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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TERRI GIBSON, and all other aggrieved
employees,

Plaintiff,

v.

SWIFT TRANSPORTATION CO. OF
ARIZONA, LLC, SWIFT
TRANSPORTATION SERVICES, LLC,
and DOES 1 to 10,

Defendants.

NO. 5:20-cv-00318-ODW-SP

PLAINTIFF TERRI GIBSON'S
NOTICE OF MOTION AND
RENEWED MOTION FOR
APPROVAL OF PAGA
SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES;
DECLARATION OF MANNY
STARR; PROPOSED ORDER

Date: July 19, 2021

Time: 1:30 p.m.

Ctrm: 6D

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on July 19, 2021 at 1:30 p.m. or as soon thereafter as
may be heard in Courtroom 6D of the United States District Court of the Central
District of California located at 350 W. First St., Los Angeles, CA 90012, plaintiff
Terri Gibson will move the court pursuant to Cal. Lab. Code, § 2699(1)(2) to approve
the Private Attorneys General Act ("PAGA") settlement reached at mediation.

The motion is based on this notice, the memorandum of points and authorities,
the declaration of Manny Starr and its attachments, pleadings on file, and arguments
at the hearing.

1 Date: June 16, 2021

FRONTIER LAW CENTER

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/s/ Adam Rose

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Attorney for Plaintiff

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Terri Gibson

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On May 20, 2021, the Court raised the following concerns with the first motion
4 for approval of the settlement in this case: (1) the gap between Plaintiff's estimated
5 maximum exposure of \$3,702,972 and the settlement amount, \$288,420 (7.7% of the
6 estimated exposure); (2) Plaintiff needed to provide an analysis of why a 7.7%
7 recovery was within the range of reasonableness; (3) Plaintiff needed to provide
8 further proof that the proposed settlement was submitted to the LWDA; and (4)
9 Plaintiff needed to provide a more user-friendly billing summary. These four points
10 are addressed in this renewed motion for approval.

11
12 **II. COURT APPROVAL OF PAGA SETTLEMENTS**

13 Pursuant to Cal. Lab. Code, § 2699(1)(2), the court shall review and approve
14 any PAGA settlement. While there are no set criteria to approve a PAGA settlement,
15 the arguments below demonstrate that the settlement is fair, adequate, and reasonable,
16 and is consistent with the functions of PAGA. *See O'Connor v. Uber Technologies,*
17 *Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016).

18
19 **III. FACTUAL BACKGROUND**

20 Plaintiff Teri Gibson worked for defendants Swift Transportation Co. of
21 Arizona, LLC., and Swift Transportation Services, LLC as a dispatcher from October
22 24, 2004 through September 1, 2019 at Swift's office in Rialto.

23 The case relates to alleged violations of Labor Code sections 203, 226, 226.7,
24 510, 512, and 1194 regarding the following: (1) not providing compliant meal and
25 rest periods; (2) not paying overtime at the regular rate of pay (3) not providing
26 accurate wage statements; and (4) not paying waiting time penalties.

27 The case was filed on February 18, 2020 as a proposed class/collective action.
28 Thereafter, a first amended complaint was filed on April 6, 2020 that removed the

1 class/collective allegations and alleged a single cause of action for PAGA. The reason
2 the first amended complaint alleged only PAGA violations was because Defendants
3 presented an arbitration agreement containing a class/collective action waiver that
4 Plaintiff signed. PAGA is not subject to arbitration pursuant to *Iskanian v. CLS*
5 *Transportation of Los Angeles, LLC*, 59 Cal.4th 348 (2014).

6 A second amended complaint was filed May 6, 2020 that refined the factual
7 allegations and narrowed the definition of the aggrieved employees to just non-truck
8 driver employees like Plaintiff. On September 9, 2020, the court set the case for trial
9 on November 19, 2021. The parties then agreed to go to mediation with experienced
10 wage and hour mediator Mark Rudy. Through a combination of informal discovery
11 and mediation, the parties were able to reach an agreement and a formal settlement
12 agreement was fully signed on March 23, 2021.

13 The case settled for \$288,420. The PAGA period covers February 18, 2019
14 through April 30, 2021. There are 232 aggrieved employees with an estimated 9,614
15 pay periods where Labor Code violations allegedly occurred. Extrapolating the data
16 provided by Defendants, the damage calculations are set forth below.

