SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

KELLY ROSE, et al, Plaintiffs, v. HOBBY LOBBY STORES, INC., et al, Defendants.	No. RG17-862127 ORDER GRANTING IN PART MOTION OF PLAINTIFF TO STRIKE OR TAX COSTS Date: 12/22/23 Time: 9:00 a.m. Dept.: 21

The motion of plaintiff Rose acting as agent or proxy of the LWDA to strike or tax costs came on for hearing on 12/22/23, in Department 21 of this Court, the Honorable Evelio Grillo presiding. Counsel appeared on behalf of Plaintiff and on behalf of Defendant. After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED: The motion of plaintiff Rose acting as agent or proxy of the LWDA to strike or tax costs is GRANTED IN PART.

BACKGROUND

On 5/5/20, Plaintiff filed the First Amended Complaint (1AC). The 1AC asserts claims on behalf of the LWDA under PAGA. "An employee plaintiff suing ... under the [PAGA] does so as the proxy or agent of the state's labor law enforcement agencies." (*Kim v. Reins*

International California, Inc. (2020) 9 Cal.5th 73, 81.) Every PAGA action is "a dispute between an employer and the *state*." (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 386.)

The case went to trial. Defendant Hobby Lobby prevailed at trial. On 6/23/23 the court entered its Statement of Decision.

On 7/6/23, the court entered judgment in favor of defendant Hobby Lobby and against plaintiff Rose as proxy or agent of the LWDA. The judgment states: "Judgment is hereby entered in favor of Defendant and against Plaintiff KELLY ROSE ("Plaintiff"), the Labor and Workforce Development Agency ("LWDA"), and the State of California, with prejudice, on all claims presented in the action."

On 8/4/23, defendant Hobby Lobby filed a memorandum of costs seeking a total of $474,707.80 in costs. Plaintiff filed a motion to strike or tax costs. Hobby Lobby argued that because plaintiff Rose is acting as agent and proxy of the LWDA that the LWDA is jointly and severally liable for any award of costs. (CCP 1028.)

On 9/15/23, the court requested an amicus brief from the LWDA.

On 10/25/23, the State of California, Department of Industrial Relations, Division of Labor Standards Enforcement (which is a department within the LWDA) elected to file a motion

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for leave to intervene rather than filing an amicus brief.[1] On 12/5/23, the court granted leave to intervene, and expressly noted that "The procedural issue of whether the DLSE sought to intervene in the case rather than seeking to file an amicus brief will not determine the substantive issue of whether the state (through the LWDA, the DIR, the DLSE, or otherwise) is responsible for the costs that defendant incurred in defending this case."

SUMMARY OF LEGAL ISSUES

The court holds as a matter of law that in a case brought under the PAGA on behalf of the LWDA that a prevailing defendant can recover its CCP 1032 litigation costs. CCP 1032 applies "[e]xcept as otherwise expressly provided by statute." (CCP 1032(b); *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989-999.) The PAGA states at Labor Code 2699(g)(1) at a prevailing plaintiff can recover fees and costs. Labor Code 2699(g)(1) does not "otherwise expressly provide" that a defendant cannot recover costs.

The court holds as a matter of law that in a case brought under the PAGA on behalf of the LWDA that, all other things being equal[2], the LWDA is responsible for paying any CCP 1032 litigation costs. The alternatives for what person or entity is responsible for paying the costs are

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[1] In filing the motion to intervene, the intervenor clarified that the intervening entity was the Division of Labor Standards Enforcement (DLSE) and not the LWDA. It is not clear what difference this might make. The PAGA states that a private PAGA plaintiff may assert claims on behalf of "Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees." (Labor Code 2699(a).) The LWDA is a cabinet-level agency that coordinates workforce programs. (Government Code 12800.) The LWDA includes the Department of Industrial Relations (DIR) (Labor Code 50). The DIR includes the DLSE (Labor Code 79). The court refers to all the state's labor law enforcement agencies collectively as the "LWDA."

[2] This analysis applies to the claims that a plaintiff asserts under the PAGA. If a plaintiff in a single action is asserting some claims on behalf of the LWDA under the PAGA and some claims as an individual or on behalf of a putative class, then the trial court would need to take those factors into consideration.

(1) the plaintiff, (2) the aggrieved employees, (3) the plaintiff's attorneys, (4) the LWDA, or (5) some combination of them with joint and several liability. The court reviews the various alternatives. A PAGA plaintiff has no personal interest in the claim and recovers only the penalties owed to the LWDA. (*ZB, N.A. v. Superior Court of San Diego County* (2019) 8 Cal.5th 175, 185.) The consistent line that runs through PAGA jurisprudence is that a PAGA plaintiff is proxy or agent of the LWDA.

NATURE OF A CLAIM UNDER THE PAGA

Before turning to the specific issues in this motion, the court sets out a broad overview of the court's understanding of the PAGA. The consistent line that runs through the California Supreme Court cases on the PAGA is that the PAGA permitted private parties to bring claims as proxy or agent of the state to recover penalties that are recoverable by the state and that the PAGA plaintiff has no individual interest in the case.

"The Legislature's sole purpose in enacting PAGA was "to augment the limited enforcement capability of the [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 86.)

Under the PAGA, "An employee plaintiff suing ... under the [PAGA] does so as the proxy or agent of the state's labor law enforcement agencies.... In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 985.) (See also *Adolph v. Uber Technologies* (2023) 14 Cal.5th 1104, 1116; *Kim v.*

Reins International California, Inc. (2020) 9 Cal.5th 73, 81; *ZB, N.A. v. Superior Court of San Diego County* (2019) 8 Cal.5th 175, 185; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 381.)

Every PAGA action is "a dispute between an employer and the state." (*Iskanian*, 59 Cal.4th at 386; *LaFace v. Ralphs Grocery Co.* (2022) 75 Cal.App.5th 388, 397; *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 74.) "[A]n action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." (*Iskanian*, 59 Cal.4th at 381.)

The fundamental essence of an action under the PAGA as a law enforcement action determines a host of issues. A law enforcement action under the PAGA is not automatically stayed simply because a private party is arbitrating a private claim against the same employer. (*Jarboe v. Hanlees Auto Group* (2020) 53 Cal.App.5th 539, 555-558.) A PAGA plaintiff may file an action in any county where the LWDA could file a law enforcement action. (*Crestwood Behavioral Health, Inc. v. Superior Court of Alameda County* (2021) 60 Cal.App.5th 1069, 1076-1077.)

When a private plaintiff prosecutes a case under the PAGA, the plaintiff is representing the "Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees." (Labor Code 2699(a).) As a general principle, when the state brings an action, the state brings the action on behalf of all the people in the state. "The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their

name." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1344-1345; *People v. Eubanks* (1996)14 Cal.4th 580, 589-590.)

