SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

DEWAYNE CASSEL, on behalf of the State of California and aggrieved employees as to PAGA, and as an individual seeking a public injunction, Plaintiff, vs. GOOGLE LLC; GOOGLE INC.; ALPHABET, INC.; and DOES 1 through 10,, Defendants.	Case No.: 17CV319202 **ORDER AFTER HEARING ON OCTOBER 26, 2018** **(1) Motion by Defendants Google LLC, Google Inc., and Alphabet, Inc. to Stay Plaintiff's Third thru Tenth Causes of Action Pending Disposition of Previously-Filed Action; (2) Motion by Plaintiff Dewayne Cassel to Compel Arbitration of Specified PAGA Claim; (3) Motion by Defendants Google LLC, Google Inc., and Alphabet, Inc. to Stay Plaintiff's First and Second Causes of Action Pending Arbitration of Plaintiff's Eleventh Cause of Action; (4) Joint Motion for Approval of PAGA Settlement Relating to Medical Release Form; (5) Motion by Plaintiff Dewayne Cassel for Fees, Costs, and Incentive Payment**

The above-entitled matter came on regularly for hearing on Friday, October 26, 2018 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. A tentative ruling was issued by the Court on October 25, 2018. The appearances are as stated in the record. The Court, having reviewed and considered the written submission

of all parties, having heard and considered the oral argument of counsel, and being fully advised, orders that the tentative ruling be adopted and incorporated herein as the Order of the Court, as follows:

This is an action under the Private Attorneys General Act ("PAGA") and the Unfair Competition Law ("UCL") arising from defendants Google LLC, Google Inc. and Alphabet, Inc.'s (collectively, "Google") alleged practice of recruiting diverse candidates by misrepresenting the nature of the job they will perform if they are hired, along with its imposition of unlawful confidentiality agreements and other policies on employees.

Before the Court are (1) Google's motion to stay the third through tenth causes of action in favor of a related case; (2) plaintiff's motion to compel arbitration of his first and second causes of action; (3) Google's motion to stay the first and second causes of action pending arbitration; (4) the parties' joint motion for approval of a settlement of one of plaintiff's PAGA claims; and (5) plaintiff's motion for fees, costs, and an incentive payment related to the settlement. The first three motions are opposed.

I. Allegations of the Operative Complaint

According to the First Amended Complaint ("FAC"), plaintiff had a successful career with Caterpillar, Inc. in Illinois from 2006 until 2015, when he left to care for his ill sister. (FAC, ¶¶ 13-14.) His last position at Caterpillar was Senior Business Relationship Manager. (*Id.* at ¶ 13.) After his sister passed away in 2016, plaintiff returned to the labor market and received interest from numerous employers, including an offer with a substantial salary and a relocation package. (*Id.* at ¶¶ 14-15, 20.)

At the urging of a Google manager, plaintiff applied for a job at Google as a Partner Operations Manager in the gTech department. (FAC, ¶ 16.) His resume made his prior experience as a Business Relationship Manager clear, and in response to plaintiff's questions, interviewers and a recruiter stated that the job duties of the Partner Operations Manager role would be consistent with plaintiff's expertise as a Business Relationship Manager. (*Id.* at ¶¶ 16-19.) In reliance on these statements, as well as Google's omissions about the actual nature of the

1 Partner Operations Manager role, plaintiff accepted the offer from Google, foregoing other
2 opportunities and moving to California, leaving a second, disabled sister behind in Illinois. (*Id.*
3 at ¶ 21.)

4 As a condition of employment with Google, plaintiff was required to sign an "At-will
5 Employment, Confidential Information, Invention Assignment and Arbitration Agreement,"
6 which contains several provisions that he contends are unlawful. (FAC, ¶¶ 22-28.) Furthermore,
7 plaintiff learned during his orientation in early August of 2016 that his new duties would
8 comprise providing technical support to Google customers. (*Id.* at ¶¶ 29-30.) Contrary to his
9 offer letter, he was assigned a job title of "Senior Solutions Consultant," which is not equivalent
10 to a Business Relationship Manager or even a Partner Operations Manager. (*Id.* at ¶ 31.) When
11 he complained to his superior within days of being hired, his superior told him not to worry
12 because Google was "newly committed" to hiring and retaining African-Americans and would
13 therefore try to find him a different job that was a better fit. (*Id.* at ¶ 32.)

