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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

JOHN DOE, PAOLA CORREA, and
DEWAYNE CASSEL, on behalf of the State
of California and aggrieved employees,

Plaintiffs,

v.

GOOGLE, INC., ALPHABET, INC.,
ADECCO USA, INC., ADECCO GROUP
NORTH AMERICA and ROES 1 through 10,

Defendants.

Case No. CGC-16-556034

**SUPPLEMENTAL BRIEF IN SUPPORT
OF PLAINTIFFS' UNOPPOSED
MOTION FOR APPROVAL OF PAGA
SETTLEMENT; MOTION FOR
ATTORNEYS' FEES, COSTS AND
SERVICE AWARDS**

Date: December 4, 2023
Time: 9:00 am
Dept.: 304 (COMPLEX)
Judge: Hon. Ethan P. Schulman

Action Filed: December 20, 2016
Trial Date: Not Set

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1 Plaintiffs submit this supplemental briefing in response to the issues that the Court
2 identified in its October 31, 2023 Order Continuing Hearing on Plaintiffs' Motion for Approval of
3 PAGA Settlement for Supplemental Filing ("Order").

4 **I. Notice to the LWDA and the LWDA Response**

5 In its Order, the Court observed that the LWDA cannot always timely monitor all filings
6 and ordered Plaintiffs to provide a copy of the Order to the LWDA, along with the Court's
7 request that it provide its views no later than November 27, 2023.

8 As an initial matter, Plaintiffs appreciate the Court's care in soliciting input from the
9 LWDA, and the implication that the LWDA's perspective on PAGA is vitally important.
10 Plaintiffs respectfully submit that the LWDA is entitled to significant deference in matters such as
11 the reasonableness of a PAGA settlement, consistent with longstanding principals of agency
12 deference, given their expertise.

13 In addition to filing the settlement papers through the LWDA's online portal on October
14 12, 2023, as is standard practice and required by PAGA, Plaintiffs also emailed the settlement
15 agreement and moving papers directly to the LWDA's counsel on October 12.¹ Supplemental
16 Declaration of Chris Baker ("Baker Supp. Decl.") ¶¶ 9-10. In response, the LWDA's counsel
17 stated, based on the data available to him, that that he believed Plaintiffs' counsel were correct
18 that "at least as November 2021, there have been no civil-penalty only cases larger than this one."
19 *Id.* ¶ 10 & Ex. 2. The LWDA's counsel also stated, on October 31, that "LWDA does not oppose
20 the settlement and has no intention of filing comments with the court." *Id.* ¶ 10 & Ex. 2.

21 Later that day, the Court issued its Order. Within the hour, Plaintiffs provided the Order,
22 highlighting the Court's request in the body of the email, to the LWDA. *Id.* ¶ 11 & Ex. 2.

23 **II. Average, Minimum, and Maximum Recoveries for the Aggrieved Employees**

24 In its Order, the Court asked four questions about the Aggrieved Employees' 25% share of
25 the PAGA payment. Plaintiffs address each question in turn.

26 _____
27 ¹ As additional background, since 2019, Plaintiffs have been in direct communication with the
28 LWDA concerning both *Doe* and *Moniz* because of the importance of the issues these cases
present. *Id.* ¶ 8 & Ex. 3.

a. Per Employee Figure for the § 1102.5 Portion of the Settlement

This item asks about the original Baker Declaration statement at ¶ 15 that “we estimate that the gross penalty for the Labor Code § 1102.5 violations is \$126.98 per employee.” The purpose of this calculation was to quantify the portion of the settlement attributable to Labor Code § 1102.5 violations, as opposed to the other violations, on the logic that § 1102.5 provides a fixed penalty calculated per employee (up to \$10,000), whereas the other violations provide for penalties calculated per pay period (with the potential exception of Labor Code § 432.5). *See* Labor Code § 1102.5(f)). This is consistent with the plan of allocation’s bifurcated approach to calculating individual Aggrieved Employee awards: a fixed payment (\$20) for each individual, plus a variable payment (based on pay periods in periods A, B, and C). Baker Supp. Decl. ¶ 12. The math works as follows:

If the Court approves the requested fees, costs, and awards, the total payment to the LWDA and Aggrieved Employees equal \$17,600,577.05 (i.e., \$27,000,000 minus the \$9,000,000 in requested attorneys’ fees, \$125,522.95 in costs, \$153,900 in administration costs, and \$120,000 in requested service awards). Of that amount, 75% (i.e., \$13,200,432.79) goes to the LWDA, and 25% (i.e., \$4,400,144.26) goes to the Aggrieved Employees as the PAGA Distribution Fund. This fund is equal to 16.297% of the \$27,000,000. In other words, 16.297% of the settlement is being paid out to individuals. (This percentage fluctuates only a tiny amount from case to case, because PAGA settlements always have the 75% allocation to the LWDA, plus a one-third fee, costs, and service awards are standard.). *Id.* ¶ 13.

