

THE HONORABLE ROBERT J. BRYAN

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

C. P., by and through his parents,
Patricia Pritchard and Nolle Pritchard;
and PATRICIA PRITCHARD,

Plaintiffs,

vs.

BLUE CROSS BLUE SHIELD OF
ILLINOIS,

Defendant.

Case No. 3:20-cv-06145-RJB

**DEFENDANT BLUE CROSS BLUE SHIELD
OF ILLINOIS' REPLY TO PLAINTIFFS'
RESPONSE TO SUPPLEMENTAL ORDER
ON PLAINTIFFS' MOTION FOR
CLASSWIDE RELIEF AND FOR
NOMINAL DAMAGES [DKT. 219]**

**NOTE ON MOTION CALENDAR:
JANUARY 19, 2024**

1 Defendant Blue Cross Blue Shield of Illinois (“BCBSIL”) submits this reply in response to
2 Plaintiffs’ request for an incentive award for the Named Plaintiffs in their Response to Supplemental
3 Order on Plaintiffs’ Motion for Classwide Relief and for Nominal Damages [Dkt. 219] (“Response”).
4 In their Response, Plaintiffs request that the Court “provide Named Plaintiffs with Class
5 representative service awards at an amount to be determined following briefing to occur
6 simultaneously with Plaintiffs’ anticipated motions for attorneys’ fees and costs.” Dkt. 219 at 5.

7 Plaintiffs’ request for an incentive award for the Named Plaintiffs should be denied because
8 incentive awards are impermissible unless they are (1) paid out of a common fund, or (2) agreed to
9 by a settling defendant. Neither is true here. Moreover, Plaintiffs failed to plead a claim for an
10 incentive award as required by Rule 9(g) (requiring pleading special damages). Even if this Court
11 does award Plaintiffs an incentive award, it should award no more than \$1,000 under the case law
12 Plaintiffs themselves cite.

13 **A. Incentive awards to class representatives are improper when there is no common**
14 **fund or agreed settlement of class claims.**

15 Incentive awards are discretionary payments to class representatives “for their service to the
16 class in bringing the lawsuit.” *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1163 (9th Cir.
17 2013). The Ninth Circuit has instructed district courts to “to scrutinize carefully the awards so that
18 they do not undermine the adequacy of the class representatives.” *Id.* Incentive awards that are
19 disproportionate to the class’s recovery risk a conflict of interest between a class representative’s
20 interests and the interests of the class. *Id.* (citing *Rodriguez v. W. Publ’g Corp. (Rodriguez I)*, 563
21 F.3d 948, 959 (9th Cir. 2009)). Where the class representatives “face significantly different financial
22 incentives than the rest of the class . . . we cannot say that the representatives are adequate.” *Id.* at
23 1165.

24 Typically, incentive awards are paid (1) out of a common fund, or (2) when agreed to by a
25 settling defendant. In the leading case on this issue, *Hadix v. Johnson*, 322 F.3d 895 (6th Cir. 2003),
26 the Sixth Circuit affirmed the denial of an incentive award because the parties had not agreed to such
27 an award and there was not a common fund from which to draw the award. *Id.* at 898. The court

1 explained that “incentive awards are usually viewed as extensions of the common-fund doctrine, a
2 doctrine that holds that a litigant who recovers a common fund for the benefit of persons other than
3 himself is entitled to recover some of his litigation expenses from the fund as a whole.” *Id.* (citing
4 *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (describing the common-fund doctrine)).
5 Without a common fund, however, “there is no place from which to draw an incentive award.” *Id.*
6 The Sixth Circuit concluded it was “unable to find any case where a claim for an incentive award that
7 is not authorized in a settlement agreement has been granted in the absence of a common fund.” *Id.*
8 District courts within this Circuit agree that “[i]n the absence of a common fund and the agreement
9 by the defendant to award an enhancement payment upon settlement, courts generally do not award
10 incentive payments to the class representatives *regardless of the extent of their participation in the*
11 *action.*” *In re Taco Bell Wage & Hour Actions*, 222 F. Supp. 3d 813, 849 (E.D. Cal. 2016) (emphasis
12 added) (citing *Hadix*, 322 F.3d at 899).

