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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
APPLICATION FOR APPROVAL
OF PAGA SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION
OF MANNY STARR; PROPOSED
ORDER

TO THE COURT:

Plaintiff Terri Gibson applies to the court to approve a settlement of this Private Attorneys General Act ("PAGA") action reached at mediation on March 4, 2021. Pursuant to Cal. Lab. Code, § 2699(l)(2), the court is required review and approve any PAGA settlement. There are no set criteria to approve a PAGA settlement, however the arguments below demonstrate that the settlement is fair, adequate, and reasonable, and is consistent with the functions of PAGA. *See O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016).

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1 The settlement terms are discussed, and the reasons bolstering approval are
2 presented and analyzed below.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION**

5 This case relates to alleged violations of Labor Code sections 203, 226, 226.7,
6 510, 512, and 1194 regarding the following: (1) not providing compliant meal and
7 rest periods; (2) not providing premium pay for non-compliant meal and rest periods;
8 (3) not paying overtime at the regular rate of pay (4) not providing accurate wage
9 statements; and (5) not paying waiting time penalties.

10 Plaintiff Teri Gibson alleges that she worked for defendants Swift
11 Transportation Co. of Arizona, LLC., and Swift Transportation Services, LLC as a
12 dispatcher October 24, 2004 through September 1, 2019 at Swift's office in Rialto.

13 The case was filed on February 18, 2020 as a proposed class/collective action
14 lawsuit. Thereafter, a first amended complaint was filed April 6, 2020 that removed
15 the class/collective allegations and alleged a single cause of action for violations of
16 PAGA. The reason the first amended complaint contained PAGA only was because
17 Defendants presented an arbitration agreement that Plaintiff signed. However, PAGA
18 is not subject to arbitration pursuant to *Iskanian v. CLS Transportation of Los*
19 *Angeles, LLC*, 59 Cal.4th 348 (2014).

20 A second amended complaint was filed May 6, 2020 that corrected the factual
21 allegations and narrowed the definition of the allegedly aggrieved employees. The
22 second amended complaint clarified that the group of allegedly aggrieved employees
23 only included non-truck driver employees. On September 9, 2020, the court set the
24 trial for November 19, 2021. The parties then agreed to go to mediation with
25 experienced wage and hour mediator Mark Rudy. Through the combination of
26 informal discovery, extensive negotiations, and mediation, the parties were able to
27 reach an agreement and the formal settlement was fully signed on March 23, 2021.
28

1 The case settled for \$288,420. The PAGA period covers February 18, 2019
2 through April 30, 2021. There are 232 aggrieved employees. Plaintiff estimates there
3 were 9,614 pay periods where Labor Code violations occurred. Extrapolating the data
4 provided by Defendants, the damage calculations are set forth below.

5 6 **II. LEGAL ARGUMENT AND PAGA PENALTY CALCULATION**

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

8 **A. Regular Rate of Pay Violation**

9 When calculating an employee's regular rate of pay, non-discretionary bonuses
10 must be factored in. 29 CFR § 778.108. Bonuses were paid to the aggrieved
11 employees each quarter. Pursuant to 29 C.F.R. § 778.211(c), a bonus is non-
12 discretionary if it is promised to "induce [employees] to work more steadily or more
13 rapidly or more efficiently or to remain with the firm." Plaintiff alleges the bonuses
14 here were non-discretionary. Swift maintains the bonuses are entirely discretionary.
15 Swift did not factor these bonuses into the regular rate of pay for purposes of
16 calculating overtime rates. Plaintiff alleges this resulted in an overtime violation in
17 59.6% of pay periods.

18 The PAGA penalties for this violation are found in Labor Code section 1197.1
19 which are \$100 per employee for the initial violation and \$250 per employee for each
20 subsequent violation. Plaintiff estimates that if these alleged violations were proven,
21 the PAGA penalties would be \$572,553 based on a violation rate of 59.6%.

22 23 **B. Meal and Rest Break Violations**

24 Plaintiff alleges that she and the rest of the allegedly aggrieved employees were
25 frequently unable to take timely, compliant meal and rest breaks. With respect to
26 meal breaks, Plaintiff alleges that the workload was such that either 1) employees
27 were rarely able to take a full 30-minute meal break; 2) they were often forced to take
28 meal breaks after the fifth hour of work; and 3) they were frequently forced to forego

1 their meal breaks altogether. Plaintiff further contends that rest breaks were simply
2 not provided. Swift maintains that legally-complaint meal and rest breaks were
3 provided to all employees, including the allegedly aggrieved employees.

4 Plaintiff's analysis of the data indicated that 76.2% of pay periods resulted in
5 meal break violations and there was a 100% violation rate for rest periods. Swift
6 denies meal or rest break violations can be ascertained through analysis of data alone.
7 Plaintiff estimates a maximum exposure of \$732,666 for alleged meal period
8 violations and a maximum exposure of \$961,356 for alleged rest period violations.

9 10 **C. Wage Statement Violations**

11 Plaintiff alleges that, due to the regular rate issue, the wage statements were
12 arguably inaccurate since they did not list the correct hourly rates in violation of Cal.
13 Lab. Code, § 226(a)(9). Also, the total hours worked were not listed in violation of
14 Cal. Lab. Code § 226(a)(2). The estimated PAGA penalties for the inaccurate wage
15 statements are \$1,431,382.

