by competent counsel are better positioned than courts to produce a
22 settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter. Sec.*
23 *Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Plaintiff is represented by experienced wage and hour
24 counsel with decades of combined experience, who believe this Settlement to be fair and adequate
25 for all involved. Blakely Decl., ¶¶ 2-6; Declaration of Paul K. Haines ("Haines Decl."), ¶¶ 3-8;
26 Declaration of Joel M. Gordon ("Gordon Decl."), ¶¶ 3-4. This factor strongly supports settlement
27 approval. *Kullar*, 168 Cal.App.4th at 130 ("The court undoubtedly should give considerable
28 weight to the competency and integrity of counsel and the involvement of a neutral mediator in

1 assuring itself that a settlement agreement represents an arm's length transaction entered without
2 self-dealing or other potential misconduct").

3 **B. The Requested Award of Attorneys' Fees is Reasonable as a Percentage of the**
4 **Settlement Fund**

5 Plaintiff is entitled to attorneys' fees in this PAGA action under Labor Code § 2699(g)(1),
6 which provides that "[a]ny employee who prevails in any [PAGA] action shall be entitled to an
7 award of reasonable attorneys' fees and costs." *See also Gouskos v. Aptos Village Garage, Inc.*,
8 94 Cal.App.4th 754, 765 (2001) (holding that attorneys' fees to prevailing party are mandatory
9 when the statute uses the word "shall"). It is undisputed that by obtaining PAGA penalties for the
10 LWDA and Aggrieved Employees, Plaintiff has prevailed. *See Graciano v. Robinson Ford Sales*,
11 144 Cal.App.4th 140, 153 (2006) ("[P]laintiffs may be considered 'prevailing parties' for
12 attorney's fee purposes if they succeed on any significant issue in the litigation that achieves some
13 of the benefit the parties sought in bringing suit." (internal citation omitted)).

14 A fee award is justified where the legal action has produced its benefits by way of
15 settlement. *See, e.g., Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987); *Westside Comty. for*
16 *Independent Living, Inc. v. Obledo*, 33 Cal.3d 348, 352-53 (1983); *Serrano v. Priest* (1977) 20
17 Cal.3d 25, 34 ("when a number of persons are entitled in common to a specific fund, and an action
18 brought by a plaintiff...for the benefit of all results in the creation or preservation of that fund,
19 such plaintiff...may be awarded attorney's fees out of the fund."); *Serrano v. Unruh* (1982) 32
20 Cal.3d 621, 627 (in awarding a fee from the common fund obtained for the benefit of all parties,
21 the trial court acts within its equitable power to prevent the other parties' unjust enrichment);
22 *Rawlings v. Prudential-Bache Properties, Inc.* (6th Cir. 1993) 9 F.3d 513, 516 (the percentage of
23 the fund method for calculating attorneys' fees more accurately reflects the results achieved for
24 the putative class than the lodestar method and "establishes reasonable expectations on the part
25 of Plaintiff attorneys as to their expected recovery; and it encourages early settlement, which
26 avoids protracted litigation."); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005)
27 ("The percentage-of-recovery method is generally favored in common fund cases because it
28 allows courts to award fees from the fund 'in a manner that rewards counsel for success and

1 penalizes it for failure.”).

2 Fee awards of one-third of the settlement fund are routinely awarded in California courts
3 in class and representative PAGA actions. The California Supreme Court confirmed its approval
4 of the use of the “percentage of fund” method in *Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480,
5 506 (2016), where it announced “the percentage of fund method survives in California class action
6 cases...” Specifically, the *Laffitte* Court held:

7 The recognized advantages of the percentage method—including relative ease
8 of calculation, alignment of incentives between counsel and the class, a better
9 approximation of market conditions in a contingency case, and the
encouragement it provides counsel to seek an early settlement and avoid
unnecessarily prolonging the litigation—convince us the percentage method
is a valuable tool that should not be denied our trial courts.

10 *Id.*, at 503 (internal citation omitted). Indeed, “[F]ee awards in class actions average around one-
11 third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008); *see also*
12 *Chavez v. Saticoy Lemon Ass’n*, 2015 WL 5561118 (Ventura Cty. Super. Ct., Aug. 29, 2015)
13 (approving attorneys’ fees of one-third of settlement fund in PAGA settlement); *Clavel v. Lupe’s*
14 *Thousand Oaks Mexican Restaurant, Inc.*, 2016 WL 1601223 (Ventura Cty. Super. Ct., Mar. 25,
15 2016) (same). This is also consistent with Plaintiff’s counsel’s experience in similar wage-and-
16 hour class and PAGA matters.

17 Here, Plaintiff’s fee request of one-third of the GSA (estimated to be \$100,000.00) which
18 is the same percentage approved by the California Supreme Court in *Laffitte*, is fair and reasonable
19 based on the percentage of the recovery method, as confirmed by a lodestar cross-check.

