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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO**

CARLOS CRUZADO, as an individual
and on behalf of all others similarly
situated,

Plaintiffs,

vs.

ONTARIO T, INC., a California
corporation doing business as JOHN
ELWAY'S CROWN TOYOTA; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: CIVSB2027249

[Assigned to the Hon. David Cohn, Dept. S-26]

**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: February 22, 2022

Time: 10:00 a.m.

Dept.: S-26

Complaint Filed: December 10, 2020

Trial Date: Not Set

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

2 **PLEASE TAKE NOTICE** that on February 22, 2022, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, before the Honorable David Cohn, judge presiding, in
4 Department S-26 of the above referenced Court, located at 247 W. Third Street, San Bernardino,
5 California 92415, Plaintiff Carlos Cruzado ("Plaintiff") will seek an Order approving the
6 concurrently filed Joint Stipulation of PAGA Settlement and Release of Claims ("Settlement
7 Agreement" or "Settlement"), pursuant to the procedures 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, and Plaintiff Carlos Cruzado, upon the oral arguments of counsel (should there be
11 any), and on the complete records and file herein.

12
13 DATED: January 27, 2022

DIVERSITY LAW GROUP, P.C.

14
15 By: 

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and Aggrieved Employees

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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 Carlos Cruzado (“Plaintiff”) hereby moves the Court for an order approving the
4 non-reversionary PAGA settlement as set forth in the Joint Stipulation of PAGA Settlement and
5 Release of Claims (“Settlement Agreement” or “Settlement”).¹

6 The operative Complaint in this case alleges that Defendant Ontario T, Inc., doing
7 business as Elway’s Crown Toyota (“Defendant”) (Defendant and Plaintiff together, the
8 “Parties”), violated the PAGA by (i) failing to pay all minimum wages owed for non-productive
9 time in violation of Labor Code §§ 226.2, 1194, 1197, and 1197.1; (ii) failing to provide off-duty
10 rest breaks in violation of Labor Code § 226.7; (iii) failing to provide accurate itemized wage
11 statements in violation of Labor Code §§ 226 and 226.2; and (iv) failing to reimburse business
12 expenses in violation of Labor Code § 2802. With respect to the aforementioned PAGA claims,
13 Plaintiff seeks to recover civil penalties against Defendant on behalf of the State of California
14 and other similarly aggrieved employees.

15 As will be explained in further detail below, based on the California Supreme Court’s
16 opinion in *Arias v. Superior Court* (2009) 46 Cal. 4th 969 and *Iskanian v. CLS Transportation*
17 *Los Angeles, LLC* (2014) 59 Cal. 4th 348, Plaintiff can seek appropriate civil penalties as called
18 for under the PAGA, on behalf of the State of California and other similarly situated aggrieved
19 employees, without seeking class certification or meeting the requirements of class certification
20 (*i.e.*, numerosity, typicality, commonality and adequacy). As such, while the PAGA settlement
21 reached herein is on behalf of the State of California and other aggrieved employees, the usual
22 two-step preliminary and final approval process is not required. Rather, as called for under Labor
23 Code § 2699(l), all that is required is an approval by this Court of the settlement of the PAGA
24 claim by the Parties.

25
26
27 ¹ A true and correct copy of the Settlement Agreement is attached to the Declaration of Nicholas
28 Rosenthal (“Rosenthal Decl.”) as Exhibit A. Unless otherwise indicated, capitalized terms used
herein have the same meaning as defined in the Settlement Agreement.

1 The Parties have reached such an agreement, and thus now seek this Court's approval of
2 the settlement which provides for the payment of civil penalties under the PAGA. As
3 demonstrated below, the proposed settlement warrants the Court's approval. Significantly, this
4 settlement was reached after extensive investigation and exchange of informal discovery,
5 including data pertaining to the aggrieved employees, a sample of time and payroll records of the
6 aggrieved employees, and documents pertaining to Defendants' relevant payroll policies. The
7 Parties also participated in a full-day mediation with mediator, Todd Smith, Esq., and continued
8 negotiations thereafter facilitated by Mr. Smith, after which the Parties were ultimately able to
9 reach this settlement.