14 At the end of August 2016, plaintiff met with his superiors and a Human Resources
15 professional, who explained that Google does not have a Business Relationship Manager role on
16 the gTech team. (FAC, ¶ 33.) Instead, plaintiff was hired pursuant to a new pilot program called
17 "Chameleon," in which Google would hire individuals as Partner Operations Managers without
18 knowing what they would actually do when they arrived or if there was even an open position
19 available. (*Ibid.*) Once hired, Google would assign these individuals an available job—in
20 plaintiff's case, the Solutions Consultant role. (*Ibid.*) Plaintiff explained that he accepted
21 Google's offer of employment and moved to California to work in a Business Relationship
22 Manager position, not as a Solutions Consultant, but was informed that if he did not find another
23 role within Google within 30 days, he would have to remain on the gTech team as a Solutions
24 Consultant. (*Id.* at ¶¶ 33-34.) While plaintiff attempted to find an appropriate role at Google, he
25 was unsuccessful due to Google's general practices of prohibiting a role change within the first
26 year of employment and prohibiting a change in "grade level," which was necessary for plaintiff
27 to work in a job similar to a Business Relationship Manager role. (*Id.* at ¶ 35.)
28

1 In October 2016, plaintiff's disabled sister suffered a setback and he was permitted to
2 work out of Google's Chicago office to care for her. (FAC, ¶ 36.) While in Chicago, he learned
3 of another opportunity as a "strategic negotiator" for Google's data center team and interviewed
4 for the position. (*Id.* at ¶ 37.) Although it appeared he would be offered the position, he was
5 advised in February 2017 that he was required to return to Mountain View, a requirement that
6 was not imposed on a younger, white Solutions Consultant on his team. (*Id.* at ¶ 38.) Upon his
7 return to Mountain View, plaintiff was placed on a "Performance Expectation Plan" and then a
8 "Performance Improvement Plan," with Google citing behavior that described a stereotypical
9 "angry black man," but for which non-blacks were not disciplined. (*Id.* at ¶¶ 39-46.)
10 On May 8, 2017, plaintiff went on leave. (FAC, ¶ 47.) Google initially denied his
11 request for protected leave under the Family and Medical Leave Act ("FMLA") and California
12 Family Rights Act ("CFRA") and only approved his leave after he signed a release allowing
13 Google and others to access all of his medical information. (*Id.* at ¶ 47.) Plaintiff contends that
14 this violates the FMLA, CFRA, the California constitution, and other laws. (*Id.* at ¶¶ 48-49.)
15 Based on these allegations, plaintiff asserts claims under PAGA for (1) fraud in violation
16 of Labor Code section 970, (2) retaliation in violation of Labor Code section 1102.5(b), (3)
17 unlawful confidentiality agreement in restraint of trade in violation of Labor Code section 432.5,
18 (4) unlawful confidentiality agreement with no Federal Defend Trade Secrets Act notice in
19 violation of Labor Code section 432.5, (5) illegal harassment release in violation of Labor Code
20 section 432.5, (6) prohibition on engaging in lawful conduct during non-work hours in violation
21 of Labor Code sections 96(k) and 98.6, (7) violations of Labor Code sections 232 and 1197.5(k)
22 by prohibiting employees from disclosing information about their wages, (8) violation of Labor
23 Code section 232.3 by prohibiting employees from disclosing information about their working
24 conditions, (9) violation of Labor Code section 1102.5(a) by preventing employees from
25 disclosing information about suspected violations of the law, (10) Labor Code violations arising
26 from Google's Code of Conduct, and (12) unlawful medical release forms in violation of Labor
27 Code section 432.5. Plaintiff also asserts an eleventh cause of action for unfair competition, in
28 which he seeks a public injunction enjoining Google from (1) misleading candidates to induce

them to move for a job at Google in violation of Labor Code section 970; (2) retaliating against whistleblowers in violation of Labor Code section 1102.5(a); and (3) requiring employees to sign its medical release as a condition of receiving leave, and from obtaining or sharing their medical records pursuant to the release.

II. Procedural Background

At a mediation on March 22, 2018, the parties reached a settlement of plaintiff's PAGA and UCL claims related to the medical release he signed in connection with his leave. The parties' motion for approval of the settlement, and plaintiff's motion for fees, costs, and incentive payments, are now before the Court.

In August of 2018, the parties submitted a stipulated order setting forth their respective positions concerning which of plaintiff's remaining claims should proceed to arbitration and which should be heard by this Court. The parties agreed that the arbitration provision governing plaintiff's employment permits the arbitrator to enter a public injunction and that plaintiff's eleventh cause of action under the UCL should proceed to arbitration insofar as it arises from Labor Code sections 970 and 1102.5(b). They disagreed regarding the proper treatment of the PAGA causes of action. Plaintiff stated that he would move to compel arbitration of the first and second causes of action, while Google intended to seek a stay of the third through tenth causes of action in favor of a related PAGA case filed by plaintiff's counsel, *Doe v. Google* (Super. Ct. S.F. City and County, No. CGC-16-556034) (hereinafter, "*Doe*"). The Court signed the stipulation, ordering that the eleventh cause of action be submitted to arbitration as it relates to the claims under Labor Code sections 970 and 1102.5(b), while the Court would decide how the remaining claims would proceed through motion practice.

The motions contemplated by the parties' stipulation have now been fully briefed and have come on for hearing by the Court. Google also filed a motion to stay the first and second causes of action pending arbitration in the event plaintiff's motion to compel arbitration of those claims is denied.