17 18 **IV. PENALTY CALCULATIONS**

19 Each of the bases for PAGA penalties are discussed below.

20 21 **A. Regular Rate of Pay Violation**

22 When calculating an employee's regular rate of pay, non-discretionary bonuses
23 must generally be factored in. 29 CFR § 778.108. Here, Plaintiff and the allegedly
24 aggrieved employees regularly received quarterly bonuses. The crux of the dispute
25 between the parties is whether the bonuses were non-discretionary or discretionary.

26 Pursuant to 29 C.F.R. § 778.211(c), a bonus is non-discretionary (and should
27 be included in the regular rate) if it is promised to "induce [employees] to work more
28 steadily or more rapidly or more efficiently or to remain with the firm." Plaintiff

1 alleges the bonuses in this case were non-discretionary but Swift vehemently
2 maintains they were not. Swift did not factor the bonuses into the regular rate of pay
3 for purposes of calculating overtime based on its position that the bonuses are
4 discretionary. Plaintiff alleges this resulted in overtime violations in approximately
5 59.6% of pay periods during the PAGA period.

6 The PAGA penalties are \$100 per employee for the initial violation and \$250
7 per employee for each subsequent violation. Plaintiff estimates that if she were able
8 to prove these alleged violations, the PAGA penalties would be \$572, 553 based on a
9 violation rate of 59.6% of the pay periods during the PAGA period.

10 However, Plaintiff would face significant hurdles in attempting to prove
11 regular rate violations. Swift maintains the bonuses are discretionary and, if the
12 Court ultimately agrees, there would be no regular rate violations at all. Under 29
13 USC § 207(e)(3)(A) and 29 CFR § 788.211(a), discretionary bonuses are properly
14 excluded from the regular rate of pay.

15 Generally, if an employer promises in advance to pay a bonus if certain criteria
16 are met, the employer has abandoned its discretion. Here, Swift provided evidence
17 that it did not promise in advance to pay any employee any bonus, and that the
18 bonuses it did pay were not based on any pre-determined criteria. Swift maintains it
19 never abandoned discretion by promising a bonus to its employees in advance, and
20 that any and all bonuses paid to the allegedly aggrieved employees were therefore
21 excludable from the regular rate. 29 CFR § 788.211(b).

22 Accordingly, although Plaintiff and the allegedly aggrieved employees
23 regularly received bonuses, there could very well be a finding that the bonuses were
24 paid in recognition of services performed rather than on a non-discretionary,
25 contractual basis. While Plaintiff believes she would ultimately prevail in the case,
26 her chances of prevailing may only be 50-50, which would discount the expected
27 recovery on this portion of the possible PAGA penalties to \$ 286,276.50. Of course,
28 it is entirely within the realm of possibility that Plaintiff and the allegedly agreed

1 employees could recover nothing if the case ultimately went to trial.

2
3 **B. Meal and Rest Break Violations**

4 Plaintiff alleged that she and other aggrieved employees were unable to take
5 timely, compliant meal and rest breaks. With respect to meal breaks, Plaintiff alleged
6 the workload was such that employees either 1) were rarely able to take full 30-
7 minute meal breaks; 2) were forced to take meal breaks after the fifth hour of work;
8 and/or 3) had to forego their meal breaks altogether. Plaintiff further contended that
9 rest breaks were not provided in a legally-compliant manner. Swift maintained that
10 complaint meal and rest breaks were provided to all employees, including the
11 allegedly aggrieved employees, and that Plaintiffs' meal and rest break claims could
12 not be adjudicated on a representative basis.

13 Plaintiff's analysis of the data indicated that 76.2% of pay periods included
14 meal breaks that appeared on the face of the records to be non-compliant either
15 because the meal break was less than 30 minutes, was taken late, or there was no
16 meal break recorded at all. There was an assumption that every one of these
17 instances constituted a violation and that there was a 100% violation rate for rest
18 periods. Swift denied that meal break violations can be ascertained through analysis
19 of data alone and maintained that there was absolutely no data suggesting classwide
20 rest period violations since rest periods were not recorded.

21 Swift argued, for example, that if the records indicated a meal period was taken
22 5 hours and 1 minute into the employee's shift, it is entirely possible that the
23 employee was provided an opportunity to take a meal period before the end of the 5th
24 hour of work but voluntarily chose to delay the start of the meal period for personal
25 reasons (e.g., they were making lunch plans with a co-worker, they wanted to run to
26 the restroom before clocking out for lunch, they were texting with a friend or family
27 member). Plaintiff estimated maximum PAGA exposures of \$732,666 for meal
28 period violations and \$961,356 for rest period violations.