When a private plaintiff prosecutes a case under the PAGA and the plaintiff recovers penalties, then 75% of the penalties go "to the Labor and Workforce Development Agency for enforcement of labor laws." In non-PAGA actions, the LWDA can bring an action for civil penalties for violations of the Labor Code, "with the money going into the general fund or into a fund created by the Labor and Workforce Development Agency (Agency) for educating employers." (*Iskanian*, 59 Cal.4th at 378.) (See also *Z.B.*, 8 Cal.5th at 186-187.)

When a private plaintiff prosecutes a case under the PAGA and the plaintiff recovers penalties, then 25% of the penalties go to the aggrieved employees. (Labor Code 2699(i).)[3] To the extent that the 25% in penalties can be construed as compensation for the aggrieved employees, this is somewhat similar to the situation where a District Attorney prosecutes a case on behalf of the People of the State of California and recovers restitution for the victims of a crime. (Penal Code 1202.4(f)(3), (i).) A settlement by a District Attorney of the claims of The People is not a settlement of the potential civil claims of the victims. (*Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 442-443.) If the victim files a civil case against the defendant, then the defendant can assert that any victim compensation payment in the criminal case is an offset in the civil case. (Penal Code 1202.4(j).) The fact that the prosecution of a law enforcement case

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[3] The legislature made the decision that the "aggrieved employees" get 25% of the penalties to "discourage any potential plaintiff from bringing suit over minor violations in order to collect a "bounty" in civil penalties." (SB-796 Senate Committee Analysis 4/30/03.) (*Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742.) This distribution of penalties is unique. When the LWDA brings the claim on its own behalf the employees affected by Labor Code violations get no portion of the penalties recovered by the LWDA. In a typical qui tam action (California False Claims Act, Insurance Frauds Prevention Act, Prop 65) the private plaintiff receives some percentage of the penalty collected to compensate for the time, effort, and risk of prosecuting the case on behalf of the state.

results in the payment of compensation to injured persons does not change the essential nature of the case as an action by a law enforcement entity.

There is recent uncertainty about the nature of a claim on behalf of the LWDA. In *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, the United States Supreme Court expressly recognized that claims under the PAGA are claims on behalf of the LWDA (142 S.Ct. at 1915) and acknowledged the California law that "[t]here is no individual component to a PAGA action" (142 S.Ct. at 1916). *Viking River* then somewhat incongruously held that a California claim on behalf of a California Labor Code enforcement agency has an individual component. *Viking River* interpreted California law and held that a claim on behalf of the LWDA could be separated into an "individual PAGA claims" and a "non-individual PAGA claim." (142 S.Ct. at 1917.)

In *Gavriiloglou v. Prime Healthcare Management, Inc.* (2022) 83 Cal.App.5th 595, 605 (review denied), the California Court of Appeal rejected the *Viking River* concept of "individual PAGA claims," stating: "This is mere wordplay. What the Supreme Court called, as shorthand, an "individual PAGA claim" is not actually a PAGA claim at all. It would exist even if PAGA had never been enacted. It is what we are calling, more accurately, an individual Labor Code claim."

In *Adolph v. Uber Technologies* (2023) 14 Cal.5th 1104, the California Supreme Court restated the settled law that "A PAGA claim for civil penalties is fundamentally a law enforcement action. … The government entity on whose behalf the plaintiff files suit is ... the real party in interest." (*Adolph*, 14 Cal 5th at 688.) *Adolph* then accepted the *Viking River* concept that there are "individual PAGA claims" and "non-individual PAGA claims" but made

no effort to reconcile that concept with its multiple prior holdings in *Kim*, in *Z.B.*, in *Iskanian*, and in *Arias* that under the PAGA an employee acts as agent and proxy for the LWDA.

The uncertainty in the law about the essential nature of an action under the PAGA as a law enforcement action appears to be in large part due to the consistent efforts of employers to characterize claims asserted under the PAGA as the claims of the individual PAGA plaintiff or "aggrieved employee" so that the employers can enforce the arbitration agreements they have with the individual employees.

This trial court will follow the consistent California Supreme Court authority in *Adolph*, in *Kim*, in *Z.B.*, in *Iskanian*, and in *Arias* that an action under the PAGA is a law enforcement action and that under the PAGA an employee acts as proxy and agent for the LWDA. This means that there is no such thing as an "individual PAGA claim." This is consistent with *Gavriiloglou*, 83 Cal.App.5th at 605. The court is "not bound by the United States Supreme Court's interpretation of PAGA." (*Barrera v. Apple American Group LLC* (2023) 95 Cal.App.5th 63, 90.) On matters of California law, the court is bound by California appellate authority. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.) To the extent that the appellate authority is inconsistent, a trial court "must make a choice between the conflicting decisions" and can follow the most persuasive authority. (*Auto Equity*, 57 Cal.2d at 456.)

Under the PAGA, the LWDA entrusts the prosecution of the litigation of its behalf to its agents and proxies. (*California Business & Industrial Alliance v. Becerra* (2022) 80 Cal.App.5th 734.) Under the PAGA, the LDWA authorizes private parties to institute litigation on behalf of the LWDA within the scope of the pre-filing PAGA notice letter. (*LaCour v. Marshalls of*

California, LLC (2023) 94 Cal.App.5th 1172, 1197.) Under the PAGA, the LWDA reviews settlements that are entered into on its behalf. (Labor Code 2699(l)(2).)

Under the PAGA, the plaintiff as agent of the LWDA can recover civil penalties that could have been collected by the LWDA. (Labor Code 2699(a), (f), (g)(1).) A private plaintiff acting as agent of the LWDA does not recover back wages or other compensatory damages on behalf of the affected employees. (*Z.B.*, 8 Cal.5th at 185.) The LWDA received over $109,800,000, $111,500,000, and $157,000,000 resulting from PAGA settlements or judgments in Fiscal Years 2019-20, 2020-21, and 2021-22, respectively. (Cabral Supp Dec., para 4.)

A DEFENDANT THAT PREVAILS IN A CASE BROUGHT UNDER THE PAGA MAY RECOVER ITS COSTS UNDER CCP 1032.

CCP 1032 is the general cost statute and permits a prevailing party to recover the costs identified in CCP 1033.5. "Costs are allowances which are authorized to reimburse the successful party to an action or proceeding, and are in the nature of incidental damages to indemnify a party against the expense of successfully asserting his rights. … The theory upon which [costs] are allowed to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant, that the plaintiff sued him without cause. Thus the party to blame pays costs to the party without fault." (*DeSaulles v. Community Hospital of Monterey Peninsula* (2016) 62 Cal.4th 1140, 1147.)

CCP 1032(b) states that it applies "[e]xcept as otherwise expressly provided by statute." The PAGA includes Labor Code 2699(g)(1), which states: "Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." The legal issue is whether statement in Labor Code 2699(g)(1) that employees may recover reasonable attorney's

fees and costs fees, but not mentioning employers, meets the "otherwise expressly provided by statute" exception in CCP 1032(b) to the bilateral cost shifting statute.