Meanwhile, on June 27, 2018, a partial PAGA settlement was approved in *Doe*. The settlement concerned defendants' former practice of requiring employees to sign an "Adult Content Liability Release," which is the subject of plaintiff's fifth cause of action. Plaintiff has stipulated to the dismissal with prejudice of this claim, with both sides to bear their own costs.

III. Motion to Stay the Third Through Tenth Causes of Action

Google contends that plaintiff's third through tenth causes of action should be stayed in light of *Doe*, invoking both the statutory plea of abatement and the rule of exclusive concurrent jurisdiction. Plaintiff opposes Google's motion, urging, among other arguments, that parallel PAGA actions are authorized by the statute.

A. Requests for Judicial Notice

Google's request for judicial notice of filings in *Doe*, which is unopposed, is GRANTED. (Evid. Code, § 452, subd. (d).) Plaintiff's request for judicial notice of additional filings in *Doe* is similarly GRANTED (Exs. 1-10 to plaintiff's request).

Plaintiff's request for judicial notice of filings in a third related action, *Monitz v. Adecco* (Super. Ct. San Mateo County, No. 17-CIV-1736 (hereinafter, "*Monitz*") (Exs. 11-18 to plaintiff's request) and in coordination proceedings involving *Doe* and *Monitz* (Exs. 19-26) is also GRANTED to the extent these proceedings add factual context to the Court's consideration of Google's motion. (Evid. Code, § 452, subd. (d).) The Court notes, however, that unpublished rulings are not to be cited or considered as legal precedents. (Cal. Rules of Court, rule 8.1115(a) [unpublished California opinions "must not be cited or relied on by a court or a party in any other action"].) Finally, plaintiff's request for judicial notice of an amicus curiae brief by the California Labor Commissioner in a fourth PAGA action is GRANTED (Ex. 27 to plaintiff's request). (Evid. Code, § 452, subd. (d); *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 168, fn. 2 [granting judicial notice of amicus curiae brief in another action].)

B. Legal Standard

"The pendency of another earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action." (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574.) A defendant may assert the pending action as a bar either by demurrer, or where fact issues must be resolved, by answer and subsequent motion pursuant to Code of Civil Procedure section 597. (*Ibid.*) In either case, if the court determines a pending action raises substantially the same issues between the same parties, it must enter the interlocutory judgment specified in Code of Civil Procedure section 597. (*Ibid.*) "In determining whether the causes of action are the same for purposes of pleas in abatement, the rule is that such a plea may be maintained only where a judgment in the first action would be a complete bar to the second action." (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 787-788.)

Related to the statutory plea in abatement is the rule of exclusive concurrent jurisdiction, which "has been interpreted and applied more expansively, and therefore may apply where the narrow grounds required for a statutory plea of abatement do not exist." (*Plant Insulation Co. v. Fibreboard Corp., supra,* 224 Cal.App.3d at p. 788.) "Unlike the statutory plea of abatement, the rule of exclusive concurrent jurisdiction does not require absolute identity of parties, causes of action or remedies." (*Ibid.*) "If the court exercising original jurisdiction has the power to bring before it all the necessary parties … [and] to litigate all the issues and grant all the relief to which any of the parties might be entitled under the pleadings," the court should stay the second action pending resolution of the first. (*Ibid.*) Nevertheless, while complete identity between the parties and remedies sought is not required, "the issues in the two proceedings must be substantially the same and the individual suits must have the potential to result in conflicting judgments" for the rule to apply. (*County of Siskiyou v. Superior Court (Environmental Law Foundation)* (2013) 217 Cal.App.4th 83, 91.)

Under either doctrine, "[a]n order of abatement issues as a matter of right[,] not as a matter of discretion[,] where the conditions for its issuance exist." (*Lawyers Title Ins. Corp. v. Superior Court (Harrigfeld)* (1984) 151 Cal.App.3d 455, 460.)

C. The *Doe* Action

1 The plaintiffs in *Doe* are current and former employees of Google and Adecco, a staffing
2 agency that employs contingent workers at Google. Like the plaintiff here, they allege that
3 Google and Adecco use illegal confidentiality agreements and policies to restrict employees'
4 freedoms of speech and of the press and to restrain trade. In their Third Amended Complaint
5 ("TAC"), the *Doe* plaintiffs asserted 18 causes of action under PAGA arising from violations of
6 the Labor Code and other statutes. The plaintiffs claim representative status on behalf of all
7 individuals employed by Google since May 17, 2015.[1]

8 On June 27, 2017, the *Doe* court sustained Google's demurrer to the TAC's first 17
9 causes of action without leave to amend, on the ground that these claims were preempted by the
10 National Labor Relations Act. The surviving claim related to the "Adult Content Liability
11 Release" also at issue in this action. On September 14, the *Doe* court sustained with leave to
12 amend a demurrer by Adecco to the TAC on the ground of preemption, and on November 7, it
13 sustained Adecco's subsequent demurrer to the Fourth Amended Complaint without leave to
14 amend as to the preempted claims. The court permitted plaintiffs to file a Fifth Amended
15 Complaint re-asserting their claim based on the "Adult Content Liability Release" (called the
16 "Harassment Release" in that case); plaintiffs also re-alleged the 23 causes of action against
17 Google and Adecco that the court had found were pre-empted "as a matter of caution, in order to
18 preserve without doubt their right to appeal …." On February 25, 2018, plaintiffs filed a petition
19 for writ of mandamus regarding the orders on Google's and Adecco's demurrers, which the
20 Court of Appeal denied as untimely.