1 The primary obstacle Plaintiff would face is that under *Brinker Restaurant*
2 *Corp. v. Superior Court*, 53 Cal.4th 1004 (2012), employers do not need to ensure
3 their employees are not working during meal and rest breaks—if breaks are provided
4 to employees and they voluntarily choose to come back from a break early or take a
5 break late, there is no legal violation. *Id.* Even if the allegedly aggrieved employees
6 did not take legally compliant breaks, there was a possibility that was not due to any
7 failure by Swift to provide legally compliant breaks.

8 Notably, Swift’s position is that the meal and rest break policy was legally
9 compliant. Because Swift did have a facially defective meal and rest break policy,
10 there was a significant chance that the Court would find that Plaintiff’s meal and rests
11 break allegations cannot be manageably tried on a representative basis and dismiss
12 the representative meal and rest period allegations altogether. There was also a
13 possibility the Court would find there were no meal and rest break violations at all.

14 While it is an inherently speculative exercise to try to pinpoint the impact of all
15 of these risks on the expected recovery, Plaintiff estimates the potential PAGA
16 recovery for meal breaks could decrease by as much as two-thirds from \$732,666 to
17 \$244,222, and the potential PAGA recovery for rest breaks could also decrease by as
18 much as two-thirds from \$961,356 to \$320,452.

19 20 **C. Wage Statement Violations**

21 Plaintiff alleged that due to the regular rate issue described above, the allegedly
22 aggrieved employees’ wage statements were inaccurate since they did not list the
23 correct hourly rates in violation of Cal. Lab. Code, § 226(a)(9). The alleged wage
24 statement violations allegations are entirely derivative of the alleged regular rate
25 violations discussed above. The estimated maximum PAGA penalties for the
26 allegedly inaccurate wage statements are \$1,431,382.

27 This amount could be potentially reduced for at least two reasons.
28

1 First, this calculation used the higher PAGA penalty in Cal. Lab. Code § 226.3
2 rather than the lower PAGA penalty in Cal. Lab. Code § 2699. Cal. Lab. Code §
3 226.3 provides for a “a civil penalty in the amount of two hundred fifty dollars (\$250)
4 per employee per violation in an initial citation and one thousand dollars (\$1,000) per
5 employee for each violation in a subsequent citation,” whereas Cal. Lab. Code § 2699
6 provides for a “civil penalty [of] one hundred dollars (\$100) for each aggrieved
7 employee per pay period for the initial violation and two hundred dollars (\$200) for
8 each aggrieved employee per pay period for each subsequent violation.” However,
9 section 226.3 might not apply since some courts have read section 226.3 to limit civil
10 penalties to only those instances where the employer failed to provide any wage
11 statement or to keep records. *York v. Starbucks Corp.*, 2012 U.S. Dist. Lexis 190239,
12 pp. *11–*12 (C.D.Cal., Nov. 1, 2012, No. CV-08-07919 GAF); *Fleming v. Covidien,*
13 *Inc.*, 2011 U.S. Dist. Lexis 154590, at p. *7 (C.D.Cal., Aug. 12, 2011, No. ED CV-
14 10-01487 RGK). If the Court were to find that the lower PAGA penalty in Cal. Lab.
15 Code § 2699 applies, the potential exposure would be reduced by more than half.

16 Second, under *Kim v. Reins Int’l California*, 18 Cal.App.5th 1052 (2017) and
17 *Harris v. Best Buy Stores, L.P.*, 2018 U.S. Dist Lexis 28079 (N.D.Cal., Feb. 20, 2018
18 No. 17-cv-00446-HSG), when an underlying allegation of a Labor Code violation
19 fails, the derivative PAGA claim fails as well. This could reduce the potential PAGA
20 penalties to zero, since if there were no regular rate of pay violation, then there would
21 be no wage statement violation.

22 Given the above, the potential PAGA exposure for alleged wage statement
23 violations would be discounted by as much as three-fourths from \$1,431,382 to
24 \$357,845.50.

25 26 **D. Waiting Time Penalties**

27 If the allegedly aggrieved employees were not paid all overtime wages because
28 Defendants did not properly calculate the regular rate of pay, Plaintiff alleged that

1 waiting time penalties apply. For the 50 aggrieved employees who stopped working
2 for Defendants during the PAGA period, the total PAGA penalty exposure was
3 \$5,015.

4 This amount would similarly be discounted due to the risks associated with
5 proving the regular rate violations, namely whether the bonuses were discretionary
6 and therefore excludable from the regular rate. Plaintiff conservatively estimates the
7 potential PAGA exposure should be discounted by half from \$5,015 to \$2,507.50.

