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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

JOHN DOE, DAVID GUDEMAN, and PAOLA CORREA, on behalf of the State of California and aggrieved employees,

Plaintiffs,

vs.

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

Defendants.

Case No. CGC-16-556034

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, COSTS, AND AN INCENTIVE PAYMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Department: 304 (COMPLEX)
Judge: Hon. Curtis E.A. Karnow
Hearing Date: June 25, 2018
Time: 3:00 p.m.

Complaint Filed: December 20, 2016
Trial Date: November 6, 2018

PLEASE TAKE NOTICE that on June 25, 2018 at 3:00 p.m., before the Honorable Curtis E.A. Karnow of the California Superior Court, City and County of San Francisco, Department 304, Plaintiffs John Doe, David Gudeman, and Paola Correa will and hereby do move the Court, pursuant to Labor Code § 2699(g), Code of Civil Procedure § 1021.5, and the Court's inherent authority and applicable case law, for an order: (1) awarding Plaintiffs' Counsel fees in the

amount of $346,118.20; (2) awarding litigation costs in the amount of $ 7,207.50; and (3) awarding incentive payments to Plaintiffs in the amount of $1000 each, all in connection with the requested approval of the PAGA Settlement in this case.

This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities attached to this Motion, the Baker Declarations, all pleadings and papers filed herein, including those associated with the Joint Motion, the arguments of counsel, and any other matters properly before the Court.

DATED: June 1, 2018

Respectfully submitted:
BAKER CURTIS & SCHWARTZ, P.C.

By: _____
Chris Baker
Attorneys for Plaintiffs
JOHN DOE, DAVID GUDEMAN
AND PAOLA CORREA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After substantial litigation, Google and Alphabet (collectively Google) have agreed to pay $1,048,843.00 into a common fund in exchange for the release of PAGA claims arising from its Adult Content Liability Release.

Under the Settlement Agreement, Plaintiffs and Plaintiffs' Counsel may request from this common fund: (1) an award of 33% of the gross settlement amount, or $346,118.20; (2) litigation costs not exceeding $25,000; and (3) incentive payments of $1,000 per Plaintiff. Through this motion, Plaintiffs and Plaintiffs' Counsel do so.

II. FACTS

Below are certain facts relevant to this Motion for Fees, Costs, and Incentive Payments. Additional relevant facts are set forth in the Joint Motion for Approval, as well as the declarations filed in support of the parties' and Plaintiffs' moving papers.

A. Plaintiffs' Counsel

In 1995-96, Chris Baker, after completing a clerkship with Judge Bailey Brown of the United States Court of Appeals for the Sixth Circuit, began practicing labor and employment law in California. Initially, he was an associate at Littler Mendelson, then an associate and partner at Thelen Marin Johnson & Bridges (in all its iterations), and then an equity partner at Nixon Peabody LLP. In March 2013, Baker founded the Baker Law Practice. (Baker Decl. ¶ 2.)

In 2014, Deborah Schwartz joined Baker's practice and the firm became Baker & Schwartz, P.C. Deborah Schwarz has practiced labor and employment law since 2000. She was an associate at Thelen LLP, and an associate and partner at Nixon Peabody LLP. In 2015, Mike Curtis joined Baker & Schwartz and the firm soon became Baker Curtis & Schwartz, P.C. Curtis has practiced labor and employment law since 2007 and was previously a senior associate at Nixon Peabody. (Baker Decl. ¶ 3.)

Baker, Schwartz and Curtis have, at various times, all been recognized as "Super Lawyers" by their peers. On the defense side, they have represented companies such as Kaiser Permanente, the Hertz Corporation, Oracle, the Golden State Warriors, and Solar City in the

defense of complex employment matters, including class, collective, and PAGA actions. On the plaintiffs' side, they have brought complex class, collective and PAGA actions against companies such as Bank of America, Chase, Fidelity, PennyMac, Mixpanel, and, of course, Google. (Baker Decl. ¶¶ 4-5.)