16 17 **D. Waiting Time Penalties**

18 Since the allegedly aggrieved employees were not paid all overtime wages
19 based on the incorrect regular rate of pay, Plaintiff alleges that waiting time penalties
20 apply. For the 50 aggrieved employees who stopped working for Defendants, the total
21 PAGA penalty exposure was \$5,015.

22 23 **E. Total Penalties**

24 Based on the above, the total exposure for PAGA penalties is \$3,702,972. The
25 settlement of \$288,420 is 8% of the total exposure. Because of the inherent
26 uncertainty in proving that any Labor Code violations actually occurred, the
27 uncertainty that the Court would impose the maximum penalty, and various other
28 risks and uncertainties described further below, a settlement of 8% of the total

1 exposure is within the range of reasonableness.

3 **III. THE SETTLEMENT TERMS**

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

- 6 • \$7,500 to Terri Gibson as an enhancement payment;
- 7 • \$96,140 to Frontier Law Center for attorney fees;
- 8 • \$15,000 to Frontier Law Center as reimbursement for costs;
- 9 • \$3,000 to Phoenix Class Action Settlement Administrators to administer the
10 settlement; and
- 11 • \$166,780 in PAGA penalties, of which 75% will go to the Labor and
12 Workforce Development Agency and 25% will be distributed to the
13 allegedly aggrieved employees proportionally based on the number of pay
14 periods worked during the PAGA Period.

16 **IV. THE SETTLEMENT IS FAIR AND REASONABLE**

17 Even if Plaintiff were to prevail in this case, there are a number of factors that
18 could reduce the PAGA penalties awarded, potentially down to zero.

20 **A. The Court's Power to Impose Less Than Maximum Penalties**

21 Cal. Lab. Code § 2699(e)(2) states that a court may award a lesser amount than
22 the maximum civil penalty if it would result in an award that is unjust, arbitrary and
23 oppressive, or confiscatory. The maximum amount of PAGA penalties could fit into
24 one of the above categories. As shown in the Court of Appeal's decision in
25 *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504 (2018), while the plaintiff
26 prevailed on his PAGA claim at trial, the trial court reduced the maximum PAGA
27 penalty amount by 90 percent, citing the employer's good faith attempt at complying
28 with the law. *Id.* at 517. The analysis below explains the risks with each theory.

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2 **B. PAGA Penalties Applicable to Wage Statement Violations**

3 There is a debate as to whether the penalties in Cal. Lab. Code § 226.3 even
4 apply to situations like the present case, where the alleged wage statement violations
5 result from allegedly inaccurate information, or whether they apply only in cases
6 where the employer provided no wage statements at all. *See Lopez v. Friant & Assoc.*
7 192 Cal.App.4th 75. (2011). If Section 226.3 did not apply, the available PAGA
8 penalties would be reduced.

9
10 **C. Meal and Rest Break Claim Defenses**

11 Defendants almost certainly have argued that time records showing a short,
12 late, or missed meal break do not necessarily mean that that a meal break violation
13 occurred. Defendants would further argue that it did not have a policy which
14 discouraged its employees from taking meal breaks, and thus, it was the employee's
15 choice whether to take a late or short meal break, or to forego a meal break
16 altogether. Defendants could make this same argument regarding rest breaks.

17 While Plaintiff would contest these positions, there is still a significant risk
18 Defendants could prevail on this issue if Defendants could prove that breaks were
19 made available to the aggrieved employees, further reducing the available PAGA
20 penalties.

21
22 **D. The Court May Choose Not to Stack PAGA Penalties**

23 Courts are sometimes hesitant to award full PAGA penalties where they are
24 derivative of other claims that were subject to PAGA penalties in the first instance.
25 *See Naranjo v. Spectrum Security Services, Inc.*, 40 Cal.App.5th 444 (2019).

26 In this case, the court could choose not to impose any PAGA penalties to as a
27 result of the alleged wage statement violations and waiting time violations, since
28 those penalties are derived from the overtime violation claims. If the Court chose not

1 to stack those penalties, PAGA penalties might be eliminated altogether for the wage
2 statement and waiting time penalty theories.

4 **V. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT**

5 The terms of the settlement are reasonable under the circumstances and serve
6 the purpose of PAGA. *O'Connor v. Uber Technologies, Inc., supra*, 201 F.Supp.3d at
7 1135. Defendants are now cognizant of the requirement to pay overtime at the correct
8 regular rate, and to allow meal and rest periods.

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

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

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

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

25 1. Size of fund and number of persons benefitted – if the court were to grant the
26 requested fees of a third, the common fund would be \$41,695 (25% for the aggrieved
27 employees) for 232 people. This is an average recovery of \$179.71, which is a
28 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).

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

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

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

6. Amount of time devoted by plaintiff’s counsel – attached to the declaration of Manny Starr is a spreadsheet that contains a compendium of time.

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

Based on the above, the requested attorney fees should be granted.

Additionally, Plaintiff has incurred \$12,581.40 in costs litigating this case. These costs include filing fees, service costs, costs to retain an expert to evaluate the time and payroll records, mediation, and other litigation costs. The (up to) \$15,000 requested for costs should be granted.

A service award enhancement of \$7,500 is requested for plaintiff Terri Gibson. Ms. Gibson provided numerous documents and information and spent several hours collectively on the phone answering questions about the case.

While the Court must review and approve a PAGA settlement, the statute does not require that this be done as part of a noticed motion. However, the statute does require Plaintiff to file a copy of the settlement agreement with the LWDA, which Plaintiff has done.

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