21 As discussed above, the *Doe* plaintiffs and Google settled the surviving claim regarding
22 the "Adult Content Liability Release" in June of 2018. A trial of that claim as to Adecco is
23 scheduled for February of 2019. Presumably, the *Doe* plaintiffs will appeal the earlier rulings in
24 that action once judgment is entered in that case.

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26 D. Analysis

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28 [1] The *Doe* plaintiffs submitted a series of letters to the Labor & Workforce Development Agency corresponding to their various claims, beginning on May 17, 2016. Thus, the penalty periods associated with their claims differ somewhat.

The parties do not cite, and the Court is unaware of, any authority addressing the application of the statutory plea of abatement or the rule of exclusive concurrent jurisdiction to parallel PAGA claims filed by different representative plaintiffs. As urged by plaintiff, California and federal authorities have held that "separate but similar actions by different employees against the same employer" are generally permissible under the PAGA statutory scheme.[2] (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 866 [where one representative plaintiff had already filed a PAGA action, subsequent agreements to arbitrate PAGA claims executed by other employees were unenforceable as against those employees], citing *Tan v. GrubHub, Inc.* (N.D. Cal. 2016) 171 F.Supp.3d 998, 1012-1013.) Federal courts have accordingly denied requests to stay parallel PAGA actions based on a claimed "first-to-file" rule and under the *Colorado River* abstention doctrine. (See *Tan v. GrubHub, Inc., supra,* 171 F.Supp.3d at pp. 1012-1016 [noting that defendants cited no case holding that "two PAGA representatives cannot pursue the same PAGA claims at the same time" and "declin[ing] to be the first [court] to so hold"].)

The courts have emphasized that "the doctrine of collateral estoppel … shields the employer from an abusive one-way intervention, that is, a series of PAGA actions by different employees that would continue until some employee prevailed." (*Julian v. Glenair, Inc., supra,* 17 Cal.App.5th at pp. 866-867, internal quotations omitted.) Under this doctrine, "a judgment unfavorable to the employee binds the government, as well as all aggrieved nonparty employees potentially entitled to assert a PAGA action." (*Id.* at p. 867, italics added.) As federal courts have noted, concerns with protecting employers from duplicative PAGA suits do not "compel a bar to filing a PAGA claim because of the mere pendency of another PAGA suit on the same issue by someone else." (*Tan v. GrubHub, Inc., supra,* 171 F.Supp.3d at p. 1013.) However, the analysis would differ where "the earlier-filed PAGA claim [had] already been decided, since any judgment would be binding on government agencies and any aggrieved employee not a party to

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[2] This is in contrast to the other major *qui tam* statute in California, the False Claims Act. (See Gov't Code § 12652(c)(10); *Canela v. Costco Wholesale Corporation* (N.D. Cal., May 23, 2018, No. 13-CV-03598-BLF) 2018 WL 2331877, at *7; *Gonzalez v. Corecivic of Tennessee, LLC* (E.D. Cal., Aug. 1, 2018, No. 16-CV-01891-DAD-JLT) 2018 WL 3689564, at *4 (contrasting PAGA with federal False Claims Act).

the proceeding …." (*Ibid.*; see also *Canela v. Costco Wholesale Corporation* (N.D. Cal., May 23, 2018, No. 13-CV-03598-BLF) 2018 WL 2331877, at *7 ["*Tan* recognizes that a judgment in one PAGA action may bar another pending PAGA action. As such, there would be no inconsistent judgments even if there were concurrent suits at an earlier time."], internal citation omitted.)

With these relevant authorities in mind, the Court finds that the doctrine of exclusive concurrent jurisdiction applies in the unique circumstances presented by this case. While the representative plaintiffs in the actions at issue are different people, the *Doe* court has all the necessary parties before it given that the plaintiffs in that action also represent the state, the issues in the two proceedings are identical to those raised in the third through tenth causes of action here,[3] and there is a potential for conflicting judgments. The Court is mindful that "the rule of exclusive concurrent jurisdiction is a rule of policy, and countervailing policies may make the rule inapplicable." *County of Siskiyou v. Superior Court, supra,* 217 Cal.App.4th at p. 92.) In enacting PAGA, the Legislature elected not to prohibit parallel actions by multiple representative plaintiffs as it did, for example, with respect to the False Claims Act. As a matter of policy, the Court would typically not apply the doctrine of exclusive concurrent jurisdiction where doing so "would … significantly impair PAGA's enforcement mechanism, which permits the state to act through more than one employee with respect to a PAGA claim against a particular employer." (*Julian v. Glenair, Inc., supra,* 17 Cal.App.5th at p. 873.) Here, however, the *Doe* action has been fully litigated with respect to Google, with only the imminent trial of a single claim against a different defendant delaying the entry of judgment. The policy in favor of allowing parallel PAGA actions must yield to the policies underlying the rule of exclusive concurrent jurisdiction in these unique circumstances. (See *People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 770 [rule of exclusive concurrent