Each of the 96,939 Aggrieved Employees receives a fixed payment of \$20. As noted above, this amount can be viewed as the employee’s share of the penalty arising from the § 1102.5 violation. This totals \$1,938,780 in fixed payments to all Aggrieved Employees in aggregate. Dividing that “net” figure by 16.297% yields \$11,896,669.04, which is the “gross” amount of the settlement attributable to the § 1102.5 violation. In other words, \$11.9 million of the \$27.0 million settlement is attributable to the § 1102.5 penalty. That is a gross (as opposed to net) figure because most of that money is going to the State fees, costs, and service awards. Dividing that \$11,896,669.04 figure among the 96,939 Aggrieved Employees yields an average

gross payment of \$122.72 per Aggrieved Employee for the § 1102.5. *Id.* ¶ 14. As the Court saw in the earlier Baker Declaration, Plaintiffs' counsel's calculations to arrive at this figure in the first submission contained a mathematical error which led to a slightly different result of \$126.98, which is incorrect. Plaintiffs apologize for the discrepancy. *Id.* ¶ 15.

b. Number of Aggrieved Employees in Each Time Period

Google informed Plaintiffs that the population of Aggrieved Employees in each time period is:

Period	Aggrieved Employees
A	39,099
B	54,972
C	85,451
A and B	35,093
A or B	58,978
B and C	47,320
B or C	93,103
A and B and C	28,411
A or B or C	96,939

Id. ¶ 16.

c. Minimum and Maximum Net Payments

Plaintiffs calculated the following minimum and maximum payments for each pay period:

Period	Minimum Net Payment	Maximum Net Payment
A only	\$21.00	\$56.87
B only	\$20.00	\$20.00
C only	\$20.20	\$42.25
A and B and C	n/a	\$79.12

Id. ¶ 17.

d. Average Net Settlement Payment

The average net settlement payment equals the \$4,400,144.26 net payment to Aggrieved Employees divided by the total 96,939 Aggrieved Employees, which is \$45.39. *Id.* ¶ 18.

Plaintiffs note that the real benefit of the settlement to the Aggrieved Employees and the State is its deterrent effect, expressed as an aggregate number (\$27,000,000), coupled with the detailed notice to almost 100,000 California workers, explaining their speech rights and that

1 Google will not retaliate against them for exercising these rights. This is worth far more than the
2 individual payments, or even the collective payment amount. *Hamilton v. Juul*, No. 20 Civ. 3710,
3 2021 U.S. Dist. LEXIS 221416, at *13 n.1 (N.D. Cal. Nov. 16, 2021) (“The full value of the
4 injunctive relief is likely significantly greater than \$956,000 because, . . . the programmatic relief
5 is directly responsive and wide-ranging in redressing the theoretical harms to speech that
6 Plaintiff’s [sic] alleged.”).

7 **III. Release**

8 In its Order, the Court pointed out that the Release by PAGA Group Members incorrectly
9 included claims under Labor Code § 98(k), and ordered the parties to correct the typographical
10 error by changing the reference to Labor Code § 96(k). The parties have executed a revised
11 settlement agreement that corrects the typo and a misspelling of the word “occurred” in § 4.7.1.
12 The signature dates were updated to reflect the dates on which the revised settlement agreement
13 was signed. Otherwise, the revised settlement agreement is identical to the original. Baker Supp.
14 Decl. ¶ 5 & Ex. 1.

15 **IV. Incentive Awards**

16 In its Order, the Court raised concerns about the requested incentive awards. First, the
17 Court observed that there is no reported California authority of which it is aware that authorizes
18 incentive awards to named plaintiffs in PAGA representative actions. The Court also raised
19 concerns about the amounts of the requested incentive awards.