20 In *Laffitte*, the California Supreme Court held that trial courts have discretion to assess the
21 reasonableness of fee awards with tools such as the “lodestar cross-check,” whereby the trial court
22 calculates counsel’s lodestar and determines whether the “lodestar multiplier” needed to bring the
23 lodestar on par with the percentage of recovery is reasonable. *Laffitte*, 1 Cal.5th at 503-06. While
24 a trial court may utilize the lodestar cross-check, it need not do so. *Id.* at 506 (“[w]e hold further
25 that trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the court
26 did here; they also retain the discretion to forgo a lodestar cross-check and use other means to
27 evaluate the reasonableness of a requested percentage fee.”).

28 Under the lodestar method, the court multiplies the number of hours reasonably expended

by each attorney or legal staff member by their reasonable hourly rates, then enhances this lodestar figure by a “multiplier” to account for a range of factors, such as the contingent nature of the case and the degree of success achieved. *See Serrano v. Priest*, 20 Cal.3d 25, 48-49 (1977); *Ketchum v. Moses*, 24 Cal.4th 1122, 1132-36 (2001); *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th 819, 834 (2001) (“There is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation”).

Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g., Chavez*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *Coalition for L.A. County Planning etc. Interest v. Bd. of Supervisors*, 76 Cal.App.3d 241, 251 (1977) (approving multiplier of approximately 12.8). In representative actions such as this one, where Plaintiff’s counsel efficiently protected the rights of the aggrieved employees and where the value of the benefit conferred to the group “can be monetized with a reasonable degree of certainty,” the Court may “adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation.” *Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557 (2009).

In this case, Plaintiff’s counsel has a lodestar of approximately \$107,445.00 without the use of any multiplier, resulting in a *negative* multiplier compared to the \$100,000.00 fee request. Blakely Decl., ¶ 22; Exhibit 4. Plaintiff’s counsel submits that the billing rates used are reasonable in view of the market rates and the rates at which Plaintiff’s counsel has been approved at in other courts. Blakely Decl., ¶¶ 22-23; Exhibit 5 (*Laffey Matrix*).

Name	Rate	Hours	Pre-Multiplier Lodestar
Paul K. Haines (18th Year Attorney)	\$850	4.9	\$4,165.00
Sean M. Blakely (15th Year Attorney)	\$750	65.5	\$49,125.00
Joel M. Gordon (10th Year Attorney)	\$650	76.8	\$49,920.00
Firm Paralegals	\$175	24.2	\$4,235.00
Total Lodestar			\$107,445.00

Critically, Plaintiff’s recovery for the State of California and Aggrieved Employees of

1 approximately \$175,271.79 (NSA) significantly exceeds other PAGA awards approved by
2 California courts. *See, e.g., Aguirre v. DSW, Inc.*, No. DCV-11-01522-GW (SPx), 2012 WL
3 11875296 at *3 (C.D. Cal. Nov. 29, 2012) (approving \$10,000 PAGA payment); *Jamil, supra*,
4 2020 WL 6544660 at *6 (S.D. Cal. Nov. 5, 2020) (approving \$10,000 total PAGA payment,
5 finding the amount “fair and adequate in view of the purposes and policies of PAGA”); *Garcia v.*
6 *Gordon Trucking, Inc.*, No. 1:10-cv-0324-AWI-SKO, 2012 WL 5364575 at *7 (E.D. Cal. Oct.
7 31, 2012) (“approving \$10,000 total PAGA payment, finding that “[t]his comports with
8 settlement approval of PAGA awards in other cases. [Citations.]”); *Boyd v. Bank of Am. Corp.*,
9 No. SACV-13-0561-DOC (JPRx), 2014 WL 6473804 at *8 (C.D. Cal. Nov. 18, 2014) (approving
10 \$18,750 PAGA payment); *Franco v. Ruiz Food Prods.*, No. 1:10-cv-02354-SKO, 2012 WL
11 5941801 at *14 (E.D. Cal. Nov. 27, 2012) (approving \$10,000 PAGA payment); *Chu v. Wells*
12 *Fargo Inv., LLC*, 2011 WL 672645 at *1 (N.D. Cal. Feb. 16, 2011) (\$10,000 PAGA payment).

13 As discussed above, this case presented significant risks to Plaintiff. Plaintiff’s counsel
14 conducted extensive research regarding the merits of Plaintiff’s claims, his ability to recover
15 PAGA civil penalties, and Excel’s potential defenses. Blakely Decl., ¶¶ 13-17. Since undertaking
16 representation of Plaintiff, Plaintiff’s counsel has dedicated substantial resources to this litigation
17 without receiving any compensation to date. *Id.*, ¶ 21. Plaintiff’s counsel also performed extensive
18 analysis of data and information produced by Excel, used this analysis to evaluate Plaintiff’s
19 claims, and drafted a comprehensive mediation brief. *Id.*, ¶ 10. Plaintiff’s counsel attended a full-
20 day mediation, and expended significant effort in preparing settlement documents, this Motion
21 and supporting documents, and will oversee the settlement administration process. *Id.* Given the
22 considerable potential for adverse outcomes in this case, the contingent risk borne by Plaintiff’s
23 counsel was great. *Id.*, ¶ 20. The quality of Plaintiff’s counsel’s work, and the efficacy and
24 dedication with which it was performed, should be compensated. Thus, Plaintiff submits the
25 requested fee award is fair, reasonable and adequate and should be approved.