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[3] The Court's review of the pleadings in *Doe* confirms that they encompass all of the claims asserted in the third through tenth causes of action here, including the tenth cause of action arising from the Code of Conduct. In a notice of errata filed on September 10, 2018, plaintiff essentially concedes this point. The *Doe* demurrers were sustained on grounds of preemption that would be dispositive of plaintiff's third through tenth causes of action here. Plaintiff does not explain why the *Doe* court's additional ruling that the statue of limitations barred a claim against Adecco arising from "Social Event" and "GBike" releases—which are not at issue here—would change the analysis above.

jurisdiction advances the public policies of avoiding conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and preventing vexatious litigation and multiplicity of suits].)

Finally, the Court is not persuaded by plaintiff's arguments regarding certain rulings in *Monitz* and in the unsuccessful proceedings to coordinate *Monitz* and *Doe*. As stated above, these unpublished rulings are not to be cited or considered as legal precedents. (Cal. Rules of Court, rule 8.1115(a).) In the Court's view, the pendency of a third parallel PAGA case underscores the greater importance of the policies underlying the rule of exclusive concurrent jurisdiction in this case.

D. Conclusion and Order

Google's motion to stay the third through tenth causes of action is GRANTED. Proceedings on these claims are stayed until the *Doe* action has terminated.

IV. Motions Regarding the First and Second Causes of Action

Plaintiff moves to compel arbitration of the first and second causes of action. Google opposes plaintiff's motion, and moves instead to stay these claims pending the arbitration of the eleventh cause of action.

A. Legal Standard

Code of Civil Procedure section 1281.2 provides that a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2; see also 9 U.S.C. § 3 [the court must grant a motion to compel arbitration if any suit is brought upon "any issue referable to arbitration under an agreement for such arbitration"].)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger*

Co. (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413 [moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal v. Great Western Fin'l Securities Corp., supra,* 14 Cal.4th at p. 413.)

If the court orders arbitration "of a controversy which is an issue involved in [the] action or proceeding pending before [it], the court … shall, upon motion of a party …, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies." (Code Civ. Proc., § 1281.4.) "If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only." (*Ibid.*)

B. Plaintiff's Motion to Compel Arbitration

The first and second causes of action are PAGA claims for (1) fraud in violation of Labor Code section 970 and (2) retaliation in violation of Labor Code section 1102.5(b). These claims arise from Google's alleged practices of recruiting diverse candidates by misrepresenting the nature of the job they will perform if they are hired and of retaliating against employees who report suspected legal violations; the parties agree that the same allegations underlie those aspects of the eleventh cause of action that were ordered to arbitration pursuant to their stipulation.

Plaintiff contends that these claims are encompassed by the parties' arbitration agreement and, while California courts have held that a PAGA plaintiff cannot be bound by a pre-dispute agreement to arbitrate PAGA claims, *Google* is nevertheless bound by the agreement it drafted.

As urged by Google, however, the arbitration agreement provides that plaintiff

> AGREE[S] THAT I MAY ONLY COMMENCE AN ACTION IN ARBITRATION, OR ASSERT COUNTERCLAIMS IN ARBITRATION, ON

> AN INDIVIDUAL BASIS AND, THUS, I HEREBY WAIVE MY RIGHT TO COMMENCE OR PARTICIPATE IN ANY CLASS OR COLLECTIVE ACTION(S) AGAINST GOOGLE, TO THE FULLEST EXTENT PERMITTED BY LAW.

Authorities addressing the arbitration of PAGA claims are clear that PAGA claims are not brought "on an individual basis": to the contrary, "a PAGA claim may not be brought solely on the employee's behalf, but must be brought in a representative capacity." (*Williams v. Superior Court (Pinkerton Governmental Services, Inc.)* (2015) 237 Cal.App.4th 642, 649; see also *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1124 [a "PAGA claim is not an individual claim"]; *Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 178 [PAGA action "did not allege any individual claims or disputes"]; *Khan v. Dunn-Edwards Corp.* (2018) 19 Cal.App.5th 804, 810, fn. 1 ["a PAGA action is only a representative action"]; *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 760 ["a PAGA plaintiff does not pursue an individual claim but rather is deputized to bring a suit to collect penalties on behalf of the government"].) Thus, while the arbitration agreement may encompass plaintiff's PAGA claims on its face, it clearly does not authorize the arbitration of such a representative action.

