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9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF LOS ANGELES

12 RICHARD BOOTH and CHERYL FERRO,
on behalf of themselves and all others
13 similarly situated, and the general public,

14 Plaintiffs,

15 v.

16 FRITO-LAY, INC., a Delaware corporation;
ROLLING FRITO-LAY SALES, LP, a
17 Delaware limited partnership; FRITO-LAY
NORTH AMERICA, INC., a Delaware
18 corporation; FRITO-LAY SALES, INC., a
Delaware corporation; and DOES 1 through
19 50, inclusive,

20 Defendants.
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Case No. 21STCV46151

Assigned for All Purposes to the Honorable
Curtis Kin, Department 72

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND CERTIFICATION OF
SETTLEMENT CLASS; MEMORANDUM
OF POINTS AND AUTHORITIES**

*[Filed concurrently with Declaration of Shaun
Setareh in support thereof]*

Date: December 03, 2024
Time: 8:30 a.m.
Place: Department 72
Reservation ID: 718209228261

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on December 03, 2024 at 8:30 a.m., or as soon thereafter as
3 the matter may be heard in Department 72 of the above-entitled Court located at 111 North Hill
4 Street, Los Angeles, CA 90012, Plaintiffs RICHARD BOOTH, CHERYL FERRO and BRETT
5 BURKETT (“Plaintiffs”) will and do hereby move this Court for an Order:

- 6 • Preliminarily approving the Settlement Agreement;
- 7 • Certifying the Settlement Class;
- 8 • Appointing Plaintiffs as the Class Representatives;
- 9 • Appointing Setareh Law Group as Class Counsel;
- 10 • Appointing Phoenix Class Action Administration Solutions as the Settlement
11 Administrator;
- 12 • Directing that notice be mailed to the Settlement Class; and
- 13 • Scheduling a hearing date for the Motion for Final Approval of Class Action Settlement.

14 This motion is made pursuant to California Rules of Court 3.769. This motion will be based
15 upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the
16 Declaration of Shaun Setareh as well as exhibits attached thereto, the arguments of counsel, the
17 documents filed in this action and any other matters as may be properly presented on or before the
18 hearing on this motion.

19
20 DATED: September 19, 2024

SETAREH LAW GROUP

21
22 /s/ Farrah Grant

23 SHAUN SETAREH
24 THOMAS SEGAL
25 FARRAH GRANT
Attorneys for Plaintiffs
RICHARD BOOTH, CHERYL FERRO
and BRETT BURKETT

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs RICHARD BOOTH, CHERYL FERRO and BRETT BURKETT (collectively,
4 “Plaintiffs”) seek preliminary approval of a class and representative action settlement of wage and hour
5 claims and claims for civil penalties under the Private Attorneys General Act (“PAGA”) against
6 Defendants Frito Lay, Inc., Rolling Frito-Lay Sales, LP, Frito-Lay North America, Inc., and Frito-Lay Sales,
7 Inc. (“Defendants”)¹ for a Settlement Fund (“SF”) of \$3,500,000. The Settlement Class consists of
8 approximately 12,971 Class Members and 12,868 PAGA Members.

9 The Payout Fund expected to be paid to Class Members – after payment of Class Counsel fees of
10 thirty three and one-third of the SF (\$1,166,666.67) and costs of up to \$50,000, settlement administration
11 not to exceed \$50,000, Plaintiffs’ enhancement awards of \$5,000 each (\$15,000 total), and a payments to
12 the California Labor & Workforce Development Agency (“LWDA”) pursuant to the PAGA of \$187,500
13 (75% of the total PAGA Payment of \$250,000), is \$2,030,833.33. Including the 25% portion of the PAGA
14 Payment, or \$62,500, that will be paid to PAGA Members, the Payout Fund being paid to Class Members
15 is **\$2,093,333.33**. Plaintiffs have obtained a significant monetary recovery for Class Members.

16 The Settlement occurred as a result of extensive, arm’s-length negotiations by experienced counsel
17 after sufficient formal and informal written discovery and investigation into the facts with guidance of
18 David Rotman, an experienced and well-respected class action mediator. The Settlement seeks to fully
19 and finally settle and resolve all claims Plaintiffs pled or could have pled based on California or federal
20 wage-and-hour laws, for all hourly-paid and/or non-exempt employees employed by Rolling Frito-Lay Sales,
21 LP and Frito-Lay, Inc.in California at any time during the Class Period, excluding any weeks covered by the
22 settlements in *Lopez v. Frito Lay, Inc.*, Los Angeles Superior Court Case No. 21STCV01652 and *Stevens v.*
23 *PepsiCo, Inc. et al.*, Case No. 22-cv-00802 (S.D.N.Y).