10 Pursuant to the terms of the Parties' proposed Settlement Agreement, Defendant will pay
11 the total amount of \$264,000.00 (the "Gross Settlement Amount"). This amount encompasses a
12 payment of attorneys' fees to Plaintiff's Counsel in the amount of \$88,000.00, Plaintiff's
13 Counsel's actual litigation costs in the amount of \$9,454.15, a service award to Plaintiff in the
14 amount of up to \$10,000.00, and settlement administration costs in the amount of \$3,000.00.
15 Assuming the Court grants the foregoing amounts in full, the Net Settlement Amount totals
16 approximately \$153,545.85. Pursuant to the PAGA, 75% of the Net Settlement Amount, or
17 \$115,159.39, will be paid to the Labor & Workforce Development Agency ("LWDA") as civil
18 penalties, and 25% of the Net Settlement Amount, or \$38,386.46, will be paid to the aggrieved
19 employees. The aggrieved employees' portion of the settlement include all current and former
20 non-exempt employees who worked for Defendant in the State of California and were paid, in
21 whole or in part, on a commission basis at any time from June 10, 2019, through December 31,
22 2021 ("PAGA Settlement Members").

23 The proposed settlement also has a limited and tailored release for PAGA Settlement
24 Members that does not release any of their substantive claims. Specifically, the PAGA
25 Settlement Members are releasing only claims for civil penalties under PAGA for violations of
26 Labor Code §§ 201-204, 226, 226.2, 226.7, 1194, 1197, 1197.1, and 2802, based on the facts
27 alleged in the Action.

28 In light of the above, the proposed settlement constitutes an adequate, fair, and reasonable

1 settlement on behalf of the LWDA and PAGA Settlement Members and accomplishes the goals
2 of PAGA. Thus, the Court should grant approval of the settlement.

3 **II. PROCEDURAL HISTORY**

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

5 **1. Plaintiff's Claims and Allegations**

6 Plaintiff asserts claims against Defendant under the PAGA based on Defendant's failure
7 to pay all minimum wages owed for non-productive time in violation of Labor Code § 226.2,
8 1194, 1197, and 1197.1; failure to provide off-duty rest breaks in violation of Labor Code §
9 226.7; failure to provide accurate itemized wage statements in violation of Labor Code § 226;
10 and failure to reimburse all business expenses in violation of Labor Code § 2802. (Rosenthal
11 Decl. ¶¶ 2-6, Ex. A.)

12 Specifically, with respect to Plaintiff's claims under Labor Code § 226.2, 1194, 1197, and
13 1197.1, Plaintiff alleges that Plaintiff and aggrieved employees were paid, in part, on a
14 commission basis. As a result, Plaintiff did not receive wages, including minimum wages, for
15 time spent working for Defendant completing non-productive tasks. Moreover, because Plaintiff
16 was paid on a commission basis and not an hourly wage, any duty-free rest breaks Plaintiff may
17 have taken were not "paid" breaks.

18 With respect to Plaintiff's business reimbursement claims, Plaintiff alleges that
19 Defendant required Plaintiff and aggrieved employees to use their personal cell phones in order
20 to perform their jobs. Defendant printed Plaintiff's personal cell phone number on company
21 business cards, and consequently, business-related calls were routinely sent to Plaintiff's cell
22 phone. Defendant did not reimburse Plaintiff for these and other business expenses.

23 Lastly, Plaintiff also alleges wage statement violations under Labor Code § 226 resulting
24 from Defendant's unpaid/underpaid minimum wage violations and rest break violations.

25 **2. Procedural History of the Key Pleadings**

26 On or about November 12, 2020, Plaintiff submitted written notice under Labor Code §
27 2699.3 (the "PAGA Notice") to the LWDA and Defendant. As set forth in the PAGA Notice,
28 Plaintiff alleged that Defendant violated California Labor Code §§ 201-204, 226, 226.2, 1194,

1 1197, 1197.1, and 2802, based on the theories alleged above. (Rosenthal Decl. ¶ 2, Ex. A.)

2 On or about January 6, 2021, Defendant filed a notice with the LWDA alleging that
3 Plaintiff was paid for rest periods and non-sales activity during his employment, that Plaintiff's
4 wage statements identified regular and overtime hours worked, and that Plaintiff was not
5 required to use his personal cell phone for business purposes. (Rosenthal Decl. ¶ 3.)

6 On or about January 19, 2021, Plaintiff filed a response to Defendant's alleged cure
7 notice, stating that only violations of Labor Code §§ 226(a)(6) and 226(a)(8) may be "cured."
8 (*Id.* ¶ 4.)

9 On January 21, 2021, the LWDA issued a decision that no cure had taken place. (*Id.* ¶ 5.)

10 On December 10, 2020, Plaintiff filed a class and representative action complaint against
11 Defendant in the Superior Court of California, County of San Bernardino, alleging causes of
12 action for (1) violation of Labor Code §§ 226.2, 1194, 1197, and 1197.1; (2) violation of Labor
13 Code § 226.7; (3) violation of Labor Code §§ 226 and 226.2; (4) violation of Labor Code § 2802;
14 (5) violation of Business and Professions Code § 17200, *et seq.*; and (6) violation of Labor Code
15 § 2698, *et seq.* (the "Action"). (*Id.* ¶ 6.)