8 9 **E. Total Penalties**

10 Based on the above, Plaintiff estimates the total maximum exposure for PAGA
11 penalties is \$3,702,972. However, given the risks described above, a more realistic
12 PAGA penalty exposure is \$1,211,303.50.

13 Consequently, the settlement of \$288,420 is approximately 25% of the total
14 exposure. Because of the inherent uncertainty in proving Labor Code violations, the
15 uncertainty that the Court would impose the maximum penalties, and additional risks
16 described below, a settlement of 25% of the exposure is within the range of
17 reasonableness.

18 19 **V. SETTLEMENT TERMS**

20 The gross amount of the settlement is \$288,420. The itemization of this gross
21 amount is the following:

- 22 • \$7,500 to Terri Gibson as an enhancement payment;
- 23 • \$96,140 to Frontier Law Center for attorney fees;
- 24 • \$15,000 to Frontier Law Center as reimbursement for costs;
- 25 • \$3,000 to Phoenix Class Action Settlement Administrators to administer the
26 settlement; and
- 27 • \$166,780 in PAGA penalties, of which 75% will go to the Labor and
28 Workforce Development Agency and 25% will be distributed to the

1 allegedly aggrieved employees proportionally based on the number of pay
2 periods worked during the PAGA Period. For the 232 aggrieved employees,
3 that is an average recovery of about \$180 per aggrieved employee.
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5 **VI. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

6 Even if Plaintiff were to prevail, there are additional factors that could
7 significantly reduce the PAGA penalties that are explained below:
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1 **A. The Court’s Power to Impose Less Than the Maximum Penalties**

2 One significant risk every PAGA plaintiff faces is the fact courts have the
3 power to reduce any PAGA penalties awarded, and often do so. Cal. Lab. Code §
4 2699(e)(2) states that a court may award a lesser amount than the civil penalty if it
5 would result in an award that is unjust, arbitrary, and oppressive, or confiscatory. In
6 *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) despite the fact that
7 the plaintiff prevailed on their PAGA claim at trial, the court reduced the maximum
8 PAGA penalty amount by 90 percent based on the employer’s “good faith attempts”
9 to comply with the law and because the violations were “minimal.”

10 In *Carrington*, the PAGA plaintiff alleged that their employer failed to provide
11 compliant meal periods and failed to pay meal period premiums for employees in
12 violation of Cal. Lab. Code §§226.7 and 512. *Id.* at 507. The plaintiff alleged that she
13 missed meal periods because she was required to get permission to start her break,
14 and the stores were frequently too busy for a supervisor to allow her a break. *Id.* at
15 523. The *Carrington* court’s decision to reduce the PAGA penalties was based on the
16 fact that the employer had policies designed to provide employees with compliant
17 meal periods, as well as policies designed to compensate employees for missed meal
18 periods, and the amount of actual damages was relatively small. *Id.* at 529.

19 Ultimately, a court may exercise its discretion to reduce maximum PAGA
20 penalties under Cal. Lab. Code § 2699(e)(2) where an employer showed a good faith
21 effort to comply with the law, as opposed to a blatant disregard for the rights of their
22 employees.

23 With Swift, it is a distinct possibility that the Court would take Defendants
24 good faith efforts to comply with the law and the relatively small amount of actual
25 damages into account when determining whether or not to reduce the maximum
26 PAGA penalties for those violations. As noted above, Swift’s position is that it has
27 legally compliant meal and rest period policies in place and good faith arguments
28 why the bonuses paid to the allegedly aggrieved employees were discretionary and

1 therefore properly excluded from the regular rate. Plaintiff believes that meal and
2 rest period violations occurred despite Swift's policies and that Swift's arguments
3 why the bonuses were discretionary would ultimately fail, but that does not preclude
4 the Court from finding that Swift attempted in good faith to comply with the law and
5 that its actions were not egregious enough to warrant the maximum penalty. Were
6 the Court to follow in *Carrington's* footsteps, it may very well reduce Plaintiff's
7 estimated maximum PAGA penalties further from \$1,211,303.50 by as much as
8 another third to \$807,535.67. The settlement is 35.7% of this figure.