24 The Settlement will result in financial benefit to the class members on terms that are fair,
25 reasonable, and adequate. Based upon their evaluation, Plaintiffs and their counsel have determined that
26

27 ¹ The Parties executed a Joint Stipulation and Settlement of Class and Representative Claims
28 (“Settlement”), attached as Exhibit A to the Declaration of Shaun Setareh filed concurrently herewith.

the Settlement is fair, reasonable, adequate and in the best interest of the Class, and they request that this Court grant preliminary approval of the Settlement.

II. THE MAJOR TERMS OF SETTLEMENT

Key provisions of the proposed settlement include the following:

- Defendants stipulate to certification of a Settlement Class for purposes of settlement only.
- Defendants will pay a maximum of **\$3,500,000**, referred to as the Settlement Fund (“SF”).
- Defendants will not oppose Class Counsel’s application for fees of 33 and 1/3 of the SF (**\$1,166,666.67**) and costs not to exceed **\$50,000**, to be paid out of the SF.
- The notice portion of the Settlement will be administered by Phoenix Class Action Administration Solutions (“Phoenix”), whose costs are not to exceed **\$50,000** to administer the Settlement.
- **\$25,000** of the SF is allocated to resolve PAGA claims, with 75%, i.e., **\$187,500**, to be paid by the Settlement Administrator to the LWDA, and 25%, i.e., **\$62,500**, to be paid to Class Members.
- Defendants will not oppose the application for Class Representative Service Awards in the amount of **\$5,000** to each of the Plaintiffs (or **\$15,000** total), to be paid out of the SF.
- After deducting Class Counsel’s attorneys’ fees and costs, enhancement payment to Plaintiffs, settlement administration costs, the payment to the LWDA, the remainder – i.e., the Payout Fund – is calculated to be at least \$2,030,833.33. Including the 25% portion of the PAGA Payment, or \$62,500, that will be paid to PAGA Members, the Payout Fund being paid to Class Members is **\$2,093,333.33**.
- Defendants represented, at the time the settlement agreement was signed, that the number of workweeks covered by the Settlement is 642,552, comprised of 323,093 workweeks worked by employees who were not DOT-regulated Route Sales Representatives or Route Sales Associates, and 319,459 workweeks worked by employees who were DOT-regulated Route Sales Representatives or Route Sales Associates. The settlement agreement allowed for a 10% escalator clause. In preparing the preliminary approval papers, Defendants represented the following updated workweek counts, which are within the 10% escalator clause the parties agreed to: the number of workweeks covered by the Settlement is 647,022, comprised of 327,525 workweeks worked by employees who were not DOT-regulated Route Sales Representatives or Route Sales Associates, and 319,497 workweeks worked by

employees who were DOT-regulated Route Sales Representatives or Route Sales Associates. In recognition of the fact that DOT-regulated employees are exempt from California overtime requirements, and California meal and rest period requirements are preempted for these employees, non-DOT regulated employees will receive twice the amount per workweek worked during the Class Period that DOT-regulated employees will receive per workweek.

- Settlement Class Members will be mailed a check so long as they do not opt out. PAGA Members will be mailed a check regardless of whether they opt out of the Settlement.
- The Settlement will release specified wage-and-hour claims for those Settlement Class Members who do not opt out of the Settlement.
- There will be language on the checks stating that by endorsing and cashing their check, individuals consent to join the FLSA settlement class and release any claims under the Fair Labor Standards Act that were pleaded or that could have been pleaded based upon the facts alleged in this action.
- After 120 days, any uncashed checks issued by the Settlement Administrator to Class Members will be sent to the California State Controller with the identity of the Class Member to whom the funds belong, to be held for the Class Member per the California Unclaimed Property Law.

(Declaration of Shaun Setareh (“Setareh Decl.”), ¶ 13, Exh. A (the “Settlement”).)

III. STATEMENT OF FACTS

A. THE PARTIES

Frito creates and distributes their snack brand products through the work of thousands of Frito-Lay employees. Frito-Lay has been in business since 1961.

Plaintiffs worked for Defendants in California as hourly employees transporting Frito-Lay merchandise. Plaintiffs allege that Defendants did not provide Plaintiffs and putative class members with uninterrupted meal breaks and that meal breaks were not scheduled. Plaintiffs further allege that Defendants sometimes required employees to work through meal breaks, or provided short or late meal breaks.

Plaintiffs assert that Defendants also did not provide Plaintiffs and putative class members with 10 minute uninterrupted rest breaks. Plaintiffs claim that Defendants’ rest break policy is deficient because rest breaks were not scheduled, and Plaintiffs were sometimes required to work through rest breaks.

1 Plaintiffs allege that Defendants failed to calculate the regular rate of pay to include premium
2 rates for work performed on holidays.

3 Plaintiffs allege that Plaintiffs were not paid all accrued vacation pay upon termination.

4 Plaintiffs additionally allege Defendants did not reimburse for all business expenses, including
5 no-slip shows, black or brown pants, the use of personal cell phones to communicate with management
6 regarding scheduling and work tasks, and use of personal vehicles to drive merchandise from store to
7 store.