The authorities are also clear that PAGA waivers are invalid, and agreements to arbitrate PAGA claims executed before an employee brings suit under PAGA are invalid because a PAGA claim "is not a dispute between an employer and an employee arising out of their contractual relationship," but "a dispute between an employer and the *state,* which alleges directly or through its agents—either the Labor and Workforce Development Agency or aggrieved employees—that the employer has violated the Labor Code." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 386-387, italics original.)

> [A]n arbitration agreement executed before an employee meets the statutory requirements for commencing a PAGA action does not encompass that action. Prior to satisfying those requirements, an employee enters into the agreement as an individual, rather than as an agent or representative of the state. As an individual, the employee is not authorized to assert a PAGA claim; the state—through LWDA—retains control of the right underlying any PAGA claim by the employee. Thus, such a predispute agreement does not subject the PAGA claim to arbitration.

(*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 872.)

Plaintiff contends that, even accepting that the state for which he now acts as a representative is not a party to the arbitration agreement here, Google is. He cites *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782 for the proposition that "a non-signatory [party] may invoke an arbitration clause to compel a signatory [party] to arbitrate its claim when the causes of action … are based on the same facts and are inherently inseparable from the arbitrable claims." (At p. 786.) However, plaintiff's quotation from *Garcia* omits important content. The quoted language is from a discussion of equitable estoppel as an exception to the general rule that a non-signatory may not enforce an arbitration agreement. *Garcia* actually states that

> [u]nder this exception, a non-signatory *defendant* may invoke an arbitration clause to compel a signatory *plaintiff* to arbitrate its claim *when the causes of action against the nonsignatory are intimately founded in and intertwined with the underlying contract obligations.* The doctrine applies where the claims are based on the same facts and are inherently inseparable from … arbitrable claims *against signatory defendants*.

(*Garcia v. Pexco, LLC, supra,* 11 Cal.App.5th at p. 786, internal citations and quotations omitted, italics added [holding that employee of staffing agency was required to arbitrate claims against agency's customer arising from his employment where parallel claims against agency were subject to arbitration].) As explained by another court, the purpose of the equitable estoppel exception is "to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of that same agreement." (*Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 221; see also *Waymo LLC v. Uber Technologies, Inc.* (Fed. Cir. 2017) 870 F.3d 1342, 1346 ["California law establishes that reliance on the contract bearing the arbitration clause is fundamental to compulsion by a non-party to arbitrate" under the equitable estoppel exception].) Those circumstances are not present here, where plaintiff, not Google, is a nonsignatory, and he brings an enforcement action on behalf of the state—an action that does

"not [constitute] a dispute between an employer and an employee arising out of their contractual relationship" and is thus not founded in and intertwined with plaintiff's employment contract. (*Iskanian v. CLS Transportation Los Angeles, LLC, supra,* 59 Cal.4th at pp. 386-387.)

Fundamentally, equitable estoppel "precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." (*Goldman v. KPMG, LLP, supra,* 173 Cal.App.4th at p. 220, internal citations and quotations omitted.) Here, there is nothing inequitable about refusing plaintiff's demand for arbitration of PAGA claims that he could not be compelled to arbitrate himself—and which he himself has filed in court.

Plaintiff's motion to compel arbitration of the first and second causes of action will accordingly be denied.

C. Google's Motion to Stay

Google moves to stay the first and second causes of action in light of the Court's prior order that the related aspects of the eleventh cause of action be submitted to arbitration. In support of its motion, Google cites Code of Civil Procedure section 1281.4, which provides:

> If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies. …
>
> If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only.

Google also cites *Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, the only published California authority of which the Court is aware that directly addresses whether PAGA claims must be stayed pending the arbitration of related individual claims. After holding that a PAGA waiver was unenforceable, *Franco* cited section 1281.4 in directing that "[b]ecause the issues subject to litigation under the PAGA might overlap those that are subject to arbitration

of Franco's individual claims, the trial court must order an appropriate stay of trial court proceedings." (*Id.* at p. 966.) While plaintiff disputes the appellate court's reasoning and cites contrary federal authorities, in the absence of contrary California precedent, *Franco* appears to bind this Court.[4]

Notwithstanding *Franco*, plaintiff contends that the Court has discretion to stay the *arbitration* previously ordered in this case pending resolution of the related PAGA claims in court. He cites Code of Civil Procedure section 1281.2, which provides that in deciding a petition to compel arbitration, the court shall order arbitration if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

> (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding *with a third party*, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. …
>
> If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

(Code Civ. Proc., § 1281.2, italics added.)

Here, while the Court appreciates plaintiff's point that the real party in interest as to his PAGA claim is the state, plaintiff is not a "third party" to that claim, and he cites no authority supporting this reading of section 1281.2. Finally, even assuming the Court has discretion to

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[4] While it is not clear to what extent the parties in *Franco* briefed this issue, the appellate court's decision on this point does constitute a holding, since it is "responsive to the issues raised on appeal and was intended to guide the parties and the trial court in resolving the matter following … remand." (*Garfield Medical Center v. Belshe* (1998) 68 Cal.App.4th 798, 806.)

stay the arbitration it previously ordered under this section, it declines to enter a stay considering that plaintiff stipulated—after this action was filed—that his eleventh cause of action would proceed to arbitration, and no request to alter that stipulation is properly before the Court.