16 **3. The Parties Agree to Mediation**

17 In about May 2021, the Parties agreed to participate in mediation with Todd A. Smith,
18 Esq. (Rosenthal Decl. ¶ 7.) The Parties also agreed to conduct informal discovery to facilitate an
19 effective mediation. (*Id.*) As part of informal discovery, Defendant provided Plaintiff with the
20 number of aggrieved employees, the number of pay periods at issue, sample of time and payroll
21 records, employee handbook, and relevant payroll policies. (*Id.*) The data provided by Defendant
22 allowed Plaintiff to analyze liability and calculate Defendant's potential exposure. (*Id.*)

23 The Parties participated in mediation with Mr. Smith on September 1, 2021. (*Id.* ¶ 8.)
24 During the mediation, the Parties spoke at length about the strengths and weaknesses of each
25 side's claims and defenses and the scope of Defendant's liability. While the Parties did not reach
26 a resolution at the mediation, the Parties continued settlement negotiations thereafter facilitated
27 by Mr. Smith and were able to reach the current settlement of Plaintiff's PAGA claims as a result
28 of a mediator's proposal. (*Id.*)

1 In connection with the Parties' agreement and the existence of an arbitration agreement
2 containing a class waiver, on November 16, 2021, Plaintiff filed a request for dismissal of class
3 claims. (*Id.* ¶ 9.) On November 18, 2021, the Court entered an Order dismissing all class claims
4 without prejudice. (*Id.* ¶ 10.) The Action is comprised of a single cause of action for violation of
5 the PAGA. (*Id.*)

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

7 The material terms of the settlement are described below and set forth in detail in the
8 Settlement Agreement.

9 **A. The Aggrieved Employees**

10 The aggrieved employees affected by this Settlement, or "PAGA Settlement Members,"
11 include all current and former non-exempt employees who worked for Defendant in the State of
12 California and were paid, in whole or in part, on a commission basis at any time from June 10,
13 2019, through December 31, 2021. (Settlement Agreement ¶ 1.14.) The PAGA Period in this
14 matter runs from June 10, 2019, through December 31, 2021. (*Id.* ¶ 1.13.) Based upon
15 Defendant's records, Defendant represents that there are approximately 241 PAGA Settlement
16 Members and approximately 8,337 pay periods at issue during the PAGA Period. (Rosenthal
17 Decl. ¶ 13.)

18 **B. Gross Settlement Amount and Allocation**

19 The Settlement Agreement requires Defendant to pay the amount of Two Hundred Sixty-
20 Four Thousand Dollars (\$264,000.00) (the "Gross Settlement Amount") for the resolution of this
21 Action. (Settlement Agreement ¶ 3.1.) The Gross Settlement Amount includes the civil penalties
22 pursuant to the PAGA to be paid to the LWDA and PAGA Settlement Members, Plaintiff's
23 Service Award, Plaintiff's Counsel's fees and costs, and settlement administration fees. (*Id.*)

24 The balance of the Gross Settlement Amount remaining after deduction of the court-
25 approved Plaintiff's Service Award, Plaintiff's Counsel's fees and costs, and settlement
26 administration fees (the "Net Settlement Amount"), will be available for distribution to the
27 LWDA and PAGA Settlement Members. (*Id.* ¶¶ 1.11, 3.6, 3.6.1, and 3.6.2.) Pursuant to the
28 PAGA, seventy-five percent (75%) of the Net Settlement Amount, or approximately

1 \$115,159.39, will be paid to the LWDA for PAGA penalties. (*Id.* ¶ 3.6.1; Rosenthal Decl. ¶ 15.)
2 The remaining twenty-five percent (25%), or approximately \$38,386.46, will be distributed to
3 PAGA Settlement Members (“Individual PAGA Payments”) on a pro rata basis. (Settlement
4 Agreement ¶ 3.6.2.) The amount of each Individual PAGA Payment will be based on the number
5 of pay periods each individual PAGA Settlement Member was paid wages on a commission
6 basis during the PAGA Period. (*Id.* ¶ 3.6.2(i).)