8 Finally, Plaintiffs allege that because of these discrepancies in hours worked as reported,
9 Defendants failed to provide accurate wage statements and also failed to timely pay all wages owed to
10 them and other former employees all wages owed upon separation of employment.

11 Defendants point out that Route Sales Representatives (“RSRs”) and Route Sales Associates
12 (“RSA”) employees incurred much less in potential damages, as they are subject to the Federal Motor
13 Carrier Safety Administration’s (“FMCSA”) hours of service regulations. A transportation worker does
14 not need to physically cross state lines in order to engage in the movement of goods in interstate commerce.
15 *See Nieto v. Fresno Beverage Co.*, 33 Cal. App. 5th 274, 282 (2019). Thus, even if RSRs and RSAs
16 transported out-of-state goods *within* the state of California, they would be engaged in interstate
17 commerce. Additionally, because all of Defendants’ RSRs/RSAs are DOT regulated and exclusively
18 operate property-carrying commercial motor vehicle with a gross vehicle weight rating of over 10,001
19 pounds, they are subject to the Federal Motor Carrier Safety Administration’s (“FMCSA”) hours of service
20 regulations. As such, any meal and rest period claims as to Defendants’ RSRs/RSAs are covered by the
21 FMCSA’s preemption determination.

22 Similarly, Defendants assert that RSRs/RSAs are exempt from the coverage of California’s
23 overtime laws. The California Industrial Welfare Commission (“IWC”) has issued a number of Wage
24 Orders governing specific industries. These Wage Orders “are to be accorded the same dignity as statutes”
25 and may provide for exemptions from California’s statutory overtime law. *Brinker Rest. Corp. v. Superior*
26 *Court*, 53 Cal. 4th 1004, 1027 (2012); *Collins v. Overnite Transp. Co.*, 105 Cal. App. 4th 171, 177-181
27 (2003); Cal. Lab Code § 515. IWC Wage Order 9 regulates the wages, hours and working conditions in
28 the transportation industry, and it includes an exemption from California’s overtime pay requirements for

1 “employees whose hours of service are regulated by . . . the United States Department of Transportation
2 Code of Federal Regulations, Title 49, Sections 395.1 to 395.13.” Cal. Code Regs. tit. 8, § 11090(3)(F)(1).
3 Title 49, Sections 395.1 to 395.13 of the United States Department of Transportation Code of Federal
4 Regulations refers to the FMCSA’s hours of service regulations. 49 U.S.C. §§ 113(f), 31136.

5 Defendants deny that they engage in any wrongful conduct as alleged in the lawsuit. Defendants
6 assert that they had compliant break policies and provided break premium pay on instances when there
7 were break violations. Defendants further assert that they complied with the law when calculating the
8 regular rate of pay and providing vacation pay. Defendants assert that they provided employees who
9 needed cell phones for their work with company cell phones. RSRs/RSAs received company-issued
10 cell phones during their first week of onboarding. Furthermore, Defendants argue that an arbitration
11 agreement signed by employees protects it from class liability in this matter.

12 **B. PROCEDURAL HISTORY**

13 Plaintiff Booth filed this lawsuit against Defendants in the Superior Court for the State of
14 California, County of Los Angeles on December 17, 2021. On February 9, 2023, the First Amended
15 Complaint was filed adding Plaintiff Ferro as a named Plaintiff. On September 16, 2024, the parties
16 filed a joint stipulation to file a Second Amended Complaint (“The Operative Complaint”) adding
17 named Plaintiff Burkett and alleging causes of action for violation of the portions of the California
18 Code relating to: providing meal periods, providing rest breaks, paying minimum wages for all hours
19 worked, paying overtime wages, paying vacation wages, furnishing accurate itemized wage
20 statements, reimbursements for business expenses, unlawful pay deductions, record-keeping
21 violations, and timely paying all wages during employment and upon the conclusion of employment.
22 The Operative Complaint also alleges derivative claims for restitution under the California Business
23 and Professions Code section 17200 et seq. (the “Unfair Competition Law” or “UCL”), and derivative
24 claims for civil penalties under the Labor Code Private Attorneys General Act of 2004 (“PAGA”).
25 The Operative Complaint seeks to pursue Plaintiffs’ Labor Code, UCL, and PAGA claims on behalf
26 all persons employed by Defendants as hourly-paid and/or non-exempt employees at any time within
27 the applicable statute of limitations. (Settlement III; Setareh Decl. ¶ 7.)
28

1 **C. INVESTIGATION AND DISCOVERY**

2 The Parties have conducted an extensive investigation of the facts and the law, including, *inter*
3 *alia*, Defendants providing Named Plaintiffs with all employment policies and procedures for
4 Plaintiffs and the putative class members, and Defendants providing Named Plaintiffs with a random
5 sample of time and pay records for approximately 800 putative class members. Overall, Defendants
6 produced over 76,000 pages of documents in this matter. Counsel for the Parties further investigated
7 the applicable law as applied to the facts discovered regarding the alleged claims of Plaintiffs and
8 potential defenses thereto and the damages claimed by Plaintiffs. (Settlement, ¶ IV.)