The court starts with the plain text of the statutes. CCP 1032 applies "[e]xcept as otherwise expressly provided by statute." Labor Code 2699(g)(1) does not mention whether a prevailing defendant may recover costs. Labor Code 2699(g)(1) does not "expressly provide" that a prevailing defendant may not recover costs. The plain texts of the statutes suggest that in a case under the PAGA a prevailing defendant may recover costs.

The court then looks to case law, and there is a conflict in the case law. The court of appeal has recognized the split in authority. (*Cruz v. Fusion Buffet, Inc.* (2020) 57 Cal.App.5th 221, 241-242 ["We disagree with the *Plancich* court's analysis, and instead agree with the *Earley* and *Ling* courts' conclusions"].)[4] When there is a split in authority, a trial court lacks clear direction. The trial court can follow the most persuasive authority. (*Auto Equity*, 57 Cal.2d at 456 [when "appellate decisions are in conflict" then "the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions"].)

One approach is to apply the plain text of CCP 1032(b) and permit a prevailing defendant to recover costs unless there is an "express" exception that expressly addresses whether a prevailing defendant can recover litigation costs.

Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal.4th 985, applied CCP 1032(b) in the context of the Song-Beverly Act and stated:

> Although Civil Code section 1794(d) gives a prevailing buyer the right to recover "costs and expenses, including attorney's fees," the statute makes no mention of prevailing sellers. In other words, it does not *expressly* disallow recovery of costs

for prevailing sellers; any suggestion that prevailing sellers are prohibited from recovering their costs is at most *implied.* Accordingly, based on the plain meaning of the words of the statutes in question, we conclude Civil Code section 1794(d) does not provide an "express" exception to the general rule permitting a seller, as a prevailing party, to recover its costs under section 1032(b).

(*Murillo*, 17 Cal.4th at 991.)

Plancich v. United Parcel Service, Inc. (2011) 198 Cal.App.4th 308, applied CCP 1032(b) in the context of a Labor Code 1194 claim for overtime compensation and stated:

> Section 1194 gives a prevailing *employee* the right to recover attorney's fees and costs; however, the statute makes no mention of prevailing *employers.* In other words, the statute does not contain express language excluding prevailing employers from recovering their costs; any suggestion that a prevailing employer is prohibited from recovering its costs is, at most, implied by the language of section 1194. ([*Murillo*]) Accordingly, based on the plain meaning of the words of the statutes in question, section 1194 does not provide an "express" exception to the general rule permitting an employer, as a prevailing party, to recover costs under [CCP 1032(b)], because section 1194 makes no mention of prevailing employers.

(*Plancich*, 198 Cal.App.4th at 313.)

The other approach is to reason that a legislative decision to include a fee and cost shifting provision in favor of a prevailing plaintiff demonstrates a legislative decision to

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[4] (See also *Lohman v. City of Mountain View* (2022) 2022 WL 4091208 at *13-17 [not published, but identifying the split of authority].)

encourage the prosecution of claims, which in turn meets the "otherwise expressly provided by statute" standard in CCP 1032(b).

Earley v. Superior Court (2000) 79 Cal. App. 4th 1420, 1429, involved Labor Code 218.5 and 1194 claims for wages and overtime compensation. The *Early* opinion addressed two discrete issues: (1) whether Labor Code 1194 or Labor Code 218.5 controls on the question of whether attorney's fees can be awarded in a defendant's favor and (2) whether absent class members can be liable for a defendant's attorneys' fees and costs in the event the defendant prevails. (79 Cal.App.4th at 1426.) The first issue concerned fees alone and the second issue concerned both fees and costs.

In addressing the first issue regarding fees *Early* states: "if an employee is unsuccessful in a suit for minimum wages or overtime, section 1194 does not permit a prevailing employer to recover fees *or costs*." (79 Cal.App.4th at 1429 [emphasis added].) *Earley* did not analyze CCP 1032 or whether section 1194 permits a prevailing defendant to recover costs. *Earley* held that the fee and cost shifting provision in Labor Code 1194 applied instead of the reciprocal fee shifting provision in Labor Code 218.5. In its analysis of fees (not costs) *Early* reasoned:

> There can be no doubt that the one-way fee-shifting rule in former section 1194 was meant to "encourage injured parties to seek redress – and thus simultaneously enforce [the minimum wage and overtime laws] – in situations where they otherwise would not find it economical to sue." ... To allow employers to invoke section 218.5 in an overtime case would defeat that legislative intent and create a chilling effect on workers."

(*Earley*, 79 Cal. App. 4th at 1430-1431.) *Earley's* relevant analysis concerns the award of fees rather than costs, never cites CCP 1032, and never discusses *Murillo* except to note that *Murillo* disapproved another case that concerned an award of fees. The sentence in *Earley* about Labor Code 1194 not permitting an award of costs was, however, accepted as a statement of law in subsequent opinions.

Ling v. P.F. Chang's China Bistro, Inc. (2016) 245 Cal.App.4th 1242, applied CCP 1032(b) in the context of an arbitration award Labor Code 1194 claim for overtime compensation. *Ling* did not conduct any substantive analysis about the award of costs. In summarizing the law, *Ling* stated:

> Because section 1194 provides only for a successful plaintiff to recover attorney fees *and costs*, it is a one-way fee shifting statute precluding an employer from collecting fees *and costs* even if the employer prevails on a minimum wage or overtime claim. ([*Earley*].)

(*Ling*, 245 Cal.App.4th at 1253 (emphasis added).) *Ling* did not seem to recognize that the *Early* analysis applied to fees and not to litigation costs. In *Planich*, 198 Cal.App.4th at 315-316, the court of appeal previously identified this issue and stated: "the *Earley* opinion did not discuss the costs provision of section 1194 in relation to [CCP 1032(b)]. Rather, the opinion was focused on the issue of attorney's fees in section 1194, and how that provision related to Labor Code section 218.5."

Cruz v. Fusion Buffet, Inc. (2020) 57 Cal.App.5th 221, applied CCP 1032(b) in the context of a Labor Code 218.5 and 1194 claims for nonpayment of wages, failure to pay overtime, and failure to pay meal and rest break compensation. *Cruz* considered *Plancich* and stated: "We disagree with the *Plancich* court's analysis, and instead agree with the *Earley* and

Ling courts' conclusions that section 1194 is intended to operate as a one-way fee and cost shifting statute." (57 Cal.App.5th at 242.) *Cruz* did not acknowledge that *Ling* relied on *Earley* and that the *Earley* analysis applied to fees and not to litigation costs. *Cruz* states: " We decline to interpret section 1194 's silence with respect to prevailing employers as anything other than a legislative intention to provide a one-way cost and fee shifting provision." (57 Cal.App.5th at 242.) *Cruz* did not cite to or consider *Murillo*, which held that silence with respect to prevailing defendants is not an "express provision" that defendants cannot recover costs under CCP 1032.[5]

This court applies the plain text of CCP 1032. CCP 1032 applies "[e]xcept as otherwise expressly provided by statute." Labor Code 2699(g)(1) does not mention whether a prevailing defendant may recover costs. Labor Code 2699(g)(1) does not "expressly provide" that a prevailing defendant may not recover costs. In a case under the PAGA a prevailing defendant may recover costs under the bilateral cost shifting provision in CCP 1032.