7 Based on the number of PAGA Settlement Members, employees will be entitled to
8 recover, on average, approximately **\$159.27** each. (Rosenthal Decl. ¶ 16.) The amount each
9 particular PAGA Settlement Member will be entitled to recover may be greater or lower than this
10 average depending on the number of pay periods he or she was paid wages on a commission
11 basis during the PAGA Period. (*Id.*) This is fair, as it directly allocates greater penalties to
12 individual PAGA Settlement Members who were employed longer and thus allegedly suffered
13 greater harm. (*Id.*)

14 With respect to Plaintiff’s Counsel’s attorneys’ fees and costs, Defendant does not object
15 to Plaintiff’s Counsel’s request for attorneys’ fees of approximately one-third of the Gross
16 Settlement Amount, *i.e.*, Eighty-Eighty Thousand Dollars (\$88,000.00). (Settlement Agreement
17 ¶ 3.3.) Although the Settlement Agreement provides for a payment of up to \$15,000.00 in actual
18 litigation costs, Plaintiff only seeks \$9,454.15 of that amount. (*Id.*; Rosenthal Decl. ¶ 27, Ex. D.)

19 In addition, the Settlement Agreement contemplates a Service Award to Plaintiff in
20 recognition of his efforts in prosecuting this Action as the PAGA representative on behalf of the
21 State of California and other aggrieved employees, in the amount of up to \$10,000.00.
22 (Settlement Agreement ¶ 3.2.)

23 Finally, the Settlement Agreement provides for the payment of the fees and expenses
24 reasonably incurred by the Settlement Administrator for administration of this PAGA settlement.
25 (*Id.* ¶ 3.4.) The Parties have agreed to utilize Phoenix Settlement Administrators, a well-known
26 third-party settlement administrator, to administer the Settlement. (*Id.* ¶ 1.21.)

27 **C. Scope of the Released Claims**

28 In exchange for the payments described above, Plaintiff and PAGA Settlement Members

1 release Defendant and the Released Parties from the following:

2 any and all claims for civil penalties under the PAGA that were set forth,
3 or could have been set forth based on the facts alleged in the Complaint.

4 (Settlement Agreement ¶ 5.1.) The Settlement, however, does not release Defendant from
5 violations of any predicate statutes other than PAGA, and will not affect a waiver of individual
6 claims by PAGA Settlement Members against Defendant for any of the underlying Labor Code
7 claims. The release is expressly limited to claims for civil penalties under PAGA. (*Id.*)

8 Accordingly, the release for PAGA Settlement Members is narrowly tailored and appropriate.

9 **IV. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED**

10 **A. PAGA Overview**

11 Prior to the enactment of PAGA, many of the penalties provided against employers for
12 violations of certain Labor Code provisions were solely within the province of the California
13 Department of Labor to seek, enforce, and assess. (*Arias v. Superior Court* (2009) 46 Cal. 4th
14 969, 980.) However, due to the lack of financing to California's agencies and the potential
15 number of Labor Code violations by California employers, the California Legislature found that
16 it was in the public interest to allow aggrieved employees to act as private attorneys general and
17 to enforce and recover penalties on behalf of other similarly situated aggrieved employees for
18 Labor Code violations committed by their employers. (*Id.*) As such, PAGA was enacted to allow
19 such enforcement and recovery by private individuals who have been aggrieved by their
20 employers. Under the PAGA, 75% of any penalties recovered under PAGA by an aggrieved
21 employee is to be paid to the state agency, the LWDA, and the remaining 25% is to be shared
22 amongst the aggrieved employees. (Cal. Lab. Code § 2699, subd. (i).)

23 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
24 employee must first provide written notice to the LWDA and the employer of the particular
25 Labor Code violation(s) alleged to have been violated by the employer. (*See* Cal. Labor Code §
26 2699.3, subd. (a)(1).) Once the LWDA notifies the aggrieved employee that it does not intend to
27 investigate the alleged violations or the time for the LWDA to investigate the violations passes,
28 the aggrieved employee is allowed to proceed in a civil action against the employer on behalf of

all other similarly aggrieved employees. (*See* Cal. Lab. Code § 2699.3, subd. (a)(2)(A).)

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

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

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

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

7 Notably, unlike the class action settlement approval process, there is also no statutory
8 mechanism for this Court to conduct a two-step settlement approval review. (Cal. Lab. Code §
9 2699, subd. (1).) In addition, “[u]nnamed employees need not be given notice of the PAGA
10 claim, nor do they have the ability to opt-out of the representative PAGA claim” or “contest a
11 settlement, if any, reached between the parties.” (*Ochoa-Hernandez v. Cjaders Foods, Inc.* (N.D.
12 Cal. Apr. 2, 2010) 2010 WL 1340777 at p. *13.)

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

14 The Court’s focus in a PAGA case is not the amount that PAGA Settlement Members
15 will ultimately receive as a result of a settlement, but instead, on whether the total settlement
16 amount achieves PAGA’s objectives. Under PAGA, the penalties recovered are meant to
17 supplement agency funding for education and enforcement purposes. (*See* Cal. Lab. Code §
18 2699, subd. (i).)

