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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN JOAQUIN

TRACEE BIBLE, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

v.

SHEKINAH LOGISTICS, LLC, a limited
liability company; and DOES 1 through 50,
inclusive,

Defendants.

CASE NO. STK-CV-UOE-2020-0004668

[Assigned for all purposes to the Hon. Roger Ross,
Dept 11B]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION TO APPROVE SETTLEMENT
AGREEMENT PURSUANT TO THE
PRIVATE ATTORNEYS GENERAL ACT;
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: TBD
Time: TBD
Dept.: 11B

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

2 **PLEASE TAKE NOTICE** that on a date and time to be determined, before the
3 Honorable Roger Ross, judge presiding, in Department 11B of the above referenced Court located
4 at 180 E. Weber Ave., Stockton, California 95202, Plaintiff Tracee Bible (“Plaintiff”) will and
5 hereby does move the Court for an order approving a settlement pursuant to the Private Attorney
6 General Act (“PAGA”).

7 This motion will be based on this notice of motion, the accompanying declarations of
8 William L. Marder, Dennis S. Hyun, and Plaintiff in support thereof, the attached memorandum
9 of points and authorities, the records and file herein, and on such other evidence as may be
10 presented at the hearing of the motion.

11 Dated: August 31, 2021

POLARIS LAW GROUP, LLP

12 By:

13 _____
14 William L. Marder
15 Attorney for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Tracee Bible (“Plaintiff”) brought a representative claim under the Private
4 Attorneys General Act (the “PAGA”), arising from Defendant Shekinah Logistics, LLC
5 (“Defendant”) (Plaintiff and Defendant collectively, the “Parties”) alleged violations of Labor
6 Code § 226. Plaintiff alleges that Defendant failed to provide proper wage statements, which
7 included the alleged failure to list the hours worked for shift premium and/or shift differential
8 hourly wages on wage statements issued to Plaintiff and aggrieved employees. While this action
9 was initially pled as a class and PAGA action, Plaintiff filed the operative First Amended
10 Complaint alleging only a PAGA claim because she signed an arbitration agreement with a class
11 action waiver. Significantly, Defendant stopped its practice of paying shift premiums and/or shift
12 differentials as of May 2020, such that this violation is no longer occurring.

13 Accordingly, through this Motion, the Parties respectfully request that the Court approve
14 the settlement of the PAGA claims asserted herein.

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*, 59 Cal. 4th 348 (Cal. 2014), Plaintiff can seek appropriate civil penalties as
18 called for under PAGA on behalf of the State of California and other similarly situated aggrieved
19 employees without seeking class certification or meeting any of the requirements of class
20 certification (i.e., numerosity, typicality, commonality and adequacy). As such, while the PAGA
21 penalties settlement reached herein is on behalf of the State of California and other aggrieved
22 employees, the usual two-step preliminary and final approval process is not required. Rather, as
23 called for under Labor Code § 2699(l), all that is required is an approval by this Court of the
24 PAGA penalties that the Parties have agreed to settle.

25 **II. FACTUAL AND PROCEDURAL BACKGROUND**

26 On or about April 3, 2020, Plaintiff transmitted a letter to the California Labor and
27 Workforce Development Agency (the “LWDA”) asserting that Defendant failed to comply with
28 California Labor Code § 226 (the “PAGA Notice”). (Declaration of Dennis S. Hyun (“Hyun
Decl.” ¶ 8, Exhibit “A”).

1 On June 8, 2020, Plaintiff filed this action, in which Plaintiff asserted four causes of
2 action for violation of: (1) Labor Code § 226(a); and (2) the PAGA. (Hyun Decl. ¶ 9). After the
3 filing of this action, Defendant's counsel produced an arbitration agreement containing a class
4 action waiver signed by Plaintiff. (*Id.*) Therefore, Plaintiff filed the operative First Amended
5 Complaint asserting a single cause of action for violation of the PAGA on December 8, 2020.

6 In particular, Plaintiff asserts that Defendant failed to provide accurate itemized wage
7 statements because Defendant did not display the hours worked for shift premiums and/or shift
8 differentials.