D. Conclusion and Order

Plaintiff's motion to compel arbitration of the first and second causes of action is DENIED. Google's motion to stay the first and second causes of action is GRANTED.

V. Motions to Approve PAGA Settlement and for Fees, Costs, and Incentive Payment

In separate motions, the parties jointly move for approval of their settlement of plaintiff's PAGA and UCL claims related to the medical release he signed in connection with his leave, and plaintiff moves for approval of his attorney fees, costs, and incentive payment.

A. Requests for Judicial Notice

The parties' joint request for judicial notice of filings in this action and in *Doe*, filed in support of their joint motion, is GRANTED. (Evid. Code, § 425, subd. (c).)

Plaintiff's request for judicial notice of unpublished California trial court orders approving PAGA settlements in other cases, filed in support of his motion for fees, costs, and incentive payment, is DENIED. Unpublished California opinions "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a).)

B. Legal Standard

Labor Code section 2699, subdivision (l) provides that "[t]he superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to" PAGA. 75 percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the aggrieved employees. (*Iskanian v. CLS Transp. Los Angeles, LLC, supra,* 59 Cal.4th at p. 380.) "[T]here is no requirement that the Court certify a PAGA claim for representative treatment" as in a class

action. (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *5.)

There is little case law addressing the standard for approving a PAGA settlement. (See *Syed v. M-I, L.L.C.* (E.D. Cal., Feb. 22, 2017, No. 112CV01718DADMJS) 2017 WL 714367, at *13, fn. 8.) As one federal court recently noted, "aside from [the] bland mandate" that courts "review" PAGA settlements, "the Act is surprisingly short on specifics. … [N]either the California legislature, nor the California Supreme Court, nor the California Courts of Appeal, nor the [LWDA] has provided any definitive answer to th[e] vexing question" of what standards govern the courts' review. (*Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (C.D. Cal. 2017) 253 F.Supp.3d 1074, 1075.)

What guidance there is comes largely from federal cases. In connection with one such case, the LWDA indicated that "when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Villalobos v. Calandri Sonrise Farm LP*, *supra,* 2015 WL 12732709, at *13.) The PAGA settlement must be reasonable in light of the potential verdict value (see *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict]); however, it may be substantially discounted given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds a trial (see *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8-9).

C. Settlement Process and the Parties' Agreement

On March 22, 2018, a mediation was held with David Rotman that addressed claims in both this action and in *Doe*. The mediation resulted in a settlement of the "Adult Content Liability Release" claim in *Doe* (and the forthcoming dismissal of the related fifth cause of action herein), as well as plaintiff's claims in this action arising from the medical release form he signed in connection with his request for leave. The settlement in this action is for $251,157.

Plaintiff claims that, under the FMLA and CFRA, an employer may seek only limited medical information in determining whether to approve a leave, and it accordingly violates these statutes to require an employee to provide unfettered access to his entire medical history as a condition of receiving leave, as plaintiff contends Google did. Further, the FMLA and CFRA require an employer to keep medical information confidential with limited exceptions, making it illegal to require employees to authorize the sharing of such information with "attorneys, private investigators, consumer reporting agencies, and unknown others" as plaintiff alleges.

Google responds that it utilized a third-party leave administrator, the Reed Group, to administer paid disability benefits that the law does not require it to provide. It was the Reed Group that required employees to sign the disputed medical release form, and Google's approval of protected leaves was not contingent on the execution of this form. Google's records show that protected leave requests, including plaintiff's, were approved before they executed the medical release. On December 22, 2017, Google stopped using the medical release at all and no longer uses the Reed Group as its administrator.

Google represents that approximately 2,539 employees signed the medical release within the penalty period. It argues that even if it were found liable under PAGA, penalties would be limited to $100 per violation given authority holding that $200 penalties are not imposed until an employer is notified that its conduct violates the law, as well as a ruling in *Doe* regarding the statute of limitations.

The $251,157 settlement represents a recovery of nearly $99 per violation—almost the maximum under Google's authority, or around half of a $200 per violation penalty. After deducting the fees and costs described below, the aggrieved employees and the state will share a recovery of approximately $61 per violation. The settlement also requires Google to instruct Reed Group and Met Life (which was also authorized to receive employees' information pursuant to the release) to promise in writing not to transmit employee records to Google or others acting on Google's behalf and to identify any such records that have been transmitted, which Google will take reasonable steps to have destroyed or deleted. (This is essentially the same relief requested in plaintiff's eleventh cause of action under the UCL.)