19 Here, the Settlement represents an excellent recovery for the PAGA Settlement Members
20 and the State, and thus the Settlement certainly effectuates PAGA’s purpose. The Settlement
21 accomplishes PAGA’s primary objective to enforce the Labor Code. (*See O’Connor v. Uber*
22 *Techs, Inc.* (N.D. Cal. 2016) 2016 WL 4398271, at p. *18 (noting that deterring noncompliance
23 with the Labor Code is one of PAGA’s objectives).) The Settlement is also consistent with the
24 State’s public policy favoring resolution of disputes. “California law favors the settlement of
25 disputes as our high court clarified in *Neary*[]. Settlement is efficient; it reduces costs, saves
26 resources, and minimizes court congestion. [] The parties are best positioned to understand their
27 interests and resolve a dispute in a mutually beneficial manner without court intervention into the
28 settlement.” (*Consumer Advocacy Group, Inc. v. Kintetsu* (2006) 141 Cal. App. 4th 46, 62-63

1 (citing *Neary v. Regents of Univ. of Cal.* (1992) 3 Cal. 4th 273, 277- 278).)

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

3 If approved, the Settlement would release the Released Parties from PAGA claims
4 predicated on the violations of Labor Code §§ 201-204, 226, 226.2, 226.7, 1194, 1197, 1197.1
5 and 2802, arising from the facts in the Action, and nothing more. The Settlement would not
6 impact any other PAGA Settlement Members' ability to pursue PAGA claims predicated on
7 other Labor Code violations or any Labor Code claims not predicated on PAGA. Therefore, the
8 limited scope of the release also supports approval.

9 Because an aggrieved employee's PAGA action is a substitute for an action brought by
10 the government, "judgment in [a PAGA] action is binding not only on the named employee
11 plaintiff but also on government agencies and any aggrieved employee not a party to the
12 proceeding." (*Arias*, 46 Cal. 4th at p. 986.) However, "the nonparty employees, because they
13 were not given notice of the action or afforded any opportunity to be heard, would not be bound
14 by the judgment as to remedies other than civil penalties." (*Id.* at p. 987; *see also*, Lab. Code §
15 2699(g)(l) (non-party PAGA Settlement Members retain all rights "to pursue or recover other
16 remedies available under state or federal law, either separately or concurrently with an action
17 taken under this part").)

18 Accordingly, the PAGA Settlement Members will be subject to only a limited release
19 strictly confined to the statutory penalties available under PAGA for violations of Labor Code §§
20 201-204, 226, 226.2, 226.7, 1194, 1197, 1197.1 and 2802. (Settlement Agreement ¶ 5.1.) The
21 release is therefore appropriately tailored.

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

24 Although Plaintiff is reasonably confident that he would prevail at trial, proceeding in
25 litigation entails significant risk on the underlying merits of Plaintiff's theory, in addition to the
26 still-developing law under PAGA. (Rosenthal Decl. ¶ 20.)

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

28 Plaintiff asserts that his representative PAGA claim is based on the allegations that

1 Defendant failed to pay minimum wages for non-productive time, failed to provide off-duty rest
2 breaks, failed to provide accurate itemized wage statements, and failed to reimburse business
3 expenses. (Rosenthal Decl. ¶¶ 2-6.)

4 Defendant has denied violation of any applicable laws and liability for any claims
5 asserted in the Action. Specifically, Defendant argued that Plaintiff was paid for rest periods and
6 non-sales activity, and that Plaintiff was not required to use his personal cell phone for business
7 purposes. (*Id.* ¶ 18.) Moreover, Defendant argued that even if the Court ultimately found its
8 employment practices violative of the Labor Code, the Court has discretion under PAGA to
9 reduce the maximum allowable PAGA penalties at its discretion. (*Id.*) Defendant may have
10 sought summary judgment on this issue or proceeded to trial. Should Defendant have prevailed,
11 the State of California and PAGA Settlement Members would have been left with zero recovery.
12 Even if Plaintiff prevailed at trial, Defendant could have appealed, which would have continued
13 litigation in this action for several years thus depriving the State and PAGA Settlement Members
14 of any recovery for the foreseeable future.

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

16 Defendant has represented that there are approximately 241 employees who comprise the
17 PAGA Settlement Members and approximately 8,337 total pay periods at issue during the PAGA
18 Period. Based on the data provided by Defendant, Plaintiff has calculated the maximum exposure
19 for all PAGA claims to be \$2,501,100.00. (Rosenthal Decl. ¶ 17.) However, even if Plaintiff
20 were to prevail on the merits of the PAGA claim, the potential recovery is uncertain. Pursuant to
21 Labor Code § 2699(f)(2), the Court can decline to award the full amount of PAGA penalties
22 where “if, based on the facts and circumstances of the particular case, to do otherwise, would
23 result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Indeed, as shown in
24 the Court of Appeal’s decision in *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504,
25 517, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the
26 maximum PAGA penalty amount by 90%, citing the employer’s good faith attempt at complying
27 with the law. Upon review, the Court of Appeal found such reduction to be proper. (*Id.* at p. 539;
28 see *O’Connor*, 2016 WL 4398271, at p. *17 (noting that even if PAGA penalties amounted to \$1

1 billion, such award “could well be reduced, as a court may reduce the penalty when to do
2 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory”).)