9 The Parties agreed to attempt to informally resolve this matter. As part of the Parties'
10 negotiations, Defendant provided the number of aggrieved employees and wage statements at
11 issue, which permitted Plaintiff to calculate maximum exposure at \$174,500.00 (698 wage
12 statements at issue x \$250 per wage statement pursuant to Labor Code § 226.3). (*Id.*) The Parties
13 then engaged in extensive arms-length negotiations between highly experienced counsel, the
14 Parties have reached a settlement of the Representative PAGA Claims as further detailed in the
15 concurrently filed Settlement Agreement. (*Id.*) As such, this settlement represents approximately
16 20% of the total potential exposure, which is fair and reasonable. (*Id.*)

17 **III. THE SETTLEMENT TERMS**

18 The current PAGA settlement calls for a total settlement amount of \$35,000.00 in PAGA
19 civil penalties. From this amount, one-third has been allocated to attorneys' fees, or \$11,666.67,
20 and actual costs up to \$5,000.00, \$2,500.00 shall be paid to Plaintiff as compensation for serving
21 as the PAGA representative and for executing a general release, and \$2,500.00 will be paid to
22 Phoenix Settlement Administrators (the "Settlement Administrator") to administer the settlement.
23 (Settlement Agreement at ¶¶ 27, 44, 45). Plaintiff's counsel's actual costs are \$2,413.61. (Hyun
24 Decl. ¶ 12; Declaration of William L. Marder ("Marder Decl.") ¶ 12, Exh. B). This results in
25 total deductions of \$19,080.28.

26 The remaining balance of approximately \$15,919.72 shall be split, with 75% being paid to
27 the LWDA, and 25% (the "Aggrieved Employee Portion") being distributed to Aggrieved
28 Employees as follows: Each Aggrieved Employee shall be allocated a proportionate share of the
Aggrieved Employee Portion based on the Defendant's data regarding the number of pay periods

1 that the Aggrieved Employee was paid shift premium and/or shift differential hourly wages on a
2 wage statement while based in California from April 3, 2019 until the date of Court approval.
3 (Settlement Agreement at ¶¶ 26, 37). After calculating the pay periods for each individual
4 Aggrieved Employee, the Settlement Administrator shall then compute the sum total of all pay
5 periods to arrive at an “Total Relevant Pay Periods” worked by all Aggrieved Employees. (*Id.* at
6 ¶ 37(b)). The Settlement Administrator shall calculate the Individual PAGA Payment that each
7 PAGA Settlement Employee will be paid from the PAGA Payment based on each individual’s
8 own Pay Period Percentage according to the following formula: the PAGA Payment (multiplied
9 by) the individual employee’s Pay Period Percentage = Individual PAGA Payment. (*Id.* at ¶
10 37(d)). Based on the above, and as further detailed below, Plaintiff requests that this Court grant
11 approval of the current PAGA penalties settlement.

12 **IV. PAGA REQUIREMENTS**

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

25 In order to enforce and seek penalties under PAGA in a civil action, an aggrieved
26 employee must first provide written notice to the LWDA and the employer of the particular Labor
27 Code violation the aggrieved employee alleges the employer has violated. See Cal. Labor Code §
28 2699.3(a)(1). Once the LWDA notifies the aggrieved employee that it does not intend to
investigate the alleged violations, the aggrieved employee is then allowed to proceed in a civil

1 action against the employer on the alleged violations on behalf of all other similarly situated
2 employees. See Cal. Labor Code § 2699.3(a)(2)(A).

3 In 2009, the California Supreme Court considered the issue of whether an aggrieved
4 employee that brings a PAGA claim on behalf of himself and others similarly situated needs to
5 seek the PAGA claim as a class action and meet class certification requirements. *Arias*, 46 Cal.
6 4th at 976. After a substantial review of the legislative history of PAGA, the California Supreme
7 Court held that an aggrieved employee’s representative action brought on behalf of other
8 similarly situated employees against an employer for PAGA violations do not need to meet the
9 requirements for class certification. *Id.* at 975; 980-88. As the California Supreme Court held, a
10 plaintiff bringing suit under PAGA does so as the proxy or agent of California’s labor law
11 enforcement agencies. *Id.* at 986. Because an employee’s PAGA action functions as a substitute
12 for an action brought by the government itself, a judgment in the PAGA action binds all those,
13 who would be bound by a judgment in an action brought by the government. *Id.*

14 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the Superior
15 Court must “review and approve any penalties sought as part of a proposed settlement agreement”
16 relating to PAGA penalties. Labor Code § 2699(l). As the Parties to this current PAGA action
17 have reached such an agreement, the Parties now seek this Court’s approval as to the settlement
18 of the penalties amount.

19 **V. PLAINTIFF’S RATIONALE FOR AGREEING TO THE SETTLEMENT**

20 Based on the data provided to Plaintiff prior to mediation, the estimated amount of
21 potential penalties that Defendant could be liable for based on the released claims is
22 approximately \$174,500.00. (Hyun Decl. ¶ 9).