20 **a. Service Awards Are an Appropriate and Important Element in All 21 Representative Actions, and They Are in Fact Arguably Required.**

22 **i. Adjudicating the Propriety of PAGA Representative Service 23 Awards Requires Digging into Non-PAGA Authority.**

24 While there appears to be no California appellate authority analyzing the appropriateness
25 of service awards to PAGA representatives, California courts routinely grant such awards. *See,*
26 *e.g., Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 69-70 (2021) (noting that the trial court had
27 granted a \$12,000 service award for named plaintiff Moniz’s “release and service as plaintiff,”
28 but declining to grant an award to objector Correa, in rejecting Correa’s arguments).² Most often,

² In its Order, this Court stated that the *Moniz* trial court had ruled that the named plaintiff in a

1 courts assume, without analysis, that such awards are proper because service awards are
2 appropriate for representative plaintiffs generally. This assumption is correct.

3 Going back to the roots of the jurisprudence supporting service awards is helpful in
4 answering the question of how they should be treated in PAGA actions. One can trace back the
5 authority for service awards in both class actions and other representative actions to their origins,
6 because class action and other representative action jurisprudence are two logical sources of the
7 notion of service awards in PAGA actions (given that such actions long predate PAGA actions,
8 and there is a rich body of caselaw regarding all aspects of class actions in California and
9 beyond).

10 California courts – like federal and state courts across the nation – have authorized service
11 awards based on judge-made authority. Two key lines of authority are non-class representative
12 actions and class actions, discussed below.

13 **ii. Non-Class Representative Actions**

14 The United States Supreme Court recently observed, “[n]on-class representative actions in
15 which a single agent litigates on behalf of a single principal are part of the basic architecture of
16 much of substantive law. Familiar examples include shareholder-derivative suits, wrongful-death
17 actions, trustee actions, and suits on behalf of infants or incompetent persons.” *Viking River*
18 *Cruises Inc. v. Moriana*, 142 S. Ct. 1906, 1921 (2022); *see, also, Taylor v. Sturgell*, 553 U.S. 880,
19 894-95 (2008); Restatement (Second) of Judgments § 41 (1982).

20 A PAGA action is one such example. It is a non-class representative action where the
21 PAGA plaintiff acts as the proxy or agent of the State. *Adolph v. Uber Technologies, Inc.*, 14
22 Cal. 5th 1104, 1116 (2023); *Arias v. Superior Court*, 46 Cal. 4th 969, 977 n.2 (2009). PAGA
23 plaintiffs do not sue to recover compensation. Rather, PAGA penalties are instead to punish the
24 employer for wrongdoing and to deter violations, rather than compensate employees for actual

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26 PAGA case was not entitled to an incentive award. *See* Order at 3 fn. 2. The trial court ruled that
27 an *objector* in that case was not entitled to an incentive award. *See Moniz*, 72 Cal. App. 5th at 70.
28 In each of its settlement approval orders, the *Moniz* court granted the named plaintiff an
additional payment, though the rationale for payment has rested heavily on the named plaintiff
granting Adecco a non-PAGA release. Plaintiffs do not seek an award on that basis.

1 losses incurred. *Adolph, supra*, at 1117. PAGA is designed to benefit the general public and
2 penalties recovered are dedicated largely to public use. *Id.* at 1116.

3 Part of the basic architecture of non-class representative actions is that a representative
4 with fiduciary obligations to a principal is paid for their service, including, as necessary, from the
5 recovery. *E.g., Mutual Life Ins. Co. of NY v. Ginsburg*, 228 F. 2d 881, 883-84 (3d. Cir. 1956)
6 (awarding guardian ad litem fees as a cost of suit and collecting cases); *Panitch v. State of*
7 *Wisconsin*, 451 F. Supp. 132, 136 (E.D. Wis. 1978) (stating guardian ad litem award may be
8 taxed as a cost and is “a necessary consequence of the court’s equitable responsibility to protect
9 the interests of minor litigants who cannot protect themselves”). “[I]t is considered just and
10 reasonable that a trustee should receive a fair compensation for his services; and in most cases it
11 is gauged by a certain per centage on the amount of the estate.” *Barney v. Saunders*, 57 U.S. 535,
12 542 (1853). This is the case even in the absence of statutory authority.