1 The parties agree that the PAGA Settlement Group will include current and former
2 employees of Google in California who signed the release on July 31, 2016 or later. The PAGA
3 claims to be settled are those "that arise from or relate to the allegations contained in the
4 Complaint that Google unlawfully required employees to sign a Medical Release Form." The
5 released claims expressly do not include any claims against the Reed Group or Met Life.
6 From the settlement fund, $6,350 will be paid to administer the settlement, plaintiff will
7 apply for an incentive payment of $1,000, and plaintiff will seek attorney fees of $82,881.81 and
8 costs of $6,489.20. The remaining $154,435.99 will be distributed as required by PAGA, with
9 75 percent or approximately $115,000 paid to the LWDA and 25 percent or approximately
10 $38,000 to PAGA Settlement Group Members. The latter amount will be distributed pro rata to
11 participating employees, resulting in an average payment of around $15 per employee.
12 Group members will receive notice of the settlement and the claims they will be deemed
13 to "release" when it is finalized with their settlement payments. Consistent with the statute, there
14 will be no right to opt out or object. Checks uncashed after 180 days will be distributed to the
15 California State Controllers' Office Unclaimed Property Fund. The Court finds these notice
16 procedures to be fair and reasonable, and the form of notice submitted by the parties is also
17 appropriate.
18
19 D. Analysis
20 As an initial matter, while no authority addresses the courts' role in reviewing attorney
21 fees associated with a PAGA settlement, it is difficult to imagine that courts can fulfill their
22 statutory duty to review the penalties associated with PAGA settlements while turning a blind
23 eye to this economically critical issue. The Court thus finds that it must scrutinize the attorney
24 fee arrangement associated with a PAGA settlement as part of its duty to review the settlement as
25 a whole.[5] While a settlement of nearly half the maximum penalties associated with plaintiff's
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[5] This is consistent with the observation of many courts that PAGA claims are analogous to *qui tam* suits like those under the federal False Claims Act: in reviewing settlements of *qui tam* claims, courts do consider any associated attorney fee arrangement. (See *U.S. v. Texas Instruments Corp.* (9th Cir. 1994) 25 F.3d 725, 728 ["the government claims the $300,000 payment for attorneys' fees is really a settlement under the False Claims Act … contraven[ing]

claim appears to be a good result for the state and the aggrieved employees at first blush, the Court must consider this recovery in light of the fees and other amounts that will be deducted from it.

Plaintiff urges that, as it has in the past, the Court should approve a fee award under the common fund doctrine. Consistent with this approach, the main advantage of the settlement before the Court is that it creates a significant fund to benefit the LWDA and Google employees. These circumstances are analogous to cases, like wage and hour class actions, where the common fund doctrine is applied. (See *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-111 [California recognizes and consistently applies the common fund doctrine, recognizing the historic power of equity to permit a party recovering a fund for the benefit of others in addition to himself to recover costs including attorney fees from the fund itself].)

The Court finds that the common fund approach is the most reasonable one here, given the nature of the case and of the parties' settlement. A recovery of one-third of the total settlement is typical in common fund cases, matching the figure agreed by the parties here. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488.) Plaintiff also provides a lodestar figure of $39,490, based on 50.35 hours spent on the case by attorneys with billing rates of $800 to $615 per hour. The fee request results in a reasonable multiplier of 2.09. As a cross-check, the lodestar supports the 1/3 percentage fee requested. (See *id.* at pp. 488, 503-504 [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13].)

Plaintiff also seeks $6,489.20 in litigation costs and a $1,000 incentive award for his service as the named plaintiff. Prevailing PAGA plaintiffs are entitled to their litigation costs under the statute, and the small incentive award requested by plaintiff furthers the statute's purpose in a case like this where the payments to aggrieved employees will be small. The requested administrative fees are also reasonable and appropriately paid from the settlement.

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the requirements of § 3730(d)(2), which guarantees the government a substantial portion of any [such] settlement"; this concern must be considered by the trial court as part of its review of the "entire settlement arrangement"].)

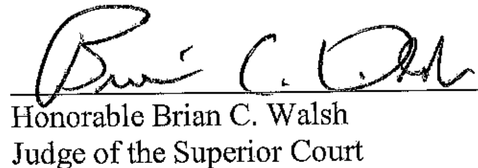
The Court consequently finds that the fees and costs requested by plaintiff are reasonable. (See *Mancini v. The Western and Southern Life Insurance Co.* (S.D. Cal., Sept. 18, 2018, No. 16CV2830-LAB (WVG)) 2018 WL 4489590, at *2 [approving fees, costs, and incentive awards in connection with a PAGA-only settlement].) Even when these sums are deducted from the settlement, the settlement represents about one-third of the maximum value of the claim at issue, or about two-thirds of its potential value if Google's position is accepted. Google has also discontinued using the release in question and agreed to take steps to address any potential or actual disclosures of employee information by its former leave administrator. In the Court's view, this is an excellent result for the aggrieved employees and the state. The Court will approve both the settlement and the fees, costs, and incentive award requested by plaintiff.

E Conclusion and Order

The parties' joint motion for approval of their PAGA settlement is GRANTED. Plaintiff's associated motion for fees, costs, and an incentive payment is also GRANTED.

IT IS SO ORDERED.

Dated: 10-26-18



Honorable Brian C. Walsh
Judge of the Superior Court