9 Plaintiffs propounded Requests for Production of Documents and both Special and Form
10 Interrogatories upon Defendants as to its policies, procedures, and practices with respect to the alleged
11 wage and hour claims during the Class Period, as to the identification of and time and payroll records for
12 the putative class members, and as to Plaintiffs. (Setareh Decl., ¶ 10.)

13 Plaintiffs hired an expert to hire analyze the produced data with respect to potential damages and
14 penalties in preparation for mediation. (*Id.* ¶ 11.) From the data and other documents obtained from
15 Defendants pertaining to the Class and Defendants’ policies, Plaintiffs’ expert was able to analyze the data
16 sampling, and Plaintiffs were then able to thoroughly assess the merits of each claim. (*Id.*)

17 Defendants argue that an arbitration agreement signed by employees protects it from class liability.
18 (*Id.*)

19 **D. SETTLEMENT NEGOTIATIONS AND SETTLEMENT**

20 The Parties mediated the case before mediator David A. Rotman on July 26, 2023. The Parties could
21 not reach an agreement at the mediation and attended a second mediation before Mr. Rotman on October 19,
22 2023. Following the mediation sessions, the parties engaged over a month of additional settlement discussions.
23 Ultimately, the parties reached an agreement to settle all claims on a class-wide basis as well as the PAGA
24 claims for aggrieved employees. (Setareh Decl., ¶ 11.) Each of the Parties, represented by its respective
25 counsel, recognized the risk of an adverse result in the Action. (*Id.*) The parties agreed to settle the Action
26 and resolve all claims Plaintiffs pled or could have pled based on California or federal wage-and-hour
27 laws, for all hourly-paid and/or non-exempt employees employed by Rolling Frito-Lay Sales, LP and Frito-
28 Lay, Inc.in California at any time during the Class Period, excluding any weeks covered by the settlements in

1 *Lopez v. Frito Lay, Inc.*, Los Angeles Superior Court Case No. 21STCV01652 and *Stevens v. PepsiCo, Inc. et*
2 *al.*, Case No. 22-cv-00802 (S.D.N.Y). (Settlement, ¶XB)

3 **E. REASONABLENESS OF THE SETTLEMENT**

4 Plaintiffs' Counsel believe that the Settlement is in the best interest of the class members based on
5 their investigation and discovery, their detailed understanding of the issues raised, and the outcome of
6 extensive settlement negotiations. (Setareh Decl., ¶¶ 7-11; Settlement, ¶ VII.) Plaintiffs' counsel balanced
7 the Settlement against the probable outcome of class certification, liability, the range of recovery at trial,
8 the risks of losing class certification, losing at trial, or not recovering as much as provided by the proposed
9 Settlement, as well as the difficulties and complexity of the litigation, the lengthy process of litigating to
10 judgment, and the various possible delays and appeals. (*Id.*) Although Defendants contend they have no
11 liability in this case, Plaintiffs' Counsel believe that the Settlement represents a fair, reasonable, and
12 adequate settlement given the respective risks associated with the Action. (*Id.*)

13 **IV. DESCRIPTION OF THE SETTLEMENT**

14 **A. CONTINGENT NATURE OF THE SETTLEMENT**

15 In the event the Settlement does not become effective by the terms of this Stipulation or for
16 any other reason, any orders entered pursuant to this Stipulation shall be vacated and rendered null
17 and void, and the Parties shall revert to their respective positions existing on the date of their second
18 mediation on October 19, 2023. (Settlement, ¶ II.)

19 **B. APPOINTMENT OF SETTLEMENT CLASS COUNSEL**

20 The Parties have stipulated to the appointment of Setareh Law Group as Settlement Class Counsel
21 ("Class Counsel"). (*Id.*, ¶ I.E.)

22 **C. APPOINTMENT OF SETTLEMENT ADMINISTRATOR**

23 The Parties have stipulated to the appointment of Phoenix to administer the Settlement and to
24 provide notice to the Class Members (the "Settlement Administrator"). The Settlement allows for up to
25 \$50,000 for settlement administration costs. \$50,000 is a reasonable amount for a settlement with a class
26 of this size. (Setareh Decl., ¶ 16.)