23 Plaintiff’s rationale for agreeing to the settlement is based upon the discretionary nature of
24 any PAGA award. Pursuant to Labor Code § 2699(f)(2) the Court can decline to award PAGA
25 penalties where “...if, based on the facts and circumstances of the particular case, to do
26 otherwise, would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” In
27 other words, were this matter to go to trial, any award granted would be completely at the
28 discretion of the Court. Plaintiff further recognizes that there may be reasons that the Court
would be unwilling to issue an award in this matter even if Plaintiff were able to prove the PAGA

1 violation at trial.

2 Further, Defendant contends that it has acted lawfully. Defendant disputes that it is
3 required to provide the hours worked for shift differentials and that an employee could determine
4 such hours though simple math. Further, Defendant changed its practices as of May 2020, such
5 that Plaintiff would not have been able to seek penalties for the Section 226(a) claim beyond this
6 date.

7 The Court of Appeal's recent decision in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th
8 504 (2018) is instructive. In *Carrington*, while the plaintiff prevailed on his PAGA claim upon
9 trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's
10 good faith attempt at complying with the law. *Id.* at 517. Upon review, the Court of Appeal
11 found such reduction to be proper. *Id.* at 539. Again, the *Carrington* decision was after Plaintiff
12 actually prevailed at trial, and even then, the PAGA penalties were reduced by 90%.

13 While Plaintiff maintains that there does not exist any reasons for reducing PAGA
14 penalties, Plaintiff is not blind to the fact that Defendant's defenses could be persuasive to the
15 Court at trial. Based on such reasons, the PAGA settlement should be approved as the very
16 purpose of PAGA have been achieved through this lawsuit as Defendant has been assessed a
17 penalty that is of significance to Defendant.

18 **VI. ATTORNEYS' FEES AND COSTS ARE APPROPRIATE**

19 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. Cal. Lab. Code §
20 2699(g). Although this is not a class action, in representative class actions, California state and
21 federal courts have recognized that an appropriate method for determining award of attorneys'
22 fees is based on a percentage of the total value of benefits to Class Members by the settlement.
23 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d
24 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v.*
25 *Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine
26 is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally among all
27 the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*,
28 557 F. 2d at 769.

1 The Common Fund doctrine is predicated on the principle of preventing unjust
2 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,
3 he may require the passive beneficiaries to compensate those who created the fund. Both
4 California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35;
5 *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal.4th
6 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
7 been applied "consistently in California when an action brought by one party creates a fund in
8 which other persons are entitled to share." The reasons for applying the common fund doctrine
9 include: "...fairness to the successful litigant, who might otherwise receive no benefit because his
10 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the
11 others who are entitled to share in the fund and who should bear their share of the burden of its
12 recovery; encouragement of the attorney for the successful litigant who will be more willing to
13 undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he
14 is assured that he will be properly and directly compensated should his efforts be successful." *Id.*

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

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

27 Here, Plaintiff's counsel has incurred fees of well over the requested \$11,666.67.
28 Specifically, Plaintiff's counsel expended 69.1 hours in litigating and settling this current action.

(Hyun Decl. ¶ 10, Exh. B; Marder Decl. ¶ 11, Exh. A). Plaintiff's counsel have been approved at hourly rates of \$750 by numerous courts. (*Id.*) Plaintiff's counsel also anticipate expending an additional 10 hours each on administering the settlement through distribution, including communicating with aggrieved employees. Based thereon, and based on Plaintiff's counsel's hourly rate of \$750.00 per hour, the lodestar through approval and on post-approval matters equates to \$66,825.00. (Hyun Decl. ¶ 10, Exh. B; Marder Decl. ¶ 11, Exh. A). Thus, the requested fee amount of \$11,666.67 is fair and reasonable.

Similarly, as to Plaintiff's counsel's costs, Plaintiff's counsel has expended \$2,413.61, including filing/service fees. (Marder Decl. ¶ 12, Exh. B; Hyun Decl. ¶ 11). As such, the requested costs should be awarded as fair and reasonable.

VII. PLAINTIFF RESPECTFULLY REQUESTS A SERVICE AWARD

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

Here, Plaintiff seeks \$2,500 for her service award, which is intended to compensate Plaintiffs for the time spent on this case, the potential for retaliation, and for executing a general release, including of Civil Code § 1542, which was not required by aggrieved employees. (Declaration of Tracee Bible ¶¶ 3-5). These requested enhancements are consistent with awards approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive awards of \$35,000).

VIII. NOTICE WAS PROVIDED TO THE LWDA

As set forth in the Declaration of Plaintiff's counsel, notice was provided to the LWDA. (Hyun Decl. ¶ 12, Exh. C).

IX. CONCLUSION

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

DATED: August 31, 2021

POLARIS LAW GROUP, LLP

By: _____
William L. Marder
Attorneys for Plaintiff

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