B. Brief History of Work on the Case As It Relates to Settled Claims

1. The Liability Release & Google's Cure

Plaintiffs' Counsel started work on this case more than two years ago, in April 2016. After settlement efforts failed, John Doe filed his initial PAGA complaint in December 2016. In February 2017, Plaintiffs notified the LWDA that Google requires all its employees and temporary workers to sign a "confidential" "Adult Content Liability Release." Under Google's non-disclosure (NDA) agreements, policies and practices then in effect, the "confidential" nature of the Release meant it could never be shared with anyone. The Release advised employees that they may be exposed to "sensitive 'adult' content" and that they "hereby release Google and its subsidiaries and affiliates from any and all liability associated with having this material present in the work environment, including but not limited to claims of harassment, hostile work environment, and discrimination." (Baker Decl. ¶ 16.)

Even assuming, as Google contends, that the Release was directed to employees who must review internet pornography (and other "adult content") for the purpose of "take down" requests, the Liability Release was problematic. As reported by the Wall Street Journal, working as "content moderators" for large technology firms can cause significant emotional and mental harm. Weber and Seetharaman, The Worst Job in Technology: Staring at Human Depravity to Keep It Off Facebook, WALL ST. J., Dec. 27, 2017.[1] As the article explains, "the content moderators [at Google] were hit hardest by images of child sexual abuse. 'The worst part is knowing some of this is happening to real people.'"

No employee should be required to release their employers from "any and all liability" associated with reviewing this material, including unwaivable claims under the workers

[1] The article can be found at https://www.wsj.com/articles/the-worst-job-in-technology-staring-at-human-depravity-to-keep-it-off-facebook-1514398398

compensation laws, Title VII, and FEHA. Defendants' potential argument that Google never sought – or intended – to enforce the Release is immaterial. As explained by one federal district court in the context of another illegal agreement: "Employees, having no reason to familiarize themselves with the specifics of California's employment laws, will tend to assume that the contractual terms proposed by their employer (especially one of [defendant's] magnitude) are legal, if draconian. Furthermore, even if they strongly suspect that a . . . clause is unenforceable, such employees will be reluctant to challenge the legality of the contractual terms and risk the deployment of [the employer's] considerable legal resources against them. Thus, the *in terrorem* effect of the Agreement will tend to secure employee compliance with its illegal terms in the vast majority of cases." *Latona v. Aetna U.S. Healthcare Inc.* (C.D. Cal. 1999) 82 F.Supp.2d 1089, 1096-97.

Nevertheless, after Plaintiffs sent their PAGA notice, Google rescinded the Release, declared it non-confidential, and instituted a new, non-confidential, policy.

Following a dispute about the sufficiency of Google's cure (as detailed in the Joint Motion), as well the expiration of the differing administration exhaustion periods (which Google refused to waive), on April 28, 2017, Plaintiffs filed their Third Amended Complaint (3AC). Google demurred to the 3AC, which was granted as to the Labor Code § 232.5 claim related to the Liability Release and denied as to the § 432.5 claim. (Baker Decl. ¶ 17.)

2. Discovery and Discovery Motion Practice Related to the Liability Release Claims against Google

With respect to discovery related to the Liability Release claims (as well as the integrity of the judicial process), in January 2017, Plaintiffs sought discovery concerning Google's employment of employees working at other Alphabet subsidiaries. Google refused to respond. Plaintiffs meet and confer efforts were unsuccessful, and eventually they filed a motion to compel responses to this discovery (among other things). This motion was taken off calendar when the case was transferred to the complex department. Eventually (in October 2017), Google provided a supplemental response concerning this discovery. (Baker Decl. ¶ 18.)

In June 2017, Plaintiffs sought discovery concerning the Liability Release claims from

both Adecco and Google, as well as discovery relevant to Correa's claim that both Google and Adecco were her "joint employers." Defendants generally refused to respond to this discovery. Plaintiffs again met and conferred. Eventually, Plaintiffs' Counsel moved to compel Google's response to certain of this discovery as it relates to the Liability Release claims. In December 2017, the Court granted this motion. (Baker Decl. ¶ 19.)

In August 2017, Plaintiffs propounded discovery concerning the integrity of the judicial process as it relates to Google's authorization under the law and its own policies to access the Court's, Plaintiffs' counsel, and Plaintiffs' "User Data" in connection with this litigation, and whether Google had actually accessed this "User Data" (an electronic form of surveillance analogous to, but exponentially more intrusive than, the surveillance that is the subject of Form Interrogatory 13.1). Google refused to respond to this discovery as well, leading to additional meet and confer efforts and a supplemental (but still incomplete) response in November 2017. (Baker Decl. ¶ 20.)