13 The same is true here. There is no common fund and no agreed-upon settlement. Class
14 counsel here seek to get paid via the fee-shifting provisions in 42 U.S.C. § 1988, *see* Response at 3,
15 but Section 1988 does not explicitly authorize incentive awards. “Because no statutes explicitly
16 authorize such awards, incentive awards are rare in fee-shifting cases.” 5 Newberg and Rubenstein
17 on Class Actions § 17:4 (6th ed.). Accordingly, there is no basis to issue an incentive award to the
18 Named Plaintiffs in this case.

19 **B. Plaintiffs failed to plead a claim for an incentive award.**

20 Incentive awards are special damages which Federal Rule of Civil Procedure 9(g) requires to
21 be specifically pled in order for Plaintiffs to recover them. Here, Plaintiffs did not plead any claim
22 for special damages. *See Bastidas v. Good Samaritan Hosp. LP*, No. 3:13-CV-04388-SI, 2017 WL
23 1345604, at *4–5 (N.D. Cal. Apr. 12, 2017) (“In contrast, special damages must be pled with
24 particularity because such damages are ‘unusual for the type of claim in question—[they] are not the
25 natural damages associated with such a claim.’”) (quoting *Avitia v. Metro. Club of Chicago, Inc.*, 49
26 F.3d 1219, 1226 (7th Cir. 1995)).

1 **C. Any incentive award should be no more than \$1,000 in total.**

2 Though the Named Plaintiffs are not entitled to any incentive award, if the Court exercises
 3 its discretion to issue an award it should nominal—no more than \$1,000 in total. Courts in the
 4 Ninth Circuit routinely refuse to award more than \$2,500 per named plaintiff. *See Monterrubio v.*
 5 *Best Buy Stores, L.P.*, 291 F.R.D. 443, 462–63 (E.D. Cal. 2013) (collecting cases in the Ninth Circuit
 6 and finding that incentive award of \$7,500 per named plaintiff was “inappropriate” but an award of
 7 \$2,500 per named plaintiff would be reasonable). In fact, one of the primary cases Plaintiffs cite in
 8 support of their petition for incentive award, *Dexter’s LLC v. Gruma Corp.*, No. 23-CV-212-MMA-
 9 AHG, 2023 WL 8790268 (S.D. Cal. Dec. 19, 2023), limited the incentive award for a group of eight
 10 named plaintiffs to \$5,000 in total, or \$625 per plaintiff. *Id.* at *12.

11 In this case, which involves half the number of named plaintiffs than in *Dexters LLC*, an award
 12 of more than \$1,000 would be inappropriate. This is particularly true given that two of the four named
 13 plaintiffs, S.L. and Emmett Jones, did not appear in the case until October 2023, almost three years
 14 after the litigation was filed and only two months before the Court entered its order on classwide relief
 15 and nominal damages. Though BCBSIL maintains no incentive award is appropriate here at all, any
 16 incentive award ordered should be no more than \$1,000.

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 18 Respectfully submitted this 19th day of January, 2024.

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 20 KILPATRICK TOWNSEND & STOCKTON LLP

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Counsel for Blue Cross Blue Shield of Illinois

I certify that this memorandum contains 1,025 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document, DEFENDANT BLUE CROSS BLUE SHIELD OF ILLINOIS’ REPLY TO PLAINTIFFS’ RESPONSE TO SUPPLEMENTAL ORDER ON PLAINTIFFS’ MOTION FOR CLASSWIDE RELIEF AND FOR NOMINAL DAMAGES [DKT. 219], to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court’s rules, the Clerk of the Court will send e-mail notification of such filing to the following attorneys of record:

<p>Eleanor Hamburger SIRIANNI YOUTZ SPOONEMORE HAMBURGER 3101 WESTERN AVENUE STE 350 SEATTLE, WA 98121 206-223-0303 Fax: 206-223-0246 Email: ehamburger@sylaw.com</p>	<p><input checked="" type="checkbox"/> by CM/ECF <input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by First Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery</p>
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DATED this 19th day of January, 2024.

KILPATRICK TOWNSEND & STOCKTON LLP

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