3 Here, Plaintiff maintains that there does not exist any reason for reducing PAGA
4 penalties. However, Plaintiff is aware that Defendant could make a compelling argument to the
5 contrary. Even if there were a finding of liability, Defendant has argued that these violations
6 were not intentional violations of the law and did not occur every pay period or apply to all
7 employees. As such, the Court may be disinclined to award full PAGA penalties. On this basis,
8 the Court again may find there is reason to significantly reduce the PAGA penalties awarded.

9 The Court’s assessment of the proposed Settlement must take into account that any
10 penalties awarded may be subject to substantial reduction. When this is considered, in
11 conjunction with the history of PAGA case law and settlements, and the fact that Plaintiff may
12 recover nothing, the proposed settlement is patently reasonable. Settlement for this reduced value
13 allows for the distribution of penalties in an amount which accounts for the risk of continued
14 litigation, and Defendants’ likely arguments that higher penalties would have been confiscatory.
15 It also sufficiently deters Defendants from engaging in similar conduct in the future, which is one
16 of the primary goals of PAGA.

17 The proposed settlement *significantly* exceeds PAGA settlements that courts have
18 approved in other cases, when considered as a percentage of the overall settlement value of the
19 case. The proposed settlement amounts to approximately **10.6%** of the potential maximum of
20 PAGA penalties, which far exceeds other PAGA settlements approved by courts—including
21 those that provide for less than the one percent allocation to PAGA penalties. (Rosenthal Decl. ¶
22 19; *see, e.g., Hopson v. Hanesbrands Inc.* (N.D. Cal. 2009) 2009 WL 928133, p. *9 (approving
23 total PAGA allocation that was 0.49% of \$408,420.32 gross settlement; *Moore v. PetSmart, Inc.*
24 (N.D. Cal. 2015) 2015 WL 5439000, p. *8 (approving total PAGA allocation that was 0.5% of
25 \$10,000,000 gross settlement); *Lusby v. Gamestop Inc.* (N.D. Cal. 2013) 97 F.R.D. 400, 407
26 (approving total PAGA allocation that was 0.67% of \$750,000 gross settlement).)

27 A PAGA allocation need not represent any particular percentage of the overall settlement
28 value in order to secure court approval, and courts routinely approve PAGA settlements

1 representing only a tiny fraction of the overall settlement value. The proposed Gross Settlement
2 Amount in this case vastly exceeds the percentage of overall settlement value of the typical
3 PAGA settlement and thus, the Settlement should be approved by the Court.

4 **F. The Attorneys' Fees and Costs are Reasonable**

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

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

1 successful.” (*Id.*)

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

9 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
10 percent of the fund. (*Laffitte*, 1 Cal.5th at p. 506.) And this was based on a lodestar amount that
11 required a multiplier of 2.13. (*Id.* at p. 487.) As the Court held, only when the multiplier is
12 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
13 should be adjusted so as to bring the imputed multiplier within a justifiable range.” (*Id.* at p.
14 505.)

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

23 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar
24 cross-check is extraordinarily high or low, the trial court should consider whether the percentage
25 used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the
26 court is not necessarily required to make such an adjustment.” (*Id.*) Thus, a lodestar cross-check
27 is aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases,
28 performing a cross-check “undermines” one of the primary reasons for using the percentage

1 method: aligning counsel’s incentives with the benefits delivered to the class and discouraging
2 protracted litigation. (*Id.* at p. 506 (finding trial courts “retain the discretion to forgo a lodestar
3 cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees* (1985) 108
4 F.R.D. 237, 258; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, pp. 29-30
5 (citing the recommendations of the Third Circuit Task Force with approval and observing that
6 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
7 authorities, who have been most vocal about the manner in which it exacerbates the problem of
8 ‘cheap settlements’ and burdens already overworked trial judge”).)

9 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
10 4 or even higher.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 255; *see also*,
11 *e.g.*, *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 512 (applying a 2.52
12 multiplier on a cross-check in an antitrust class action); *Chavez v. Netflix* (2008) 162 Cal. App.
13 4th 43, 60 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland*
14 *Raiders* (1988) 203 Cal. App. 3d 78 (affirming a 2.34 multiplier without remand).)