27 //

28 //

1 **D. DESCRIPTION OF THE SETTLEMENT CLASS**

2 For settlement purposes only, the Parties agree to the certification of a class pursuant to
3 California *Code of Civil Procedure* § 382 defined as: all hourly-paid and/or non-exempt employees
4 employed by Rolling Frito-Lay Sales, LP and Frito-Lay, Inc. in California at any time during the Class
5 Period (September 7, 2020, and ending on October 17, 2023), excluding any weeks covered by the
6 settlements in *Lopez v. Frito Lay, Inc.*, Los Angeles Superior Court Case No. 21STCV01652 and
7 *Stevens v. PepsiCo, Inc. et al.*, Case No. 22-cv-00802 (S.D.N.Y). (Settlement, ¶ I C, I K.) Defendants
8 estimates that the Settlement Class consists of approximately 12,971 Class Members and 12,868 PAGA
9 Members. (Setareh Decl. ¶ 18.) Defendants represented, at the time the settlement agreement was
10 executed, that the number of workweeks during the Class Period is 642,552. In the event the number
11 exceeds this by more than 10% the Settlement Amount will be increased proportionally i.e. by 1% if
12 the overage is 11%, by 2% if the overage is 12% etc. (Settlement, ¶ X E.) In preparing these preliminary
13 approval papers, Defendants represented that the number of workweeks during the Class Period is 647,022,
14 which is within the 10% escalator clause the Parties agreed to. (Setareh Decl. ¶ 20.)

15 **E. SCOPE OF THE RELEASE**

16 1. Release by Participating Class Members

17 The settlement provides the following release for Class Members:

18 “Released Claims” means any and all claims, demands, rights, liabilities, and causes of
19 action during the Class Period, of every nature and description whatsoever, known or
20 unknown, asserted or that might have been asserted, whether in contract, or for violation
21 of any California or federal statute, rule, or regulation, based on California or federal wage-
22 and-hour laws, whether for economic damages, restitution, penalties, or liquidated
23 damages, arising out of, relating to, or in connection with the Claims pleaded or that could
24 have been pleaded based upon the facts set forth in the Operative Complaint or any other
25 pleading filed in the Action, including but not limited to any and all claims for unpaid
26 minimum wage, straight time, or overtime wages (including on an off-the-clock, rounding,
27 calculation of regular rates or other theory); timing of payment (both during and at the end
28 of employment); meal and rest period claims (including claims regarding whether any meal
and rest periods were provided, whether any meal and rest period penalties were paid, and
how any meal or rest period penalties were calculated); unpaid expense reimbursements;
record-keeping violations; sick time violations, vacation pay or other paid time off
violations; claims for unlawful pay deductions; and any and all associated penalties and
damages, including PAGA penalties; and claims for alleged unlawful, unfair, and/or
fraudulent business practices under California Business and Professions Code section
17200 et seq. based on the alleged Labor Code violations; alleged violation of the Labor
Code Private Attorneys General Act of 2004 (“PAGA”) based on the alleged Labor Code
violations; and interest, attorneys' fees and/or costs, at any time during the Class Period,
excluding any weeks covered by the settlements in *Lopez v. Frito Lay, Inc.*, Los Angeles

Superior Court Case No. 21STCV01652 and *Stevens v. PepsiCo, Inc. et al.*, Case No. 22-cv-00802 (S.D.N.Y).

The Parties agree that this release shall have full res judicata effect as to FLSA claims for all Class Members as described in *Rangel v. PLS Check Cashers of California, Inc.*, 899 F.3d 1106 (9th Cir. 2018), regardless of whether that Class Member endorses and cashes his or her settlement check. However, in addition, the Settlement Administrator shall include the following language on each settlement check issued to Class Members: “By endorsing and cashing this check, I consent to join the FLSA settlement class and release any claims under the Fair Labor Standards Act that were pleaded or that could have been pleaded based upon the facts alleged in this action.” Copies of these signed endorsements shall be provided to Defendants and shall be filed with the Court as additional proof of consent, with confidential information redacted, if filing the consents is requested by the Court.

The Released Claims expressly do not include claims for unemployment compensation, workers’ compensation, discrimination, or retaliation. Specifically **and only with respect to the Released Claims**, the Class Members stipulate and agree that, upon the Effective Date, the Class Members shall be deemed to have, and by operation of the Final Judgment shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law, which Section provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

The Class Members may hereafter discover facts in addition to or different from those they now know or believe to be true specifically with respect to the subject matter of the Released Claims, but upon the Effective Date, shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever settled and released any and all of the Released Claims, whether known or unknown, suspected or unsuspected, contingent or non-contingent, which now exist, or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct that is intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts.

The Class Members may not sue or otherwise make a claim against any of the Released Parties for the Released Claims.

(*Id.*, ¶ X B.)