This court applies the analysis in *Murillo* and *Plancich*. The court finds this more persuasive than the analysis in *Earley*, *Ling*, and *Cruz*. In addition, *Murillo* is the California Supreme Court.

In addition to considering CCP 1032(b) and *Murillo* in the context of Labor Code 2699(g)(1), the court has also considered the application of CCP 1032(b) in other contexts. There are several statues where the ability of a prevailing defendant to recover costs is "otherwise expressly provided by statute."[6] The legislature knows how to draft provisions that "otherwise expressly provide." (*People v. Trevino* (2001) 26 Cal.4th 237, 241-242.) There are a

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[5] (See also *Lohman v. City of Mountain View* (2022) 2022 WL 4091208 at *13-17 [unpublished, distinguishing *Murillo* and *Plancich* and following *Earley*, *Ling*, and *Cruz*].)

multitude of statutes that permit a prevailing plaintiff to recover fees and costs that do not address whether prevailing defendants can recover costs, much less expressly preclude prevailing defendants from recovering costs.[7]

Under the *Cruz* analysis, a legislative decision to include a fee and cost shifting provision in favor of a prevailing plaintiff demonstrates a legislative decision to encourage the prosecution of claims, which in turn meets the "otherwise expressly provided by statute" standard in CCP 1032(b). This trial court is not prepared to adopt the statement in *Earley*, the statement in *Ling*, and the analysis in *Cruz*. The analysis in *Cruz*, once adopted, would apply (or applies currently) equally to the multitude of statutes that have a fee and cost shifting provision in favor of a prevailing plaintiff.

The bilateral cost shifting provision in CCP 1032 applies even when the losing party is a government agency or, as with the PAGA, the losing party is acting as agent or proxy for a government agency. Under CCP 1028, "when the State is a party, costs shall be awarded against it on the same basis as against any other party and, when awarded, must be paid out of the appropriation for the support of the agency on whose behalf the State appeared." The award of costs against public entities is not contrary to public policy. (*Dep't of Indus. Rels. v. Lee* (1999) 73 Cal.App.4th 763, 769–770 ["public policy is not defeated, or the DLSE hindered in protecting employees' rights, if the DLSE, like other state agencies, is subject to Code of Civil Procedure section 1028…"].)

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[6] (E.g. Labor Code section 218.5 (wages and other compensation); Gov 8670.56.5(f) (oil spills); (Gov. Code 12652(g)(9)(A) (CFCA); Govt Code 12965(c)(6) (FEHA).)

[7] (E.g. Bus & Prof 7159.2(f); Bus & Prof 22442.3(e)(4); Bus & Prof 22257(b); Bus & Prof 22948.3(c)(2); Civil Code 52.45(a); Civil Code 52.8; Civil Code 817.4(a); Civil Code 1780(e); Civil Code 1798.99.22(b)(1); Civil Code 3273.61(d); CCP 354.8(d); CCP 1021.9; Govt Code 9149.35(b)(2); H & S 7109; H & S 11857.5(a)(3); Ins Code 789(e); Ins Code 10234.2(b); Labor Code 218.7(b)(2); Labor Code 2677(b); Labor Code 2802(c).)

Therefore, in a case brought under the PAGA a prevailing defendant can recover its CCP 1032 litigation costs.

DETERMINING WHICH PERSON ON ENTITY IS RESPONSIBLE FOR THE LITIGATION COSTS

A defendant that prevails in a case under the PAGA could plausibly recover its costs from (1) the plaintiff, (2) the aggrieved employees, (3) the plaintiff's attorneys, (4) the LWDA, or (5) some combination of them with joint and several liability. There is no directly applicable case law. The court considers the alternatives.

THE PAGA PLAINTIFF

There are several reasons why a PAGA plaintiff should be responsible for litigation costs.

First, a PAGA plaintiff has their name on the complaint and is identified as a party to the case. As the "party" to the case, the plaintiff presumably pays the costs. Given that a PAGA plaintiff is proxy or agent of the LWDA, a reasonable way to caption a complaint might be "*Department of Labor Standards Enforcement ex rel [name of plaintiff] v. Employer.*"[8] The court has never seen a PAGA complaint where a PAGA plaintiff in the caption identifies the plaintiff as the LDWA, the DIR, or the DLSE ex rel the private plaintiff. (Evid Code 452.) The name on the caption does not change the reality that a PAGA plaintiff initiates the case as proxy or agent of the LWDA.

[8] ""Ex rel." is a commonly used abbreviation for the Latin phrase "Ex Relatione" connoting legal proceedings instituted by the Attorney General or other appropriate person in the name of the state on information and at the instigation of a private individual." (*People ex rel. Curtis v. Peters* (1983) 143 Cal.App.3d 597, fn 7.)

Second, a PAGA plaintiff's decision to voluntarily serve as proxy or agent of the LWDA is similar to a plaintiff's decision to voluntarily serve as a class representative. *Earley v. Superior Ct.* (2000) 79 Cal.App.4th 1420, 1432, holds that the named plaintiffs in a class action are jointly and severally liable for the costs claimed by a prevailing defendant. *Early* relied heavily on *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 204, 869, which states: "While imposition of the entire cost burden on the named plaintiffs may have a chilling effect on the willingness of plaintiffs to bring class action suits, this effect easily may be outweighed by the potential recovery. All potential litigants must weigh the costs of suit against likelihood of success and possible recovery before deciding to file suit. Those who choose to take the risks of litigation should be the ones who bear the cost when they are unsuccessful."

There are also reasons why a PAGA plaintiff should not be responsible for litigation costs. These reasons are based on the legislature's general intent in enacting the PAGA to "[t]o facilitate broader enforcement" of the state's Labor laws. None of the reasons is based on the text of CCP 1032 or the text of Labor Code 2699(g).

The legislature enacted the PAGA "[t]o facilitate broader enforcement" by authorizing "aggrieved employees" to pursue civil penalties on the state's behalf. (*Kim*, 9 Cal.5th at 80.) (See also *Williams v. Superior Court* (2017) 3 Cal.5th 531, 545 [legislative purpose].) The court reads the PAGA in light of the legislative purpose "[t]o facilitate broader enforcement." It would discourage persons from serving as PAGA plaintiffs if the persons would be liable to a prevailing defendant for costs under CCP 1032.