15 With respect to Plaintiff’s Counsel’s lodestar, to date, approximately 117.5 hours have
16 been expended by Plaintiff’s Counsel this matter. (Rosenthal Decl. ¶ 24, Ex. C; Declaration of
17 Larry W. Lee (“Lee Decl.”) ¶ 8, Ex. A; Declaration of Kristen M. Agnew (“Agnew Decl.”) ¶ 11,
18 Ex. A.) Mr. Lee requests an hourly rate of \$750.00 per hour. (Lee Decl. ¶ 9.) Ms. Agnew
19 requests an hourly rate of \$700.00 per hour. (Agnew Decl. ¶ 12.) Mr. Rosenthal requests an
20 hourly rate of \$700.00 per hour. (Rosenthal Decl. ¶ 26.) The courts are quite liberal in the
21 evidence required to prove an attorney’s hours. Detailed time records are not required. An
22 attorney’s testimony alone may suffice: “Testimony of an attorney as to the number of hours
23 worked on a particular case is sufficient evidence to support an award of attorney fees, even in
24 the absence of detailed time records.” (*Martino v. Denevi* (1986) 182 Cal. App. 3d 553, 559.)

25 Reasonable hours include, in addition to time spent during litigation, the time spent
26 before the action is filed, including time spent interviewing the clients, investigating the facts and
27 the law, and preparing the initial pleadings. (*New York Gaslight Club, Inc. v. Carey* (1980) 447
28 U.S. 54, 62.) Further, the fee award should include fees incurred to establish and defend the

1 attorneys' fee claim. (*Serrano v. Unruh* (1982) 32 Cal. 3d 621, 639 [*Serrano IV*].)

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

8 Plaintiff's Counsel's skill and experience justify the requested rate. As shown in the
9 supporting declarations, Plaintiff's Counsel have significant experience in the area of
10 employment and wage and hour class actions. Specifically, Plaintiff's Counsel's practice focuses
11 on representing employees in employment matters, particularly wage and hour cases. (Lee Decl.
12 ¶¶ 6-7; Agnew Decl. ¶¶ 6-9); Rosenthal Decl. ¶¶ 22-23.) As such, based on the hours and
13 applicable rate, the total lodestar to be expended by Plaintiff's Counsel through finalizing this
14 Settlement will be approximately \$82,915.00, based on 117.5 total hours. (Lee Decl. ¶ 8, Ex. A;
15 Agnew Decl. ¶ 11, Ex. A; Rosenthal Decl. ¶ 25, Ex. C.)

16 Once the court establishes the lodestar amount, it may enhance the fee award by a
17 multiplier in order to make an appropriate fee award. (*Serrano III*, 20 Cal. 3d at p. 48.) The
18 pertinent factors include the difficulty of the questions involved and the skill in presenting them,
19 the contingent nature of the fee award, the extent to which the litigation precluded other
20 employment, and the percentage-of-the-fund the attorney would have received on the fair
21 market. (*Id.*, *Lealao*, 82 Cal. App. 4th at p. 49.) However, this list is not exhaustive and the court
22 can consider other factors it deems important in setting the multiplier. (*Ketchum v. Moses* (2001)
23 24 Cal. 4th 1122, 1139.)

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

1 Here based upon Plaintiff's counsel's lodestar of \$82,915.00, Plaintiff's request for a fee
2 award of \$88,000.00 is more than reasonable and fair. As the Court can see, the lodestar well is
3 such that Plaintiff's counsel requests only a 1.06 multiplier. Based thereon, Plaintiff's Counsel's
4 request for attorneys' fees in the amount of \$88,000.00 is fair and reasonable, and the Court
5 should approve this amount.

6 **G. The Costs are Reasonable**

7 Additionally, Plaintiff's Counsel's cost reimbursement request in the amount of
8 \$9,454.15 is also reasonable, especially in light of the fact that the Parties agreed that Plaintiff's
9 counsel may seek up to \$15,000.00 as reimbursement for litigation costs under the Settlement
10 Agreement. (Rosenthal Decl. ¶ 26, Ex. D; Settlement Agreement ¶ 3.3.) As set forth in Plaintiff's
11 Counsel's declaration, the costs were all directly incurred in the prosecution of this action,
12 including without limitation, filing and service fees, postage fees, court fees, mediation fees, and
13 copying fees. (Rosenthal Decl. ¶ 26.) As such, the requested costs are fair and reasonable, and
14 should be awarded by the Court.