F. RELEASE AS TO NAMED PLAINTIFFS

The settlement provides the following release for Named Plaintiffs:

Named Plaintiffs, as of the Effective Date, make the additional following general release of all claims, known or unknown. Named Plaintiffs fully release and discharge the Released Parties from all claims, demands, rights, liabilities, and causes of action of every nature and description whatsoever, known or unknown, asserted or that might have been asserted, whether in tort, contract, or for violation of any state or federal statute, rule or regulation arising out of, relating to, or in connection with any act or omission by or on the part of any of the Released Parties committed or omitted prior to the execution hereof relating to his employment with or resignation from any of the Released Parties. This includes any unknown claims Named Plaintiffs do not know or suspect to exist in their favor, which, if known by them, may have affected their settlement with, and release of, the Released Parties or might have affected their decision not to object to the settlement.

With respect to this general release, Named Plaintiffs stipulate and agree that, upon

the Effective Date, Named Plaintiffs shall be deemed to have, and by operation of the Final Judgment shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law, which provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

Named Plaintiffs may hereafter discover facts in addition to or different from those Named Plaintiffs now knows or believes to be true with respect to the subject matter of the General Release, but upon the Effective Date, shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever settled and released any and all of the claims released pursuant to the General Release, whether known or unknown, suspected or unsuspected, contingent or non-contingent, which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct that is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. Named Plaintiffs will no longer be aggrieved employees for purposes of PAGA once the Settlement is approved and Defendants complete their duties under the Settlement Agreement. Named Plaintiffs will refrain from filing any litigation against Defendants while the Settlement is pending.

(*Id.*, ¶ X C.)

1. Settlement Amount And Allocation Of Settlement Monies

The Settlement provides for a SF of **\$3,500,000**, which represents the amount payable in this Settlement by Defendants, and which includes but is not limited to, all settlement payments to the Class Members, all attorneys' fees, all litigation costs, all settlement administration expenses, all payments to the LWDA, and the enhancement awards to Plaintiffs. (*Id.*, ¶ X E.) Any amounts allocated to Named Plaintiffs' Service Award, Claims Administration Costs, Attorneys' Fees, Litigation Costs, and PAGA penalties not awarded by the Court shall remain the property of Defendants. (*Id.*) The funds of checks uncashed more than 120 days after issue will be transferred by Defendants to the California State Controller with the identity of the Class Member to whom the funds belong, to be held for the Class Member per the California Unclaimed Property Law. The money paid to the California State Controller will remain the Class Member's property. This allows Class Members who did not cash their checks to collect their Individual Settlement Payment at any time in the future. Therefore, there will be no unpaid residue or unclaimed or abandoned Class Member fund and the California Code of Civil Procedure Section 384 shall not apply. (Settlement ¶ X E1d.)

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1 **G. CLASS MEMBER SETTLEMENT PAYMENT FORMULA**

2 The Payout Fund will be distributed on a pro-rata basis to Class Members based on a per-
3 workweek basis. Class Members will receive their pro-rata share based on how many workweeks they
4 worked during the Class Period excluding any weeks covered by the settlements in *Lopez v. Frito Lay,*
5 *Inc.*, Los Angeles Superior Court Case No. 21STCV01652 and *Stevens v. PepsiCo, Inc. et al.*, Case
6 No. 22-cv-00802 (S.D.N.Y) (“Workweek Totals”). The number of workweeks for each Plaintiff will
7 be determined by adding all the calendar days within the inclusive dates of employment and dividing
8 that number by seven. Any partial workweek will be expressed as a percentage of a full workweek.
9 This shall be considered each Plaintiff’s “Workweek Figure.” Class Members’ Gross Settlement
10 Amounts will be calculated by dividing the Payout Fund by the total of all Plaintiffs’ Workweek
11 Figures to arrive at a Per-Workweek Amount, and then multiplying this amount by each Class
12 Member’s Workweek Figure. Defendants represented, at the time the settlement agreement was
13 executed, that the number of workweeks covered by the Settlement is 642,552, comprised of 323,093
14 workweeks worked by employees who were not DOT-regulated Route Sales Representatives or Route
15 Sales Associates, and 319,459 workweeks worked by employees who were DOT-regulated Route
16 Sales Representatives or Route Sales Associates. The settlement agreement allowed for a 10%
17 escalator clause. In preparing the preliminary approval papers, Defendants represented the following
18 updated workweek counts, which are within the 10% escalator clause the parties agreed to: the number
19 of workweeks covered by the Settlement is 647,022, comprised of 327,525 workweeks worked by
20 employees who were not DOT-regulated Route Sales Representatives or Route Sales Associates, and
21 319,497 workweeks worked by employees who were DOT-regulated Route Sales Representatives or
22 Route Sales Associates. (Setareh Decl. ¶ 20.) In recognition of the fact that DOT-regulated employees
23 are exempt from California overtime requirements, and California meal and rest period requirements
24 are preempted for these employees, non-DOT regulated employees will receive twice the amount per
25 workweek worked during the Class Period that DOT-regulated employees will receive per workweek.