In September 2017, Google served discovery on Plaintiffs related to the Liability Release claims, to which Plaintiffs responded. (Baker Decl. ¶ 21.)

In October 2017, Plaintiffs served additional discovery on Google concerning its employment of Correa and other contingent workers, as well as its possession of employment documents signed by Plaintiffs. In response, Google (eventually) produced an NDA signed by Correa in the applicable limitations period that included the Liability Release. (Baker Decl. ¶ 22.)

3. *Motion for Judgment on the Pleadings, Mediation, and Settlement*

In late November 2017, Google moved for judgment on the pleadings as to the Liability Release Claims under Labor Code § 432.5. Plaintiffs opposed the motion. In December 2017, the Court ruled in Plaintiffs' favor. Plaintiffs and Google then agreed to mediate the matter. Between January and March 2018, Google voluntarily provided Plaintiffs with extensive information concerning the PAGA claims in preparation for mediation. In February 2018, Plaintiffs filed a writ petition seeking a reversal of the Court's *Garmon* preemption rulings, including as it relates to the Labor Code § 232.5 claims associated with the Liability Release. As

of the date of the mediation, the Court of Appeal had not yet ruled on the writ.[2] (Baker Decl. ¶ 23-24)

At the March 22, 2018 mediation, the parties reached a Memorandum of Agreement resolving the Liability Release claims. They then negotiated and drafted a long-form agreement. They also drafted and filed the Joint Motion for Approval and the supporting papers presently before the Court.

Plaintiffs now seek fees, costs, and an enhancement award from the common fund created by the Settlement.

III. ARGUMENT

A. Attorneys' Fees

1. *Fees Should Be Awarded from the Common Fund Created by the Settlement*

Labor Code § 2699(g)(1) of PAGA states that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs . . . ." California Code of Civil Procedure § 1021.5 states: "a court may award attorneys fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if [among other things] a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons. . . . ."

In addition, when the prosecution of a matter results in the creation of a common fund, a court can and should award fees and costs from that fund. The reason is "that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit." *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478. Thus, it is proper to award from a fund attorneys' fees and costs "to a party who has recovered or preserved a monetary fund for the benefit of himself or herself and others," *Laffitte v. Robert Half Intern Inc.* (2016) 1 Cal.5th 480, 488 ("*Laffitte II*"). This is so even in fee-shifting

[2] The Court of Appeal would eventually deny the writ for the sole basis that it was untimely on March 29, 2018.

cases like this one. *Id.* (approving common fund doctrine in wage and hour with fee shifting statute); *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967 (approving common fund doctrine in fee-shifting case); *Sobel v. Hertz Corporation* (D.Nev. 2014) 53 F.Supp.3d 1319, 1326 (approving request for fees from common fund in addition to fees awarded against defendant in fee-shifting case).

Moreover, while Plaintiffs are aware of no published appellate cases directly on point, federal district courts routinely approve fee awards from common funds in litigation involving PAGA (and other) claims. *See, e.g., Franco v. Ruiz Food Products, Inc.* (E.D. Cal. 2012) 2012 WL 5941801 (approving settlement of class and PAGA claims and awarding fees and costs from common fund); *Garcia v. Gordon Trucking, Inc.* (E.D. Cal. 2012) 2012 WL 5364575 (same); *Chu v. Wells Fargo Investments, LLC* (N.D. Cal. 2011) 2011 WL 672645 (same). California appellate courts have also approved fee awards from common funds in non-class cases. *E.g. In re Reade's Estate* (1948) 31 Cal.2d 669, 671-72 (awarding fees from common fund in action involving an estate); *Farmers & Merchants Nat. Bank v. Peterson* (1936) 5 Cal.2d 601, 607 (awarding fees from common fund in creditor action); *Cziraki v. Thunder Cats, Inc.* (2003) 111 Cal.App.4th 552, 557-58 (finding common fund doctrine applied in derivative actions).

In light of the above law, there is no principled reason that a fee application arising from a PAGA-only common fund settlement should be treated differently than other common fund settlements. Accordingly, Plaintiffs' Counsel's fees and costs are properly paid from that common fund.

2. *The Court Should Use the Percentage-of-Recovery Method in Calculating the Fee Award*

In *Laffitte II*, the Supreme Court approved a superior court's use of the "percentage-of-recovery" method in common fund cases. *Id.* at 503. In doing so, it reasoned:

> The recognized advantages of the percentage method – including the relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation . . . convince us the percentage method is a valuable tool that should not be denied our trial courts.