26 Plaintiff’s counsel have over three decades of combined wage-and-hour class and
27 representative action experience and have been certified as class counsel in numerous wage and
28 hour class actions. Blakely Decl., ¶¶ 2-6; Haines Decl., ¶¶ 3-8; Gordon Decl., ¶¶ 3-4. Because it

1 is reasonable to compensate counsel commensurate with their skill, reputation, and experience, a
2 fee award of one-third of the GSA is reasonable. Other factors show the requested fee is
3 reasonable. This case involved nuanced legal issues, including the legality of Excel's timekeeping
4 practices and obligations to "provide" meal periods, as well as the availability and amount of
5 PAGA civil penalties for the alleged Labor Code violations. Blakely Decl., ¶ 20. Excel was also
6 represented by experienced wage-and-hour litigation counsel. *Id.* Thus, Plaintiff submits the
7 requested fee award is fair, reasonable and adequate and should be approved.

8 **C. The Requested Litigation Costs and Settlement Administration Costs Are**
9 **Fair, Reasonable, and Adequate**

10 Plaintiff's request for reimbursement of litigation costs of \$11,978.21 is also fair and
11 reasonable. All of Plaintiff's litigation costs are reasonably incurred. *See* Blakely Decl., ¶ 21,
12 Exhibit 3. Moreover, the costs Plaintiff seek are the types of costs routinely approved by courts.
13 *See, e.g., Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover "those out-
14 of-pocket expenses that would normally be charged to a fee paying client"); *Ashker v. Sayre*, 2011
15 WL 825713 at * 3 (N.D. Cal. Mar. 7, 2011) ("costs of reproducing pleadings, motions and exhibits
16 are typically billed by attorneys to their fee-paying clients" and are reimbursable); *Trustees of*
17 *Const. Industry & Laborers Health and Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258-
18 59 (9th Cir. 2006) (legal research costs reimbursable); *In re Immune Response Sec. Litig.*, 497
19 F.Supp.2d 1166, 1177-78 (S.D. Cal. 2007) (mediation expenses, consultant and expert fees, legal
20 research, copies, postage, filing fees, messenger and overnight delivery costs are reimbursable).

21 Likewise, the request for administration costs of \$5,250.00 is also fair and reasonable.
22 Phoenix was selected because it is an experienced settlement administrator and returned a
23 reasonable bid. Blakely Decl., ¶ 19; *See* Settlement, § I.9, III.4(c); *See also* Declaration of Jodey
24 Lawrence and Exhibits. Moreover, Phoenix will perform several important functions that are
25 integral to the implementation of the Settlement. Blakely Decl., ¶ 19. Its requested fee is therefore
26 reasonable.

27 ///

28 ///

1 **D. The Court Should Approve Plaintiff's Requested Enhancement Payment**
2 **Because It Is Fair, Adequate, and Reasonable in View of Plaintiff's Efforts**
3 **and the Risks He Assumed in This Litigation.**

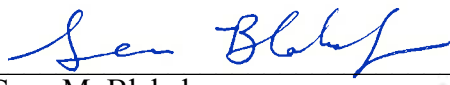
4 Courts routinely approve enhancement awards to compensate named plaintiffs for the
5 services they provide and the risks they incur during representative litigation. *See, e.g., Bell v.*
6 *Farmers Ins. Exch.*, 115 Cal.App.4th 715, 726 (2004) (upholding "service payments" to named
7 Plaintiff); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (approving
8 \$50,000 incentive payment). Here, Plaintiff seeks an Enhancement Payment of \$7,500.00. *See*
9 Settlement, § III.4(b). This request is reasonable given Plaintiff's efforts in this case and the risks
10 he undertook on behalf of Aggrieved Employees. Argueta Decl., ¶¶ 4-6. Plaintiff provided
11 substantial factual information and documents to counsel, assisted in identifying potential
12 witnesses and participated in numerous discussions with Plaintiff's counsel regarding the case.
13 *Id.*; *see also* Blakely Decl., ¶ 24. Accordingly, Plaintiff's requested Enhancement Payment is
14 appropriate and justified as part of the Settlement.

15 **V. CONCLUSION**

16 For the reasons stated herein, Plaintiff respectfully requests that this Court grant Plaintiff's
17 Motion and adopt the [Proposed] Judgment and Order Granting Settlement Approval submitted
18 concurrently herewith.

19
20 Dated: August 30, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

21 By: 
22 Sean M. Blakely
23 Attorneys for Plaintiff
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