Under the PAGA, a PAGA plaintiff has no personal financial interest in the case and no financial incentive to serve as agent or proxy of the LWDA. There is no provision in the statute or under any regulation for compensating the PAGA plaintiff for their time, effort, and risk in

asserting a claim as agent and proxy of the LWDA. PAGA plaintiffs appear solely as proxy or agent of the LWDA. PAGA plaintiffs have "no personal interest in the PAGA claims." (*Turrieta v. Lyft, Inc.* (2021) 69 Cal.App.5th 955, 977.) In a PAGA lawsuit, "whatever personal claims [individual] employees might have for relief are not at stake." (*Williams,* 3 Cal.5th at 547, fn. 4.) The "civil penalties recovered on the state's behalf are intended to 'remediate present violations and deter future ones,' not to redress employees' injuries." (*Kim*, 90 Cal.5th at 86.)

A PAGA plaintiff who prevails in or settles a case on behalf of the LWDA generally seeks an "incentive" or "service" payment that is paid from the penalties that the defendant must pay to the LWDA. These payments are non-statutory creations of the court similar to the "incentive" or "service" payments that are paid to class representatives. (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393-1395.) (Evid Code 452 [judicial notice].) (Cabral Supp Dec., Exhs E, F, G, H.) (See also *Hernandez v. Reiter Bros., Inc.* (Cal Superior 2022) 2022 WL 18396265 [service payment of $5,000]; *Marquez v. DNR Management, LLC* (Cal. Superior 2022) 2022 WL 19827114 [service payment of $5,667]; *Harris v. Hobby Lobby Stores Inc.* (Cal. Superior 2022) 2022 WL 18142629 [service payment of $2,500].)

The PAGA is frequently described as a type of qui tam action, but it is materially different from other types of qui tam actions because the PAGA provides no financial incentive to the plaintiff. Under the California False Claims Act (CFCA) a qui tam plaintiff has the incentive of receiving 25-50% of the state's recovery. (Govt Code 12652(g)((3); *State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Company* (2023) 90 Cal.App.5th 1119, 1128.) A qui tam plaintiff asserting a CFCA claim "has a personal stake in the action beyond her representative stake." (*Armenta ex rel. City of Burbank v. Mueller Co.* (2006) 142 Cal.App.4th 636, 641-642.) Under the Insurance Frauds Prevention Act a qui tam plaintiff has the incentive

of receiving 40-50% of the state's recovery. (Ins Code 1871.7(g)(2)(A); *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 500.) Under the Safe Drinking Water and Toxic Enforcement Act of 1986 (aka Proposition 65), a person may bring an action "in the public interest" (Health and Safety 25249.7(d)), and the plaintiff has the incentive of receiving 25% of the penalties the state recovers (Health and Safety 25249.12(d)). Under each of these statutes, "The qui tam litigant … may incur significant cost if unsuccessful." (*Iskanian*, 59 Cal.4th at 391.)

Under the PAGA, however, the individual plaintiff has no financial incentive to assume risk because if the PAGA plaintiff prevails, then 25% of the penalties are distributed among all the affected employees and nothing is distributed to the PAGA plaintiff to compensate them for their time, effort, and financial risk. (Labor Code 2699(i); *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742.) The court accepts and applies the statute as written. (*Kim*, 9 Cal.5th at fn 6; *People v. Montano* (2022) 80 Cal.App.5th 82, 114.) The PAGA was written with no compensation for a PAGA plaintiff.

The legislative intent "[t]o facilitate broader enforcement" of the Labor Code suggests that the legislature intended to incentivize the prosecution of claims under the PAGA. The legislature did not provide a financial incentive to PAGA plaintiffs similar to the financial incentive provided to other quit tam plaintiffs. The legislature's general intent in enacting the PAGA to "[t]o facilitate broader enforcement" of the state's Labor laws suggests that the legislature did not want to expose private persons to financial risks that would discourage private persons from serving as PAGA plaintiffs.

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THE AGGRIEVED EMPLOYEES

The aggrieved employees are not responsible for litigation costs under CCP 1032.

The PAGA states that 25% of the penalties collected for the LWDA are distributed to the "affected employees." (Labor Code 2699(i); *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742.) The PAGA defines an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Labor Code 2699(c).) The aggrieved employees are therefore plausibly real parties in interest who might plausibly be liable for costs.

There is no case law on whether aggrieved employees are liable for costs under CCP 1032. There is California case law holding that absent class members are not liable for costs under CCP 1032. *Earley v. Superior Ct.* (2000) 79 Cal.App.4th 1420, 1431-1433, reasons that absent class members do not actively participate in a class action and it would be unfair to require them to pay litigation costs to a prevailing defendant. This court finds that it would be even more unfair to require the "aggrieved employees" to pay litigation costs because under the PAGA the aggrieved employees are given no notice of the case and have no opportunity to opt out of being affected by the case.

The legislative decision to allocate 25% of the penalties among all the "affected employees" has created its own legal issues. Because the "aggrieved employees" get a portion of the penalties, this suggests that they are beneficiaries of the claim under the PAGA on behalf of the LWDA. This in turn suggests that the "aggrieved employees" are bound by the claim preclusion or issue preclusion effect of any judgment in a claim on behalf of the LWDA. (*Iskanian*, 59 Cal.4th at 381; *Arias*, 46 Cal.4th at 986.) The application of claim preclusion or issue preclusion is problematic given that there is no requirement that the court determine that

counsel in a case under the PAGA is competent. A claim under the PAGA is not a class action on behalf of the aggrieved employees with the attendant due process protections for the absent class members. (*Kim*, 9 Cal.5th at 86-87.) (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-812 [due process].) These issues bear on this motion because this decision on the issue of litigation costs should be consistent with larger body of PAGA jurisprudence.

THE PLAINTIFF'S ATTORNEYS

The attorneys for the PAGA plaintiffs are not responsible for litigation costs under CCP 1032.

CCP 1032 does not expressly state that the prevailing party recovers costs from the non-prevailing party, but it is strongly implied in the text of the statute. In defining "prevailing party," CCP 1032(a)(4) states: "the court, in its discretion, may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides." By stating that the court may apportion costs between "the parties," the statute strongly suggests that a prevailing party can recover costs only from "parties." Nowhere does the statute suggest that the prevailing party can recover costs from the attorneys for the other side. The court has located no case law suggesting the prevailing party can recover costs from the attorneys for the other side.

The Labor Code 2699(g)(1) provision for attorneys' fees to a prevailing plaintiff supports a strong inference that the lawyers are real parties in interest. An attorney who has represented a client on a claim that has a fee-shifting provision may file their own motion for fees. (*Flannery v. Prentice* (2001) 26 Cal.4th 572.) The attorneys might have an interest in fees that exceeds the interest of the parties in the case. (E.g. *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 419 [jury awarded plaintiff $30,300, counsel recovered $1,113,905.40 in fee-

shifted fees]; *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1006-1007 [client recovered $1, counsel recovered $87,525 in fee-shifted fees].) Although the attorneys can have significant interest in the outcome of cases, these factors do not persuade the court that the lawyers are real parties in interest and that a prevailing party can recover costs under CCP 1032 from the attorneys for the other side.