Id. The Supreme Court further found that, while a trial court may adjust the percentage based on a "lodestar cross check" it is not required to do so. *Id.* at 505-506 ("We further hold that the trial courts have discretion to do a lodestar cross-check on a percentage fee . . . .they also retain the discretion to forego the lodestar cross-check and use other means to evaluate the reasonableness of a requested fee percentage.")

Consistent with *Laffitte II*, this Court should exercise its discretion and utilize the percentage-of-recovery method in awarding fees for these reasons:

(1) The percentage method is more appropriate in cases such as this one, where there is a fixed, non-reversionary, common fund. *Burden v. SelectQuote Insurance Services* (N.D. Cal. 2013) 2013 WL 3988771, *4.

(2) The lodestar method is not preferred in common fund cases because it "does not achieve the stated purposes of proportionality, predictability and protection of the class. It encourages abuses such as unjustified work and protracting the litigation. It adds to the work load of already overworked district courts. It does not encourage efficiency, but rather, it adds inefficiency to the process." *In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F.Supp. 1373, 1378. In contrast, under the percentage method, "[t]he integrity of the attorneys' fee application process [is] enhanced and the class members . . . receive at least the same benefits and receive them earlier." *Id.* at 1379. This reasoning applies with equal force to PAGA-only settlements that result in the creation of common fund.

(3) PAGA expressly contemplates contingency fee awards. More specifically, in *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348, the defendant argued that PAGA violated the principle of separation of powers because it involved the state retaining private counsel "on a contingent fee" basis. *Id.* at 389. The Supreme Court rejected this argument, reasoning (among other things) that "contingent fee representation was appropriate in "ordinary civil cases" in which a government entity's own economic interests were at stake." *Id.* A contingency fee, of course, "is one type of fee arrangement for a lawyer where the lawyer gets paid a percentage of the award that is obtained for the client as a result of winning the case." THE

LAW.COM LAW DICTIONARY & BLACK'S LAW DICTIONARY 2ND ED.[3] Here, Plaintiffs have achieved an award in the form of a common fund settlement. It is thus appropriate – and certainly not an abuse of discretion – to award Plaintiffs' Counsel's fees as a percentage of this fund.

3. *A Thirty-Three Percent Award Is Appropriate*

The Ninth Circuit holds that the "benchmark" percentage in common fund cases is 25%. *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1311. California appellate courts, while not expressly announcing a "benchmark," have instead found fees in the 33-percent range appropriate. *E.g., Laffitte II*, 1 Cal.5th at 506 (affirming award of 33% of the common fund); *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 (2008)("[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery"); *Laffitte* v. *Robert Half Intern. Inc.* (2014) 180 Cal.Rptr.3d 136, 149 ("*Laffitte I*") ("the trial court's use of a percentage of 33 1/3 percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits.")[4] Among other things, a 33% award is appropriate because "the amount of attorney's fees typically negotiated in comparable litigation should be considered in the assessment of a reasonable fee in representative actions . . . . Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class ... actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior." *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 47 (emphasis added).

Here, the "legal marketplace" for PAGA-only settlements that result in a common fund provides for a fee award in the 33% range or greater. (RJN ___: Exs. 1-4; *Jones v. J.C. Penny Corporation*, Los Angeles Superior Court, Case No. BC451823 at 5, Ex. 1 at 3-4 (approving fee award from PAGA-only settlement of $1.375M against a common fund of $3.2M (42%); *Brewer v. Connell Chevrolet*, Orange County Superior Court, Case No. 30-2016-00852123 at p. 2

[3] Found at https://dictionary.thelaw.com/contingency-fee/

[4] Because the Supreme Court affirmed *Laffitte I* it is good law and may be cited. California Rules of Court, Rule 8.115(e)(2).

(approving fee award from PAGA-only settlement of $63,333.33 against a common fund of $190,000 (33%); *Garcia v. Macy's West Stores*, San Bernardino Superior Court, Case No. CIVDS1516007 (awarding fee from PAGA only-settlement of $4,166,666.67 against a common fund of $12,500,000 (33%); *Price v. Uber Technologies*, Los Angeles Superior Court, Case No. BC554512 (awarding fee from PAGA-only settlement of $2,325,000 against a common fund settlement of $7,750,000 (30%)). On top of this, *privately* negotiated contingency agreements in employment matters typically range from 33% to 48% of any recovery. (Baker Decl. ¶ ___)

For all these reasons, a fee award of 33% of the common fund in is appropriate and should be approved.