13 For example, in *In re Moore’s Estate*, 258 Cal. App. 2d 458, 462-463 (1968), the Court of
14 Appeal awarded professional fees to a doctor who sought guardian ad litem status for a disabled
15 patient “because as a result of Dr. Mathias’ activity a fund in excess of \$200,000 was brought
16 under judicial control and safeguarded from possible dissipation and neglect. In a very real sense
17 his action preserved a fund for the benefit of the conservatee and her heirs.” *Id.* at 463-64. In
18 reaching this conclusion, the court acknowledged the absence of statutory authority. *Id.* at 462.
19 Rather, it issued the award under its equitable power. *Id.* at 463. Among other things, the
20 professional fee was appropriate as a matter of “fairness to the successful litigant, who might
21 otherwise receive no benefit because his recovery might be consumed by the expenses” and
22 “correlative prevention of an unfair advantage to the others who are entitled to share in the fund
23 and who should bear their share of the burden of its recovery.” *Id.* at 462-63.

24 **iii. Class Actions**

25 Class actions, too, provide support for service awards. And, as with the non-class
26 representative cases above and PAGA, the class action statutes do not mention service awards;
27 Federal Rule of Civil Procedure Rule 23 and California Code of Civil Procedure section 382 are
28 equally silent as to service awards. *See* 5 Newberg and Rubenstein on Class Actions § 17:5 (5th

1 ed.) (“Rule 23 does not currently make, and has never made, any reference to incentive awards
2 The judiciary has created these awards out of whole cloth.”).

3 The two main California cases that considered the propriety of service awards in class
4 actions relied on federal class action cases, which found service awards to be appropriate based
5 on the policy rationales for the awards: (a) to incentivize the class representatives to bring cases,
6 (b) “to compensate class representatives for work done on behalf of the class, [(c)] to make up for
7 financial or reputational risk undertaken in bringing the action, and, sometimes, [(d)] to recognize
8 their willingness to act as a private attorney general.” *See Cellphone Termination Fee Cases*, 186
9 Cal. App. 4th 1380, 1393-1394 (2010) (quoting *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948,
10 958-59 (9th Cir. 2009) (citing 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38
11 (4th ed. 2008))); *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 804 (2009).

12 In a class action, the class representative acts as a private attorney general to enforce the
13 law for the benefit of herself and others, and service awards incentivize her to do so. “[O]ne of
14 the functions of the class action is to incentivize private parties to enforce certain laws such that
15 the government is not required to undertake all law enforcement alone,” and courts have therefore
16 dubbed class representatives as private attorneys general and “acknowledged their public service
17 through provision of an incentive award.” 5 *Newberg and Rubenstein on Class Actions* § 17:3
18 (6th ed.). “Since without a named plaintiff there can be no class action such compensation as
19 may be necessary to induce him to participate in the suit could be thought the equivalent of the
20 lawyers’ nonlegal but essential case-specific expenses. . . .” *Clark*, 175 Cal. App. 4th at 804
21 (quoting *In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992)).

22 These policy rationales apply equally in the PAGA context.³ Importantly, these rationales
23 are not based on class certification requirements or anything about class actions that distinguishes
24 them from PAGA actions. Put another way, courts have long held that service awards are
25 equitable because they solve a problem with all representative actions (not just class actions⁴) –

26 ³ To state the obvious, the “private attorney general” concept is baked into the very name chosen
27 by the Legislature in enacting PAGA.

28 ⁴ For example, courts have comfortably applied these principles to a different species of
representative action: the collective action. The statute authorizing collective actions, 29 U.S.C. §

1 that one individual's work and sacrifice creates a fund of money that benefits many passive,
2 absent individuals, so there needs to be a mechanism to make them whole for the costs that lone
3 individual has incurred. This is the equitable solution to the free rider problem of representative
4 actions.

5 **b. The Text and Purpose of PAGA Supports Service Awards.**

6 PAGA exists precisely to empower individual workers to enforce the law (here, the Labor
7 Code), because the government is too small to address all the wrongdoing in society.⁵
8 Specifically, PAGA was created because the Labor Commissioner and other agencies were
9 "hampered in their enforcement of civil penalties by inadequate funding and staffing constraints."
10 *Kim v. Reins Int'l Cal., Inc.*, 9 Cal. 5th 73, 81 (2020) (citing *Iskanian v. CLS Transp. L.A., LLC*,
11 59 Cal. 4th 348, 379 (2014)). "[T]he lack of government resources to enforce the Labor Code led
12 to a legislative choice to deputize and *incentivize* employees uniquely positioned to detect and
13 prosecute such violations through PAGA." *Iskanian*, 59 Cal. 4th at 390 (emphasis added),
14 *overruled in part on other grounds by Viking River Cruises, Inc.*, 142 S. Ct. 1906; *see also*
15 *Williams v. Superior Ct.*, 3 Cal. 5th 531, 546 (2017) ("PAGA was intended to advance the state's
16 public policy of affording employees workplaces free of Labor Code violations, notwithstanding
17 the inability of state agencies to monitor every employer or industry.").