26 For example, a Class Member who worked 360 days (180 days as a Merchandiser, for example,
27 and 180 days as a Route Sales Representation) would have a Workweek Figure of 52 weeks. If the
28 Payout Fund was \$2,085,833.33, and the total workweeks for all Plaintiffs was 647,022, this would

1 result in a \$3.22 Per-Workweek Amount for the workweeks employed as a Merchandiser, and a \$1.61
2 Per-Workweek Amount for the workweeks employed as a Route Sales Representative. Then, the
3 above Class Member would be eligible for \$3.22 for 26 workweeks, and \$1.61 for the remaining 26
4 workweeks, or \$125.58 total. This would be the Class Member's Gross Settlement Amount.
5 (Settlement, ¶ X E 2b(1)).

6 For withholding tax characterization purposes and payment of taxes, the Payout Fund shall be
7 deemed and is allocated by the Parties as follows: (1) 20% as W-2 wages; (2) 80% as penalties and
8 interest. (Settlement, ¶ X E 2b).

9 The Parties agree to allocate **\$250,000** of the Settlement Fund for settlement of claims for civil
10 penalties under PAGA, Labor Code § 2699, *et seq.* (*Id.*, ¶ X E(f).) Pursuant to Labor Code section 2699(i),
11 75% of that amount (**\$187,500**) will be paid to the LWDA as the LWDA Payment. (*Id.*) The remaining
12 25% (**\$62,500**) will be paid to the Class Members as an additional component of their Settlement
13 Awards (as defined herein) and will be part of the Settlement Fund. (*Id.*)

14 The Claims Administrator shall distribute the Individual Settlement Payments within 30 days after
15 the Effective Date. (*Id.*, ¶ X E 2.)

16 **H. NOTICE TO CLASS MEMBERS OF SETTLEMENT**

17 The proposed Notice of Settlement ("Notice," "Class Notice," or "Notice Packet") (attached as
18 Exhibit 1 to the Settlement) provides Class Members with all required information so that each member
19 may make an informed decision regarding his or her participation in the Settlement. (*Id.*, ¶ X E2A.) All
20 Class Members will receive a Notice. (*Id.* X B 2.) Each Notice will list: (1) information regarding the
21 nature of the Action, (2) a summary of the substance of the Settlement, (3) the Class definition, (4) the
22 method for calculating Individual Settlement Payments, (5) the deadlines by which the Class Member
23 must postmark a Request for Exclusion or file an objection to the Settlement, (6) a description of the claims
24 to be released, (7) the number of Workweeks, and (8) estimated individual payment. (*Id.*)

25 Defendants will provide the Claims Administrator a confidential database with, for each Class
26 Member, the full name; mailing address; Social Security number; the total number of workweeks worked
27 by each Class Member during the Class Period, telephone number and mailing address within 45 days of
28 the Court granting preliminary approval of the Settlement. (*Id.*, ¶ X B4a.) Within 45 days after preliminary

1 approval, the Administrator will run the same through the NCOA database to obtain current address
2 information. (*Id.*, ¶XB4c.) The Claims Administrator will prepare for each Class Member to be sent by
3 first-class mail a Notice Packet. (*Id.*)

4 Any Notices returned to the Settlement Administrator as non-delivered before the Notice
5 Deadline Date specified below shall be sent to the forwarding address affixed thereto within 3
6 business days of receiving notice that a Notice was undeliverable. If no forwarding address is
7 provided, then the Settlement Administrator shall attempt to determine a correct address by using a
8 single computer or other search using the social security number of the individual involved and shall
9 forward the Notice to the correct address. (*Id.*)

10 Class Members have 30 days to object or opt out of the settlement. (*Id.* X B5ab).

11 Any Class Member wishing to opt-out from the Settlement Agreement must mail the settlement
12 administrator a written request for exclusion on or before the Objection/Exclusion Deadline Date, i.e. 30 days
13 after the date the Notice is first mailed. Such written request for exclusion must contain the name, address,
14 telephone number, and last four digits of the social security number of the person requesting exclusion, and the
15 location and dates of his or her employment by Defendants.

16 Any Plaintiff who submits a timely and valid request for exclusion from the Class will not be entitled
17 to any recovery under the Settlement and will not be bound by the Settlement or have any right to object, appeal,
18 or comment thereon. Plaintiffs who fail to submit a valid and timely request for exclusion on or before the
19 Objection/Exclusion Deadline Date shall become Class Members and shall be bound by all terms of the
20 Settlement and any Final Judgment entered in the Class Action if the Settlement is approved by the Court. (*Id.*)
21 The Parties agree not to encourage or discourage any Class Members to exclude themselves or opt-out of
22 the Settlement Agreement. (*Id.* XB6).