4. *Plaintiffs' Counsel's Lodestar*

If the Court chooses to perform a lodestar cross-check in this case, such a cross-check will confirm the reasonableness of Plaintiffs' fee request.

In calculating an initial lodestar figure, a court considers: (1) the reasonable hours spent; and (2) the prevailing hourly rates for "private attorneys in the community conducting *non-contingent* litigation of the same type." *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134 (emphasis in original). These facts may be established through a declaration by counsel. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254-55 (relying on Plaintiffs' counsel's declarations as sufficient evidence to demonstrate the appropriate hourly rate). In performing a cross-check, the Court may also rely on a declaration "summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work was broken down by individual task." *Laffitte II*, 1 Cal.5th at 505.[5]

a. Plaintiffs' Counsel's Hourly Rates

The best indicator of a "reasonable market rate" is the actual rate charged by an attorney to his or her private clients. *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.* (7th Cir. 1985) 776 F.2d 646, 660. As explained by one Court of Appeal: "When an attorney's customary billing rate is the rate at which the attorney requests the lodestar be computed and that rate is within the range

[5] The Court can also, if it wishes, review time records. Plaintiff's Counsel will bring its time records to the approval hearing in the event that the Court wishes to review them.

of prevailing market rates, the court should consider this rate when fixing the hourly rate to be allowed. When the rate is not contested, it is *prima facie* reasonable." *Islamic Center of Mississippi v. City of Starkville* (5th Cir. 1989) 876 F.2d 465, 469.

The 2016-2017 hourly rates of Baker, Schwartz, and Curtis were $750 (Baker), $615 (Schwartz), and $515 (Curtis). In 2018, these hourly rates were raised to $800 (Baker), $655 (Schwartz) and $585 (Curtis) for new matters. These are the rates that individuals and corporate clients pay Baker, Curtis & Schwartz to represent them on an hourly basis.[6] Accordingly, they are *prima facie* reasonable. (Baker Decl. ¶ 7.)

Moreover, these rates are undoubtedly less than the hourly rates charged by Plaintiffs' Counsel's peers at large corporate firms. (Baker Decl. ¶¶ 8-9.) As explained in *Laffitte II,* in 2002, hourly rates ranged from $750 to $875 an hour, and in 2012, hourly rates ranged from $775 to $950 an hour. *Id.* at 152. Attorney's rates have only increased since then. Indeed, LexisNexis CounselLink's 2018 Legal Management Report found an 8% increase in rates in 2017 among the 50 largest law firms, which includes Paul Hastings, Morgan Lewis, Latham Watkins, Kirkland & Ellis, Reed Smith, Goodwin Proctor, Covington & Burlington, Sidley Austin, and other firms to whom Plaintiffs' Counsel have recently been adverse (including in this case). (Baker Decl. ¶ 10.)

Accordingly, Plaintiffs request the Court find Plaintiffs' Counsel's hourly rates reasonable.

b. Time Spent on Claims Covered by the Settlement

As noted above, Google has contested this case at every step. Summarizing the time spent concerning the claims released by the settlement is, inevitably, imprecise, because certain tasks furthered, not just the settled claims, but other claims and the entire case as well.

To date, Plaintiffs' Counsel has invested approximately **682** hours in this case as a whole. Plaintiffs' Counsel's analysis of its time records show approximately **229** of these hours should **not** be attributed to this Settlement. (Baker Decl. ¶¶ 15, 28.) Excluded time includes efforts combating Google's attempt to the expand the scope of the proceeding before the National Labor

[6] Plaintiffs' Counsel continues to charge 2016-2017 hourly rates to clients on existing matters. Note, also, that Schwartz charges a lower hourly rate when performing employment investigations for corporate clients.

Relations Board (and thus buttress its *Garmon* preemption argument), discovery solely associated with *Garmon* preemption of the primary NDA claims, discovery and motion practice concerning catalyst fees for the primary NDA claims, and motion practice, settlement efforts, and discovery requests and responses directed solely towards Adecco and related to the Adecco claims.