15 **H. The Settlement Administrator's Fees Should be Approved**

16 The Parties have agreed to pay actual costs of administration, which will not exceed
17 \$3,000.00, to the Settlement Administrator, Phoenix Settlement Administrators, to administer
18 this Settlement. (Settlement Agreement ¶ 3.4.) The Parties believe that the administration fee is
19 reasonable and should be approved.

20 **I. Plaintiff's Service Award Should be Approved**

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

27 Here, Plaintiff seeks \$10,000.00 for the service award, which is intended to compensate
28 Plaintiff for the time spent on this case and for his efforts in prosecuting this case as the

1 representative on behalf of the State of California and other aggrieved employees. In particular,
2 Plaintiff has met with his counsel to discuss the case, had numerous telephonic discussions with
3 his counsel regarding the case, and reviewed pleadings and documents, including the PAGA
4 letter, the complaint, his personnel file and payroll records, the employee handbook, and the
5 settlement agreement. (Declaration of Carlos Cruzado (“Cruzado Decl.”) ¶¶ 7-8.) Additionally,
6 by serving as the PAGA representative and filing this lawsuit, which is a public record, Plaintiff
7 also faced significant risk in not being able to find prospective employment and/or face
8 retaliation from prospective employers. (*Id.* ¶ 10.) In this regard, future employers are less likely
9 to hire and/or continue employment with individuals who have filed employment-related
10 lawsuits, particularly cases of this nature. (*Id.*) In light of Plaintiff’s efforts, the service award
11 should be awarded to Plaintiff for his commitment, dedication, and risks taken for this litigation.

12 Furthermore, the requested service award is consistent with awards approved in other
13 common fund cases. (*See Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp.
14 294, 299-300 (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer*
15 *Litig.* (S.D. Ohio 1990) 130 F.R.D. 366, 374 (two incentive awards of \$ 55,000, and three
16 incentive awards of \$35,000); *Brotherton v. Cleveland* (S.D. Ohio 2001) 141 F. Supp. 2d 907,
17 913-14 (granting a \$50,000 incentive award); *Enter. Energy Corp. v. Columbia Gas*
18 *Transmission Corp.* (S.D. Ohio 1991) 137 F.R.D. 240, 251-52 (\$50,000 awarded to each class
19 representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068 (N.D. Cal. Jan. 27, 2007) 2007 U.S.
20 Dist. LEXIS 8476, *51-52 (awarding \$25,000 incentive award in FLSA overtime wages class
21 action); *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1016 (affirming \$25,000 Incentive award
22 to class representative in ERISA case).)

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

24 Pursuant to California Labor Code § 2699(1), on January 27, 2022, Plaintiff uploaded the
25 instant motion, Settlement Agreement, and proposed order to the LWDA’s website. (Rosenthal
26 Decl. ¶ 27.) In addition, Plaintiff shall submit to the LWDA a copy of the Court’s judgment and
27 order approving the Settlement Agreement within ten (10) days after entry of judgment or order.
28 (*Id.*)

1 **V. CONCLUSION**

2 Based on the above, Plaintiff requests that the Court approve the current PAGA
3 settlement.

4
5 DATED: January 27, 2022

DIVERSITY LAW GROUP, P.C.

6
7 By: 
8 Larry W. Lee
9 Kristen M. Agnew
10 Nicholas Rosenthal
11 Attorneys for Plaintiff and Aggrieved Employees
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STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

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

- 1. 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;**
- 2. DECLARATION OF NICHOLAS ROSENTHAL IN SUPPORT OF PLAINTIFF'S MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT;**
- 3. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT;**
- 4. DECLARATION OF KRISTEN M. AGNEW IN SUPPORT OF PLAINTIFF'S MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT;**
- 5. DECLARATION OF CARLOS CRUZADO IN SUPPORT OF PLAINTIFF'S MOTION TO APPROVE SETTLEMENT AGREEMENT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT;**
- 6. [PROPOSED] ORDER AND JUDGMENT**

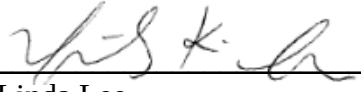
on the interested parties in this action as follows:

Spencer W. Waldron
swaldron@fisherphillips.com
 Fisher & Phillips
 2050 Main Street, Suite 1000
 Irvine, CA 92614
Attorneys for Defendant Ontario T, Inc.

 X BY ELECTRONIC MAIL: by personally sending a true and correct copy of the above-described document(s) to the party(ies) listed above or on the attached mailing list from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s)

1 indicated above or on the attached mailing list. I certify that said electronic transmission was
2 completed and that all pages were received by the party(ies) identified herein or on the attached
3 mailing list.

4 I declare under penalty of perjury under the laws of the State of California that the
5 above is true and correct. Executed on January 27, 2022, at Los Angeles, California.

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7 _____
8 Linda Lee
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