18 The legal basis for incentive awards in the class context applies equally to the PAGA
19 context. *Clark and Cellphone Termination Fee*, like most other decisions,⁶ did not analyze the

20 _____
21 216(b), is equally silent as to service awards, but the same principles apply. *See Leigh v. Bottling*
22 *Grp, LLC*, No. 10 Civ. 218, 2012 U.S. Dist. LEXIS 17016, at *19-20 (D. Md. Feb. 10, 2012)
23 ("[t]here is no provision for a 'representative plaintiff' under the FLSA" and the FLSA "is a
24 fundamentally different creature than the Rule 23 class action.") (quotation omitted); *Selk v.*
Pioneers Mem. Healthcare Dist., 159 F. Supp. 3d 1164, 1181 (S.D. Cal. Jan. 29, 2016) ("[A]
district court may award an incentive payment to the named plaintiffs in a FLSA collective action
to compensate them for work done on behalf of the class.").

25 ⁵ This is a quintessentially American solution. Rather than expand government to address all the
ills observed in society, the Legislature has asked private individuals to step forward to share the
burden of law enforcement.

26 ⁶ *See* Charles R. Korsmo, *Lead Plaintiff Incentives in Aggregate Litigation*, 72 Vand. L. Rev.
27 1923, 1930 (2019) ("'[F]ew courts have paused to consider the legal authority for incentive
28 awards.' Instead, courts have generally focused on the rationale for an incentive award." (quoting
4 William B. Rubenstein, *Newberg on Class Actions* § 17:4 (5th ed. 2019))).

1 legal justification for incentive awards. Digging deeper, we find the foundational principles in
2 the Newberg treatise (the bible of class action jurisprudence). Newberg explains that service
3 awards are justified by principles of unjust enrichment: Because the class representative has
4 created a common fund, and because all class members must be treated fairly, “if the class
5 representative provides a service to the class without the class paying for it, the class members
6 will be unjustly enriched by virtue of receiving these services for free.” 5 Newberg and
7 Rubenstein on Class Actions § 17:4 (6th ed.). That logic works equally well if “class” is replaced
8 with “PAGA.” The PAGA representative creates a fund; she is entitled to a share as an aggrieved
9 employee, and failing to compensate her for the risks and work she undertook to benefit the State
10 and the other aggrieved employees would violate the core notion of unjust enrichment.

11 **c. The Purpose of PAGA and the PAGA Representative’s Obligations to the**
12 **State and Aggrieved Employees Support Service Awards.**

13 The two differences between PAGA actions and class actions that the Court highlighted in
14 its Order do not alter the conclusion that service awards are equally appropriate in class actions
15 and PAGA actions.

16 First, the purpose of PAGA penalties provides additional justification for a service award.
17 As this Court observed, the purpose of PAGA penalties is to remediate and deter violations, rather
18 than to compensate employees for injuries. *See* Order at 4. This makes a service award all the
19 more appropriate in PAGA cases, because the PAGA representative is not acting to recover
20 compensatory damages, restitution, or the like for himself at all. He is acting for his principal,
21 i.e., the State. As is the case with a trustee or other fiduciary, service awards for PAGA
22 representatives are justified “to secure greater activity and diligence in the performance of [his
23 PAGA duties], and to induce persons of reliable character and business capacity to accept the
24 office of [PAGA Representative].” *Trustees v. Greenough*, 105 U.S. 527, 537-38 (1881)
25 (explaining basis for trustee compensation), *superseded by statute as stated in Moses v. N.Y.*
26 *Times Co.*, 79 F.4th 235, 254 (2d Cir. 2023); Benjamin Gould, *On the Lawfulness of Awards to*
27 *Class Representatives*, 2023 Cardozo L. Rev. De Novo 1, 16-23 (arguing class representatives are
28 closer to trustees than creditors and thus service awards are appropriate in class cases). *Adolph*

1 notes that a PAGA plaintiff “may have a personal stake in the litigation of non-individual
2 claims,” *e.g.*, the value of the non-individual claims may help the plaintiff secure competent
3 counsel for the individual claims. *Adolph, supra*, at 1127. Another personal stake must be a
4 service award. This is especially true when, as here, a plaintiff’s need to secure competent
5 counsel for the individual claims has long passed because the individual claims were resolved
6 long ago.