The court does not address the possibility that attorneys might have contracts with their clients that require the attorneys to advance both the costs that the client incurs during litigation and any costs that the client might have to pay the prevailing party under CCP 1032. Such contracts are permissible under Rule of Professional Code 1.8.5(b)(3).) If an attorney advances the costs that the client might have to pay the prevailing party under CCP 1032 and then chooses to cancel or discharge the debt, then that is a matter between the attorneys, the clients, the IRS, and the FTB. (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 724 [cancellation of a debt is income for tax purposes]; IRS Form 1099-C).

THE LWDA

The LWDA is arguably responsible for litigation costs under CCP 1032.

There are several reasons why the LWDA should be responsible for litigation costs.

First, an action under the PAGA is a law enforcement action on behalf of the LWDA. (*Adolph; Kim; ZB; Iskanian; Arias*.) The penalties that a PAGA plaintiff recovers under the PAGA are the penalties that the LWDA can recover. (*ZB*, supra.)

Second, the California Supreme Court in *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, held that a real party in interest can be liable for fees or costs to the prevailing party if the person has "a direct interest in the litigation, the furtherance of which was generally

at least partly responsible for the policy or practice that gave rise to the litigation." (*Connerly*, 37 Cal.3d at 1181.) Applying the *Connerly* test, the State of California acting through the LWDA should be responsible for litigation costs. The LWDA has "a direct interest" in the penalties that a PAGA plaintiff might recover. The LWDA's interest in enforcing the state's Labor Code is the interest that is furthered when PAGA plaintiffs enforce the Labor Code.

Third, the LWDA had the opportunity to control actions filed on its behalf under the PAGA. The opportunity for active participation is central to the analysis. In enacting the PAGA, the legislature had "the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." (*Arias*, 46 Cal.4th at 980.) The PAGA at section 1(d) states: "It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act." (SB 796 (2003).)

The California Supreme Court and the Court of Appeal have held that the executive branch has sufficient control over the enforcement of California's labor laws as prosecuted under the PAGA that the PAGA is a constitutional delegation of authority to the PAGA plaintiffs. (*Iskanian*, 59 Cal.5th at 389-391; *California Business & Industrial Alliance v. Becerra* (2022) 80 Cal.App.5th 734, 748.)

The PAGA authorized the LWDA to promulgate regulations to implement the provisions of the PAGA. (Labor Code 2699(n).) The legislature enacted the PAGA in September 2003. In the intervening 20 years the LWDA has not implemented any regulations regarding how PAGA plaintiffs must prosecute their cases. There is a difference between a person or entity that has the

opportunity to exercise control and chooses to not exercise control and a person or entity that does not have the authority to exercise control.

Fourth, the LWDA receives the penalties that are recovered in actions asserted on its behalf under the PAGA. (Labor Code 2699(a), (f), (g)(1).) The LWDA received over $109,800,000, $111,500,000, and $157,000,000 resulting from PAGA settlements or judgments in Fiscal Years 2019-20, 2020-21, and 2021-22, respectively. (Cabral Supp Dec., para 4.) "He who takes the benefit must bear the burden." (Civil Code 3521.)

Fifth, principles of common law agency suggest that the LWDA is responsible for litigation costs. Common law principles of agency arguably apply because the California Supreme Court has described PAGA plaintiffs as "agents" of the LWDA. Common law principles of agency arguably do not apply because " It has long been recognized that "common-law agency doctrines are inapplicable in certain statutory contexts" and the Court of Appeal has stated that "a deputized proxy for the LWDA is not a "true agent."" (*Accurso v. In-N-Out Burgers* (2023) 94 Cal.App.5th 1128, 1149, review granted) (CRC 8.1115(e) [case has no binding or precedential value].)

The legislature created the agency relationship by authorizing and permitting private litigants to serve as proxy or agent of "the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees." (Labor Code 2699(a); Civil Code 2307 [creation of agency].) The legislature defined the scope of the agency as the scope of the claims in the PAGA notice letter. (Labor Code 2699.3(a)(1); *LaCour v. Marshalls of California, LLC* (2023) 94 Cal.App.5th 1172, 1197; Civil Code 2315, 2316 [scope of agency].) The LWDA (the principal) is responsible for all the liabilities that the agent accrues acting within the scope of the agency. (Civil Code 2330 [liability of principal].) The PAGA plaintiff (the

agent) is not responsible for the liabilities that the agent accrues acting within the scope of the agency. (Civil Code 2343 [agent's liability to third persons].)

There are also reasons why the LWDA should not be responsible for litigation costs.

First, the LWDA is not identified on the caption of the complaint as a party. The LWDA states: "Although LWDA is the real party in interest in a PAGA action, it is not a party to a PAGA action unless and until it chooses to intervene." (LWDA oppo at 9:19-20.) That is a correct statement of the law. That noted, a person that was not a "party" to a lawsuit can be added to a judgment after entry of judgment if the person *both* (1) was the alter ego of a party *and* (2) controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns. (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1106-1107.)

Second, the LWDA did not control the prosecution of this particular case. The court accepts as fact that the LWDA did not make any effort to control the conduct of this particular case until the court's order of 9/15/23 invited it to file an amicus brief on the issue of litigation costs. The court accepts as fact the LWDA's statement that "In the vast majority of PAGA cases, LWDA does not participate in the litigation in any capacity, including submitting comments to settlements." (Segarich Dec., para 5.) There is distinction between (1) whether the LWDA actually controlled this case and (2) whether the LWDA has the opportunity to control the litigation that PAGA plaintiffs prosecute on its behalf. As a matter of law, the LWDA has the opportunity to control all the cases that are asserted on its behalf. (*California Business & Industrial Alliance v. Becerra* (2022) 80 Cal.App.5th 734, 748.) The LWDA therefore had the opportunity to control this particular case.

Third, in a qui tam case under the CFCA the qui tam plaintiff is responsible for paying any award of costs to a prevailing defendant. (Gov. Code 12652(g)(9)(A).)[9] By analogy a PAGA plaintiff arguably should be responsible for paying any award of costs to a prevailing defendant. The analogy to the CFCA is reasonable and the order of 9/15/23 suggested the analogy, but the court will not import the provisions of the CFCA into the PAGA. The inclusion of the identified provision in the CFCA and the absence of a similar provision in the PAGA indicates that the legislature knew how to draft such a provision and decided not to include it in the PAGA. (*People v. Trevino* (2001) 26 Cal.4th 237, 241-242.)

THE LWDA IS RESPONSIBLE FOR PAYING THE LITIGATION COSTS.

The court holds as a matter of law that in a case brought under the PAGA on behalf of the LWDA that if the defendant prevails in the case that the LWDA is responsible for paying costs to the prevailing party under CCP 1032.

Procedurally, the LWDA can be added to the judgment as the principal of the PAGA plaintiff agent. (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1106-1107.) A PAGA plaintiff acts as agent or proxy of the LWDA. The LWDA had sufficient opportunity to control the litigation to satisfy the concerns with unconstitutional delegation of authority, and therefore has sufficient opportunity to control the litigation for purposes of being responsible for litigation costs.