9
10 **B. The Court May Choose Not to Stack PAGA Penalties**

11 Courts are often hesitant to award full PAGA penalties for violations that are
12 derivative of other violations that were subject to PAGA penalties in the first
13 instance. *See Naranjo v. Spectrum Security Services, Inc.*, 40 Cal.App.5th 444 (2019).
14 Here, for example, the Court may not be inclined to award three different penalties
15 for the same failure to properly calculate overtime in a given workweek (one penalty
16 for the failure to pay overtime, one for the failure to include the correct overtime rate
17 on the wage statement, and one for the failure to pay the overtime upon separation of
18 employment).

19 If the court opted not to stack PAGA penalties, the estimated maximum PAGA
20 liability might be reduced further from \$807,535.67 by another third to \$538,357.12.
21 This amount is 53.5% of the settlement that was reached and is certainly within the
22 range of reasonableness.

23 As such, the proposed settlement is fair and reasonable in light of the very real
24 possibility that a Court could exercise its right to significantly reduce maximum
25 PAGA penalties pursuant to Cal. Labor Code § 2699(e)(2) based on Defendants'
26 "good faith efforts" to comply with the law, the relatively small amount of actual
27 damages at issue, and the fact courts sometimes frown upon stacking of penalties.

VII. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT

The terms of the settlement are reasonable under the circumstances and serve the purpose of PAGA. *O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D.Cal. 2016). Defendants are now cognizant of the requirement to pay overtime at the correct regular rate, and to follow meal and rest period mandates.

Further, PAGA allows a prevailing plaintiff to recover attorney fees and costs. Cal. Lab. Code § 2699(g). Both state and federal courts have recognized that an appropriate method for determining attorney fees is based on a percentage of the total the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977).

When a litigant's efforts create or preserve a fund from which others derive benefits, he or she may require the passive beneficiaries to compensate those who created the fund—California state and federal courts have embraced this doctrine. (*Serrano III*, 20 Cal. 3d at 35; *Vincent*, 557 F.2d at 769).

The California Supreme Court has held that attorneys' fees in common fund wage and hour class action settlements should start with the percentage method. *Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016).

Here, Plaintiff's counsel is requesting fees of \$96,140, as it represents a third of the fund. Although the Ninth Circuit has established 25% as the benchmark award in a common fund case, the amount can be increased based on certain factors. *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2002). Those factors are analyzed below:

1. Size of fund and number of persons benefitted – if the court were to grant the requested fees of a third, the common fund would be \$41,695 (25% for the aggrieved employees) for 232 people. This is an average recovery of \$179.71, which is a relatively significant amount in a PAGA case.

2. Presence or absence of objectors – generally, aggrieved employees do not have standing to object to a PAGA settlement since they can still file individual wage and hour cases. *Canela v. Costco Wholesale Corp.*, 971 F.3d 845 (2020).

1 3. Skill and efficacy of attorneys – Frontier Law Center’s skill and efficacy was
2 instrumental in attaining the settlement.

3 4. Complexity and duration of the litigation – the complexity stems from the
4 rather esoteric understanding of the regular rate of pay, and its intersection with
5 PAGA. The complexity also stems from analyzing potential meal and rest break
6 defenses.

7 5. Risk of nonpayment – the risks of nonpayment were discussed above, and they
8 should arguably be considered for the attorney fee request.

9 6. Amount of time devoted by plaintiff’s counsel – attached to the declaration of
10 Manny Starr is a spreadsheet that contains a user-friendly compendium of
11 time/billing summary as well as evidence that the proposed settlement was submitted
12 to the LWDA.

13 7. Awards in similar cases – most (if not all) PAGA cases allow for attorney fees
14 of one-third since there is a benefit to the State as well as the aggrieved employees.
15 See, e.g., *Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 2020 WL 1492672 (E.D.
16 Cal. Mar. 27, 2020).

17 Based on the above, the requested attorney fees should be granted.
18 Additionally, Plaintiff has incurred \$12,581.40 in costs litigating the case. These costs
19 include filing fees, service costs, costs to retain an expert to evaluate the time and
20 payroll records, and mediation. The requested for costs should be granted.

21 Finally, a service award enhancement of \$7,500 is requested for plaintiff Terri
22 Gibson. Ms. Gibson provided numerous documents and information and spent several
23 hours collectively on the phone answering questions about the case and participating
24 in the mediation process.

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VIII. CONCLUSION

Based on the above facts and arguments, Plaintiff respectfully submits that the settlement is fair, adequate, and reasonable, and requests the court to grant the renewed motion to approve the PAGA settlement. As explained above, the settlement is 53.5% of the realistic maximum exposure given the risks described in the motion.

Date: June 16, 2021

FRONTIER LAW CENTER

/s/ Adam Rose
Attorney for Plaintiff
Terri Gibson