7 Regardless, none of the justifications for service awards in the class or non-class
8 representative contexts rely on the *purpose* of the money in the common fund. Regardless of the
9 policy basis for exposing the defendant to liability for a monetary remedy (deterrence or
10 compensation), the end result is a fund created by the representative’s efforts, which will be paid
11 out to the State and absent individuals who are otherwise free riders. Put another way, service
12 award jurisprudence is agnostic as to why the money was gathered or what valence it has when it
13 is paid out. All that matters is that the money was collected and will be paid out to others.

14 Second, the question of whether PAGA representatives owe a fiduciary duty to the other
15 aggrieved employees is also no obstacle. As an initial matter, basic agency law suggests that
16 PAGA representatives *do* owe a fiduciary duty, at least to the State, equivalent to (or greater than)
17 that owed by class representatives to class members. *See Engalla v. Permanente Medical Group,*
18 *Inc.*, 15 Cal. 4th 951, 977 (1997) (“An agency relationship is a fiduciary one, obliging the agent
19 to act in the interest of the principal.”); *Moniz*, 72 Cal. App. 5th at 64 (aggrieved employee “may
20 be authorized to act as an agent of the [LWDA] to bring a civil action”); Restatement (Third) of
21 Agency § 8.01 (agent has duty to “subordinate the agent’s interest to those of the principal and
22 place the principal’s interests first as to matters connected with the agency relationship.”).

23 It is instructive that the fiduciary duty of a class representative to class members is judge-
24 made, based on the requirement that the representative adequately protect the interests of absent
25 class members. *See e.g., Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 266 (2018)
26 (“Case law imposes fiduciary duties on the trial courts, class counsel, and class representatives,
27 who must ensure the action proceeds in the class members’ best interest.”). Again, those class
28 action principles apply equally well in PAGA actions, because the representative nature of the

1 action animates the same considerations. In fact, Plaintiff Correa helped make law driving this
2 point home in the PAGA context. In adopting some of Correa’s arguments and reasoning, the
3 *Moniz* court explained that “a nonparty may be bound by a judgment because she was ‘adequately
4 represented by someone with the same interests who [wa]s a party’ to the suit.” 72 Cal. App. 5th
5 at 89 (alteration in original) (quoting *Taylor*, 553 U.S. at 894–895). The court continued, “[t]hese
6 circumstances include representative suits brought on a nonparty’s behalf by an agent or proxy,
7 such as this PAGA action.” *Id.* Finally it included, “[i]n review and approval of a proposed
8 settlement under section 2699, subd. (1)(2), a trial court thus must scrutinize whether, in resolving
9 the action, a PAGA plaintiff has adequately represented the state’s interests, and hence the public
10 interest.” *Id.*

11 Here, Plaintiffs submit that they adequately represented the State’s interests, taking their
12 duties as PAGA representatives very seriously. To the extent that the Court is interested in what
13 Plaintiffs’ retainer agreements say on this topic, Plaintiffs are willing to submit them for in
14 camera review, as they are shielded from the public and Defendants’ view by the attorney-client
15 privilege.

16 While there is minority authority holding that PAGA representatives are not entitled to
17 service awards, Plaintiffs are aware of no such case that carefully analyzes the origins and policy
18 rationales undergirding the doctrine. *See Whitworth v. Solarcity Corp.*, No. 16 Civ. 01540, 2023
19 U.S. Dist. LEXIS 75564, at *22 (N.D. Cal. May 1, 2023) (holding, based on one sentence of
20 analysis and one citation, that it would run afoul of the purpose of PAGA to provide an incentive
21 award “particularly where they have already obtained an individual settlement”). Here, Plaintiffs
22 could have been paid more for their individual claims had they agreed to forego their right to
23 bring a PAGA action. *See Hamilton*, 2021 U.S. Dist. LEXIS 221416, at *41 (finding service
24 award warranted because plaintiff “pursued PAGA claims rather than bargaining them away
25 when settling her individual claims”).

26 **d. The Requested Incentive Awards Are Appropriate Here.**

27 The Court also questions the appropriateness of the amounts sought here. Plaintiffs
28 respectfully submit that the requested awards are reasonable and should be granted.