[9] (Gov. Code 12652(g)(9)(A) ["the court may award [costs] against the [qui tam plaintiff] if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment"].)

Substantively, the central issue is whether the LWDA has the ability to control the litigation prosecuted on its behalf under the PAGA. The issue is not whether the LWDA actually controlled the prosecution of this particular case.

The issue of control was resolved as a matter of law in *Iskanian,* 59 Cal.4th at 389-391, and in *California Business,* 80 Cal.App.5th at 748. In *Iskanian* and *California Business*, the appellate courts held that the executive branch of the State of California has sufficient control over the enforcement of California's labor laws as prosecuted under the PAGA that the PAGA is a constitutional delegation of authority to the PAGA plaintiffs. If the State has sufficient control over the litigation so that the statute is constitutional, then the State has sufficient control for purposes of being responsible for paying litigation costs. This court must follow appellate authority. (*Auto Equity,* 57 Cal.2d at 455.)

The issue of control is not subject to dispute because the State of California is judicially estopped from arguing that it lacks control over PAGA litigation for purposes of being responsible for litigation costs. The principle of judicial estoppel "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) The doctrine applies "when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson*, 60 Cal.App.4th at 183.)

In *California Business* the California Attorney General argued successfully to the trial court and to the court of appeal that the executive branch has sufficient control over how PAGA

plaintiffs enforce California's labor laws that the PAGA does not violate the principle of separation of powers under the California Constitution. The Attorney General and the LWDA are "the same party." "The Attorney General, ... is the chief law officer of the state." (*Citizens for Open Access Etc. Tide, Inc. (COAST) v. Seadrift Assn.* (1998) 60 Cal. App. 4th 1053, 1070.) The LWDA is a department of the state. The two cases and the "two positions" in the cases concern the same issue of state control over PAGA plaintiffs and PAGA litigation. The only reason to not apply judicial estoppel would be that *California Business* and this case concern state "control" of PAGA litigation for different purposes. The court acknowledges that the two purposes are different, but the court finds that the difference is not material.

The issue of control can be analyzed under the criteria set out by the California Supreme Court in *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1181.) Applying the *Connerly* test, the State of California acting through the LWDA should be responsible for litigation costs. The LWDA has "a direct interest" in the penalties that a PAGA plaintiff might recover. The LWDA's interest in enforcing its Labor Code is the interest that is furthered when PAGA plaintiffs enforce the Labor Code.

The issue of control was addressed at the hearing on 12/22/23, where the LWDA argued that it had no authority or power to control PAGA plaintiffs. The LWDA stated that when it gets a PAGA notice letter that it has only the options of (1) doing something in the form of initiating an investigation and then issuing a citation or filing a case (Labor Code 90.5, 95, 96.7, 98.3(b), 226.8(g)(3), 1193.6) or (2) doing nothing and permitting the PAGA plaintiff to file a case on behalf of the LWDA (Labor Code 2699(h)). (LWDA brief at p12.) The LWDA argued on 12/22/23 that it has no authority to prevent a PAGA plaintiff from pursuing a case on its behalf. In *California Business*, the court noted that the LWDA is an interested party in any action

prosecuted on its behalf under the PAGA and that after a PAGA plaintiff files an action on behalf of the LWDA the LWDA has the ability to intervene in any such action. (*California Business*, 80 Cal.App.5th at 748.) This court concludes that the LWDA has the opportunity to control PAGA cases generally by issuing regulations or specifically by monitoring and intervening in individual cases as appropriate. The LWDA did neither. The LWDA for 20 years has not issued any regulations to control the prosecution of claims under the PAGA. The LWDA did not participate in this specific case until the court order of 9/15/23 that requested an amicus brief.

On the issue of control, the LWDA seeks to persuade the court that the LWDA retains enough control over PAGA litigation so that the PAGA is a constitutional delegation of prosecutorial authority but that the LWDA lacks sufficient control to be responsible for the actions of the PAGA plaintiffs. The LWDA asserts that the state can delegate prosecutorial authority to PAGA plaintiffs, recover 75% of the penalties collected by the PAGA plaintiffs, and not be responsible for the costs incurred by the PAGA plaintiffs. This trial court is skeptical whether this "sweet spot" of power without responsibility exists. "With great power comes great responsibility." (*Nalwa v. Cedar Fair, L.P.* (2011) 126 Cal.Rptr.3d 341, 353 and fn 3, reversed on other grounds by *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148.) (See also *Kimble v. Marvel Entertainment, LLC* (2015) 576 U.S. 446, 465 [same, with Spider-Man reference].)

County of Santa Clara v. Superior Court (2010) 50 Cal.4th 35, and *Iskanian*, 59 Cal.4th at 389-391, inferentially address this issue and suggest that perhaps the sweet spot might exist.

County of Santa Clara v. Superior Court (2010) 50 Cal.4th 35, addressed whether executive branch and local entities could retain private attorneys under contingent fee contracts and still ensure a "heightened standard of neutrality." (*Santa Clara*, 50 Cal.4th at 57.) *Santa*

Clara held that the interest in prosecutorial neutrality is sufficiently protected if the private counsel are "subject to the supervision and control of government attorneys" so that "the discretionary decisions vital to an impartial prosecution are made by neutral attorneys." (*Santa Clara*, 50 Cal.4th at 59.) *Santa Clara* holds that the state must have control when it exercises power directly.

Iskanian addressed whether the PAGA violates the principle of separation of powers. *Iskanian* held "the enactment of qui tam statutes is … a legitimate exercise of legislative authority." (*Iskanian*, 59 Cal.4th 390.) *Iskanian* reasoned that an attorney retained by the government "has the vast power of the government available to him" and needs to be supervised, but the state legislature can enact legislation that delegates prosecutorial responsibility to private parties who then retain private attorneys because (1) a qui tam plaintiff "generally does not have access to [government] power," (2) the qui tam plaintiff "has only his or her own resources," and (3) the qui tam plaintiff will be prudent because they "may incur significant cost if unsuccessful." (*Iskanian*, 59 Cal.4th 391.) *Iskanian* suggest that state can delegate control when it exercises power indirectly.

Whether the state retains its own attorneys or delegates authority to private plaintiffs who in turn retain attorneys, the state is the real party in interest and benefits from any relief obtained. One distinction between the two situations is that qui am actions are historically well established and "predate the founding of the United States by a considerable margin, originating in England around the end of the 13th century." (*California Business*, 80 Cal.App.4th at 742.) A second distinction is that retaining and supervising attorneys is an executive branch function whereas enacting legislation authorizing qui tam actions is a legislative function and "We uphold [a] statute unless its unconstitutionality plainly and unmistakably appears." (*Tos v. State* (2021) 72

Cal.App.5th 184, 196.) A third distinction is that qui tam plaintiffs put their own time, effort, and money at risk and that risk presumably encourages them to pursue only cases that have merit. Thus, the sweet spot of power without responsibility arguably does exist when the state permits qui tam actions.