This leaves approximately **453** hours that are potentially relevant to the Settlement.

Approximately **59** of these 453 hours are properly attributed only to the Liability Release claims against Google that are the subject of this Settlement. This work includes legal research, drafting the initial PAGA notice and disputing the cure, opposing the motion for judgment on the pleadings, seeking and moving for discovery associated solely with the Liability Release as to Google, negotiating the long form settlement, and research and preparing the joint motion for approval. Of these 59 hours, approximately 50 were spent by Baker and nine were spent by Schwartz. The fees associated with this work comes to $43,758.

The remaining **394** hours concern other work on the case that furthered the prosecution of the settled claims, as well as the other claims against both Adecco and Google. This work includes legal research, investigation, client communications, preparing the 3AC, other discovery requests and responses (including as to joint employer liability), discovery motion practice centered on all the claims, motion practice concerning both the NDA and Liability Release claims (such as opposing Google's demurrer to the 3AC), preparing for and attending court conferences, drafting the writ petition (which remained pending at the time of the mediation, and which sought reversal of the Court's *Garmon* preemption ruling related to the Liability Release § 232.5 claim *and* the other NDA claims), and preparing for and attending the March 22, 2018 mediation. About three hundred and fifty one (351) of these 394 hours were spent by Baker, thirty-eight (38) were spent by Schwartz (primarily on legal research and reviewing and revising pleadings and motions), and five were spent by Curtis (primarily on the writ petition). The total fees associated with this intertwined work is $297,677. (Baker Decl. ¶¶ 29-30.)

When successful and [not yet or currently unsuccessful] claims are "inextricably intertwined" such that it is "impracticable, if not impossible, to separate the multitude of conjoined activities into compensable or noncompensable time units," a court need not apportion

the fee. *Harman v. City & County of San Francisco* (2007) 158 Cal.App.4th 407, 418.

Nevertheless, in conducting a "lodestar cross check," the Court may find value in discounting the intertwined time to ensure the percentage-of-recovery award is appropriate. In this case, there are four main claims: (1) the primary NDA claims (against both Google and Adecco) and (2) the release claims (against both Google and Adecco). The claims are "intertwined" in the sense that the Liability Release claims include an "NDA claim" under Labor Code § 432.5. Much of the time is intertwined (most obviously attending case management conferences) because it cannot be segregated. One of the four claims is resolved through the Settlement. For purposes of the lodestar cross check, Plaintiffs thus recommend attributing 25% of the intertwined lodestar, or $74,419, to the settled claim.

Applying this reasoning, Plaintiff's counsel's "lodestar" for purposes of the cross-check is $118,177.25. Checking this lodestar against the requested percentage recovery yields a multiplier of 2.93.

5. *A "Lodestar Cross Check" Supports the Requested Fee Award*

In *Laffitte II*, the Supreme Court explained that "the lodestar calculation, when used [as a cross-check] does not override the trial court's primary determination of fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum fee award. If the multiplier calculated by means of a lodestar cross is extraordinarily high or low, the trial court should consider whether the percentage should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make the adjustment." *Id.* at 575. Here, a multiplier of 2.93 is well-within the reasonable range. It is well-settled that "[m]ultipliers ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal. 2013) 2013 WL 3541217, *8. Indeed, "multipliers can range from 2 to 4 or even higher." *Laffitte I* at 151.

Moreover, applying the lodestar "multiplier" factors used in fee-shifting cases further supports the reasonableness of the fee request. These factors include: (1) the novelty and difficulty of the questions involved; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award; and (4) the

percentage of the fee in comparison to the value of the benefits obtained. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133; *Lealo v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 49-50.[7]

Each of these factors supports the requested fee award.

(1) Novel and Difficult Questions. Plaintiffs' counsel believes this is the first PAGA settlement arising from a violation of Labor Code § 432.5, as opposed to the more normal derivative PAGA suits based on wage and hours claims. As the motion practice to date makes clear, this claim raises novel and difficult questions.

(2) Preclusion of Other Employment. Since filing the PAGA notice asserting the Liability Release claims, Plaintiffs' Counsel has declined to take on more than 200 potential matters. While Plaintiffs' Counsel would decline to handle many of these matters regardless of the circumstances, a significant number them were either hourly matters or had merit as contingency cases. Plaintiffs' Counsel nevertheless declined these opportunities (and revenue) due to bandwidth constraints caused by the time and energy required of this case. This matter has precluded Plaintiffs' counsel from taking on other cases. (Baker Decl. ¶ 34.)