1 **i. The Ratio of Service Award to Average Recovery Is Irrelevant, and**
2 **Consideration of the Ratio Would Produce Absurd Results and**
3 **Undermine PAGA Enforcement.**

4 Analyzing the ratio between a service award and the average settlement award is
5 inappropriate.

6 First, conceptually, the ratio concept does not square with the jurisprudence regarding
7 service awards. The ratio concept is wholly unrelated to the policy rationales for the awards, as
8 discussed above. The law focuses on the total fund created, not whether the number of
9 beneficiaries is relatively small (which is how one can maximize the ratio).

10 Second, using a ratio concept would lead to absurd results. For example, why would a
11 \$10,000,000 settlement for 1,000,000 people (\$1/person) justify a smaller award than a
12 \$1,000,000 settlement for 1,000 people (\$1,000/person)?⁷ Does the smaller settlement truly
13 benefit society more? Indeed, courts routinely approve service awards multiple orders of
14 magnitude larger than individual class member awards, especially in the consumer and antitrust
15 context, where individual awards are often a handful of dollars. *See, e.g., In re Online DVD-*
16 *Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (service awards over 400 times the
17 amount of class member awards did not defeat adequacy where the awards were reasonable and
18 did not involve “intra-class structural conflict”); *In re Yahoo! Inc. Customer Data Sec. Breach*
19 *Litig.*, No. 16 MDL 2752, 2020 U.S. Dist. LEXIS 129939, at *34-35 (N.D. Cal. July 22, 2020)
20 (approving service awards that were “187.5 times larger than a \$40 individual award” because
21 that was not an excessively high factor and because of the class representatives’ “role in
22 protecting the interests of the Settlement Class”).

23 Third, consideration of a ratio would also undermine PAGA enforcement, by incentivizing
24 PAGA representatives to minimize the number of aggrieved employees covered by a settlement.
25 The fewer people one helps, the greater the “average dollars per aggrieved employee” quotient.

26 ⁷ To the extent that *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785 (2009) suggests
27 that a comparison between service awards and class member awards is a relevant factor in service
28 award analysis, Plaintiffs respectfully submit that *Clark* is incorrect on this point and failed to
grapple with either the foundational unjust enrichment rationale supporting service awards or the
logical implications of such a holding.

1 That, in turn minimizes the ratio of the incentive award to the average payment. Thus, where a
2 PAGA representative has the option to narrow the case to help fewer people at a higher dollar
3 amount, the overall settlement is decreased, the deterrence value is decreased, but the PAGA
4 representative can benefit if the court uses a ratio approach.⁸

5 In short, service awards must be adequate in terms of what the dollar amount of the award
6 means to the individual private attorney general in absolute terms, to compensate them for the
7 work and risk they undertake, so that private attorneys general are willing to step up to help
8 enforce the law. Substantial service awards are necessary to incentivize plaintiffs to prosecute
9 protracted and well-publicized PAGA litigations like this one, with all the labor this entails, and
10 the attendant risk of retaliation from current and future employers. *See* Fee Motion at 22 (citing
11 cases awarding incentive awards in amounts ranging from \$25,000 to \$300,000).

12 In fact, this is especially true in PAGA actions. “[T]he lack of government resources to
13 enforce the Labor Code led to a legislative choice to deputize and *incentivize* employees uniquely
14 positioned to detect and prosecute such violations through PAGA.” *Iskanian*, 59 Cal. 4th at
15 390. But unlike in some other types of qui tam actions, PAGA whistleblowers are not entitled to
16 a significant bounty as an incentive: the 25% share of civil penalties to employees is split among
17 “all employees affected by the Labor Code violation,” *id.* at 382, resulting in characteristically
18 small individual awards, even when, like here, the aggregate penalties satisfy PAGA’s punitive
19 objective. Thus, it is precisely because an individual aggrieved employee’s share of penalties is
20 typically modest in PAGA cases that it is not a sufficient incentive to a PAGA representative,
21 necessitating service awards to overcome a free-rider dilemma. *See Korsmo, supra*, at 1931
22 (“Where the lead plaintiff’s share of the recovery is small, the costs of serving as lead plaintiff
23 can make doing so a negative-value proposition. Even where serving as lead plaintiff is not
24 negative-value in absolute terms, it will often be so in relative terms - each individual plaintiff
25

26 ⁸ Because the purpose of PAGA is to allow an individual to pursue penalties in the name of the
27 State, to the extent that the Court determines that a ratio approach is justifiable, the proper
28 comparator in a PAGA case should include the 75% paid to the State – here, \$13,200,432.79 –
rather than to the net amount to each individual aggrieved employee. *Baker Supp. Decl.* ¶ 13.