Iskanian and *California Business* do not compel a conclusion one way or the other whether the LWDA is responsible for litigation costs. These cases did not address whether the state's constitutional delegation of the authority to prosecute Labor Code claims on behalf of the LWDA under the PAGA made the state responsible for the costs of litigation. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

Substantively, in matters of statutory interpretation the court's "core task … is to determine and give effect to the Legislature's underlying purpose in enacting the statutes at issue." (*McHugh v. Protective Life Ins. Co.* (2021) 12 Cal.5th 213, 227.) The legislative purpose in the PAGA was "[t]o facilitate broader enforcement" by authorizing "aggrieved employees" to pursue civil penalties on the state's behalf. (*Kim*, 9 Cal.5th at 80.) The legislature presumably wanted to encourage persons to serve as PAGA plaintiffs. The legislature presumably did not want to discourage persons from serving as PAGA plaintiffs by making them liable for the costs of litigation while providing them with no offsetting financial incentive to serve as proxy or agent of the LWDA.

Substantively, there is the policy of aligning the risk of bringing a case under the PAGA with the benefits of a case under the PAGA. The PAGA provides a PAGA plaintiff with no financial incentive to bring a case. The PAGA provides the LWDA with 75% of the penalties that are recovered. (Labor Code 2699(i).) Given that the benefit of a successful prosecution of a

case under the PAGA results in a financial benefit for the state, it seems appropriate that the state is responsible for the prevailing defendant's litigation costs. (Civil Code 3521.) If the state is not responsible for litigation costs when a PAGA plaintiff loses, then the relationship between the state and the PAGA plaintiff would be in the nature of "heads I win, tails you lose" – if the PAGA plaintiff prevails then the state collects penalties and the PAGA plaintiff gets no individual financial benefit, but if the defendant prevails then the PAGA plaintiff is responsible for the litigation costs of the prevailing defendant. If the LWDA brought a direct action to enforce the Labor Code and the defendant prevailed, then the LWDA would be responsible for the litigation costs. (CCP 1028.)

Substantively, a PAGA plaintiff is the proxy or agent of the LWDA and under the established law of agency the principal is responsible for all the liabilities that the agent accrues within the scope of the agency. (Civil Code 2330.)

The court concludes that the LWDA is responsible for the costs payable to a prevailing defendant in a case that was brought on behalf of the LWDA under the PAGA.

COSTS TAXED AND AWARDED

LEGAL STANDARD

CCP 1032(b) states that a prevailing party is entitled as a matter of right to recover costs. CRC 3.1700(a)(1) states that a memorandum of costs must be verified by a statement of the party that "the items of cost are correct and were necessarily incurred in the case." "[T]he verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant." (*Nelson v. Anderson* (1999) 72 Cal. App. 4th 111, 131.)

The party filing a motion to tax has the burden of showing that an item is not properly chargeable or is unreasonable. The Court's first determination is whether the statute expressly

allows the particular cost item. The Court's second determination is whether the amount of the cost is unnecessary or unreasonable. In resolving the second issue, the objecting party has burden to show the costs to be unnecessary or unreasonable. (*Benach v. County of Los Angeles* (2007) 149 Cal. App. 4th 836, 855; *Nelson v. Anderson* (1999) 72 Cal. App. 4th 111, 131.)

On 8/4/23, defendant Hobby Lobby filed its memorandum of costs seeking $474,057.80.

EXPERT COSTS

Defendant seeks $322,187.99 in fees they spent on their experts. (Motion at 4:4.) The court may not award costs for experts unless the court ordered the use of experts. (CCP 1033.5(b)(1).) The court did not order the use of experts. Defendant did not serve a CCP 998 offer. The court STRIKES expert costs in the amount of $322,187.99.

DEPOSITION TRAVEL COSTS

Defendants seek $3,799.34 for travel expenses that are arguably related to depositions. The court must award travel expenses to attend depositions. (CCP 1033.5(a)(3)(C).) The issue here is where travel expenses are "to attend depositions" when the expenses indicate that they were incurred for lodging while doing deposition preparation before the deposition or were incurred for lodging after the deposition. The court finds that round trip airfare is related to the deposition. The court finds that lodging for the nights before and after any day of deposition is related to the deposition. The court finds that lodging and similar expenses more temporally distant from a deposition are not related to the deposition. The court STRIKES $0 relating to the PMK deposition travel and lodging in 5/6/19-5/9/19. The court STRIKES $1,437 relating to the Fernandez deposition lodging 11/11/19-11/15/19. The court STRIKES $955.27 relating to the Evans and Myers depositions 11/17/ and 11/18/19.

NON-DEPOSITION TRAVEL COSTS

Defendants seek $38,890.16 for non-deposition related travel and other expenses. The court has the discretion to award cost that are not expressly excluded if "reasonably necessary to the conduct of the litigation." (CCP 1033.5(c)(2).) The court awards the cost of the $12,178.69 for a "war room" during trial. The court awards the cost of the $1,855.12 for a 2018 deposition that did not take place and airfare for two trial dates (2/12/2023 and 3/1/2023). The court does not award coats for local transportation and food related to hearings and trial. The court for this category awards a total of $14,033.81. The court STRIKES $24,856.35.

MESSENGER FEES AND OVERNIGHT DELIVERY FEES

Defendant seeks $10,810 for courier and messenger fees. Defendant seeks $1,842.60 for overnight delivery fees. The court may not award the cost of postage. (CCP 1033.5(b)(3).) The court has the discretion to award messenger fees and overnight delivery fees if "reasonably necessary to the conduct of the litigation." (CCP 1033.5(c)(2); Ladas, 19 Cal. App. 4th at 776 [affirming award of courier and messenger charges].) The court finds that the identified messenger fees and overnight delivery fees were reasonably was reasonably necessary to the conduct of litigation." The court STRIKES $0.

COURT DOCUMENT DOWNLOADS

Defendant seeks $1,632.17 for "Court Document (Download Fees." The court has the discretion to award court record access fees if "reasonably necessary to the conduct of the litigation." (CCP 1033.5(c)(2). The court finds that the Court Document Download Fees were

reasonably was reasonably necessary to the conduct of litigation." (Giddens Decl. ¶ 5). The court STRIKES $0.

FACT RESEARCH

Defendant seeks $35.95 for an "article re comparing standing posture & use of a sit-stand stool." The court may not award costs for research, computer or otherwise. (CCP 1021(b)(2); Ladas, 19 Cal. App. 4th at 776.) The court STRIKES $35.95.

CONCLUSION

The LWDA is responsible for the costs payable to prevailing defendant Hobby Lobby in this case that was brought on behalf of the LWDA under the PAGA.

The court STRIKES costs totaling $349,472.56. Hobby Lobby may recover costs from the LWDA totaling $124,585.24.

Dated: December 20, 2023

Evelio Grillo
Judge of the Superior Court