(3) The Contingent Fee Nature of the Award. Plaintiffs' Counsel has taken this case on contingency. (Baker Decl. ¶ 33.) This also confirms the appropriateness of the requested fee award. As explained by the California Supreme Court: "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value for his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." *Ketchum*, 24 Cal.4th at 1133.

(4) The Percentage of the Fee and the Results Obtained. Plaintiffs request a fee award of 33% of the common fund. As noted above, this is an ordinary fee request in PAGA-only settlements. Moreover, through this litigation, not only did Plaintiffs obtain a settlement payment on behalf of the State, Plaintiffs also caused Google to change its employment practices and rescind a Liability Release that affected thousands of individuals. This practical result further

[7] Another factor can be the "skill displayed" in presenting the case. *Ketchum,* 24 Cal.4th at 1133. However, an attorneys' skill may also be reflected in his or her hourly rate, and a court should not double count. *Id.* at 1142.

justifies the requested fee award.

***

For all of the reasons set forth above, Plaintiffs request a fee award of 33% of the common fund.

B. The Costs Should Be Awarded from the Common Fund

Plaintiffs' Counsel has incurred, to date, $7,207.50 in hard costs attributable to the settled claims against Google. In calculating these costs, Plaintiffs' Counsel relied on the same discounts and exclusions it used when calculating the lodestar. (Baker Decl. ¶ 35.) It is appropriate for these costs to be paid from the common fund. *In re Omnivision Technologies, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters."); *In re Media Vision Tech. Sec. Litig.* (N.D. Cal. 1996) 913 F.Supp. 1362, 1366 ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionally by those class members who benefit by the settlement.").

Accordingly, Plaintiffs' Counsel requests reimbursement of its hard litigation costs as it relates to the settled claims in the amount of $7,207.50.

C. Plaintiffs Should Receive the Requested Incentive Payments

Incentive payments to named plaintiffs are appropriate in representative litigation, including class cases (where an individual sues on behalf of those similarly-situated) and derivative cases (where an individual sues on behalf of a legal entity). *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1383 (class case); *Barovic v. Ballmer* (W.D. Wash. 2016) 2016 WL 199674, * 5. "The rationale for making an enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." Among other things, incentive payments to named plaintiffs can be used to "recognize their willingness to act as a private attorney general." *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958. Criteria considered when deciding an incentive award include: (1) the risk to the representative;

(2) the notoriety and difficulties encountered by the representative; (3) the duration of the litigation; and (4) the personal benefit (or lack thereof).

While not expressly saying so, PAGA clearly supports incentive awards for named plaintiffs. As with class and derivative cases, the named plaintiffs bring PAGA claims on behalf of a legal entity (the State), and similarly-situated employees share in any resolution. Moreover, "the lack of government resources to enforce the Labor Code led to a legislative choice to deputize and incentivize employees uniquely positioned to detect and prosecute such violations through PAGA". *Iskanian*, 59 Cal.4th at 390. While a 25% share of civil penalties would clearly be sufficient incentive if the named plaintiffs collected *the entire 25%*, that is not how PAGA has been construed. *Id.* at 382 (stating that, under PAGA "a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation.") Absent the possibility of an incentive payment, less employees would be willing to step forward. Absent incentive payments, the primary purpose of PAGA – private enforcement of the Labor Code – would be undermined.

Here, Plaintiffs request a modest incentive payment of $1000 each. As further explained in the Baker Fee Declaration, all the Plaintiffs have provided material support to this case. They are receiving no real financial benefit because of the case, and all have risked (and potentially faced) reputational harm. They continue to bear the risks associated with this litigation. (Baker Decl. ¶ 37.)

Accordingly, Plaintiffs ask that the Court approve the requested incentive payments.

IV. CONCLUSION

For all of the reasons set forth above, Plaintiffs and Plaintiffs' Counsel respectfully requests that the Court, in addition to granting the Joint Motion for Approval, issue an order awarding Plaintiffs' Counsel $346,118.20 in fees, $7,207.50 in costs, and incentive payments of $1000 per Plaintiff.

DATED: June 1, 2018

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