1 would be better off sitting back and letting someone *else* bear the costs of being lead plaintiff. In
2 many cases, this free-rider dynamic can prevent a suit from being brought in the first
3 place.”). And just like in other types of representative actions, the amount required as an
4 incentive must increase to account for factors such as the amount of time a representative has
5 invested in the litigation, the length of the litigation, and retaliation risks.

6 **ii. Courts Make the “Market” for Service Awards, and Due to a Drift**
7 **Away from the Core Principles Underlying Service Awards, and a**
8 **Lack of Empathy for the Huge Risks Plaintiffs Undertake, Many**
9 **Courts Inappropriately Cut Service Awards.**

10 The Court understandably questions the proposed service award amounts as compared to
11 other class and representative cases. As an initial matter, Plaintiffs note that there appears to be
12 no systematic analysis of incentive awards, so any discussion of the “market” for such awards
13 easily devolves into cherry-picking isolated anecdotal data points. But more fundamentally,
14 translating the human experience of the PAGA representative – an amalgam of work, sacrifice,
15 risk, fear, and value conveyed – into raw dollars is an inherently subjective and imprecise
16 transmutation. Plaintiffs made literally *invaluable* contributions to the creation of the settlement
17 fund – that is, sacrifices that are both impossible to value in dollars and greater than money can
18 compensate. For years, Doe and Cassel lived with daily fear of retaliation and antagonism in the
19 workplace due to their ongoing lawsuit against their employer. *See id.* at 23. And for the rest of
20 their lives, Plaintiffs’ leadership of the litigation will be apparent to every potential employer,
21 landlord, lender, business partner, etc., because they will be able to learn in seconds on the
22 internet that Plaintiffs sued their employer and perhaps they are “troublemakers,” best to be
23 quietly avoided. *See id.* at 21 (citing cases recognizing the risks named plaintiffs face with
24 respect to future employment). Plaintiffs made these sacrifices in order to bring justice to those
25 who would otherwise be hidden from judicial scrutiny,⁹ and in doing so, conferred benefits on
26 their fellow aggrieved employees and furthered the remedial purposes of PAGA. *See Bell v.*

27 ⁹ *See generally* Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive*
28 *Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 Emp. Rts. &
Emp. Pol’y J. 395 (2006).

1 *Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726 (2004) (affirming service awards to the named
2 plaintiffs “compensating them for their efforts in bringing the action”).

3 In the rarified environment of the courtroom, where we deal in abstractions, jargon,
4 procedure, and long, impenetrable documents, it is easy to lose sight of what a representative
5 plaintiff experiences. It can be difficult for legal professionals to fully comprehend the sacrifices
6 they make in leading class actions and PAGA actions. The fear of retribution at work or beyond,
7 the exposure to cost assessments in the event of a loss, the stress and antagonism of the discovery
8 process and depositions, and general anxiety about embroiling oneself in legal obligations as a
9 layperson are huge concerns. Those concerns amount to massive obstacles to individual victims
10 being willing to step forward to enforce the law. Who knows how many potential plaintiffs never
11 pick up the phone, or walk away from a potential case after their first conversation or two with a
12 lawyer, because of all those obvious costs of serving as a class representative or PAGA
13 representative.

14 At the end of the day, courts make the “market” for service awards. They are entrusted
15 with the alchemy of translating the blood, sweat, and tears of representative plaintiffs’ experience
16 into dollar amounts, via the highly abstract legal principle of unjust enrichment and the economic
17 mechanism of the free rider problem. What would it be worth to a class member or aggrieved
18 employee to receive a check in the mail by surprise? A one percent fee? A three percent fee?
19 What is a proper dollar amount for a representative plaintiff to receive to compensate them for
20 what they lived through during years of uncertainty and an amorphous fiduciary obligation to an
21 unknown group of fellow workers? What is the appropriate incentive for the State to ensure that
22 enough individuals overcome their fear and prosecute the laws that the Legislature has passed and
23 then invited them to enforce?

24 While assigning a precise monetary value to these contributions is difficult and highly
25 subjective, Plaintiffs respectfully submit that the \$20,000-\$40,000 awards they request are
26 eminently reasonable.

1 Dated: November 21, 2023

Respectfully submitted,

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