23 Class Members who wish to object to the Settlement must file with the Court and serve on counsel for
24 the Parties a written statement objecting to the Settlement on or before the Objection/Exclusion Deadline Date.
25 Such written objection must contain the name, address, telephone number, and last four digits of the social
26 security number of the person objecting; the location and dates of his or her employment by Defendants;
27 whether the objector has retained an attorney; and, if the objector has retained an attorney, the name of the firm,
28 name of the attorney, address, and telephone number. (*Id.* X B5a).

Any Class Member who submits a timely and valid objection will still be entitled to his or her Individual Settlement Award as a Class Member, and will be bound by the Settlement if the Court approves the Settlement. If an individual submits both a timely objection and request for exclusion from the settlement, the objection will not be considered but the request for exclusion will be accepted. (*Id.*).

I. NOTICE AND PAGA PAYMENT TO THE LWDA

The Parties agree to allocate **\$250,000** of the SF for settlement of claims for civil penalties under PAGA, Labor Code § 2699, *et seq.* (*Id.*, ¶ X E f.) Pursuant to Labor Code section 2699(i), 75% of that amount (**\$187,500**) will be paid to the LWDA as the LWDA Payment. (*Id.*) The remaining 25% (**\$62,500**), will be paid to the Class Members as an additional component of their Settlement Awards (as defined herein) and will be part of the Settlement Fund. (*Id.*) In connection with Settlement approval, Class Counsel must notify the LWDA of the Settlement’s existence. Class Counsel has provided a copy of the Settlement and this Motion for Preliminary Approval to the LWDA in accordance with the requirements specified in Labor Code sections 2698-2699.5. (Setareh Decl., ¶ 17.)

V. ARGUMENT

A. THE COURT SHOULD CONDITIONALLY CERTIFY THE SETTLEMENT CLASS BECAUSE IT MEETS ALL THE REQUIREMENTS FOR CLASS CERTIFICATION FOR SETTLEMENT PURPOSES ONLY UNDER CODE OF CIVIL PROCEDURE SECTION 382

Under CCP § 382, class certification is warranted so long as there is “a numerous and ascertainable class with a well-defined community of interest among its members” and a “class action proceeding is superior to other means for a fair and efficient adjudication of the litigation.” *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332. “The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’” *Id.* at 326 (quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440). Indeed, the certification question simply asks whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. *E.g., Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1298.

“[I]t is also well established that trial courts should use different standards to determine the

propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases.” *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 859 (citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n.19 (“*Dunk*”).) As the court noted in *Dunk*, although certification requirements are intended “to protect the interests of the non-representative class members,” that concern is “protected by the trial court’s fairness review of the settlement.” *Id.*

Indeed, numerous courts have certified settlement classes. For example, *In re Drexel Burnham Lambert Group, Inc.* (2d Cir. 1992) 960 F.2d 285, *cert. dismissed* (1993) 506 U.S. 1088, 122 L. Ed. 497, 113 S. Ct 1070, the parties entered into a tentative settlement before a class was certified. After a hearing, the “district court issued an order certifying the class and approving the settlement agreement.” *Id.* at 289; *see also, Alaniz v. California Processors, Inc.* (N.D. Cal. 1976) 73 F.R.D. 269, 278 (“the use of the tentative settlement class procedure was appropriate in this case”), *aff’d*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978). Certification of a settlement class is a regular feature of class action litigation and an approved procedure which ought to be followed in this case. *See Newberg on Class Actions* (3d ed. 1991) § 11.27, pp. 11-56; and *Manual for Complex Litigation*, 2d (1993) § 30.45.

As shown below, this Settlement and the Settlement Class easily meet all of the requirements for certification for settlement purposes.

1. Objectively Ascertainable and Sufficiently Numerous Class

A class is ascertainable when it may be readily identified via an objectively stated definition without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932. No set number of class members is required to maintain a class action. *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030. The California Supreme Court has upheld a class of as few as ten members. *Bowles v. Super. Ct. (Nickel, Jr.)* (1955) 44 Cal.2d 574, 577-81. Here, the Settlement Class is made up of approximately 12,971 Class Members individuals, all of whom may be readily ascertained by reference to Defendants’ personnel records. Setareh Decl. ¶ 19. Accordingly, the Settlement Class is not only ascertainable but also sufficiently numerous.

2. Predominance of Common Questions

1 A question of law or fact is common to the members of a class if it may be resolved through
2 common proof. *See Jaimez, supra*, 181 Cal.App.4th at 1305. As for predominance, it “is a comparative
3 concept, and ‘the necessity for class members to individually establish eligibility and damages does not
4 mean individual fact questions predominate.’” *Sav-on, supra*, 34 Cal.4th at 334 (*quoting Reyes v. San*
5 *Diego Cty. Bd. of Supervisors* (1979) 196 Cal.App.3d 1263, 1278). Thus, “[i]ndividual issues do not render
6 class certification inappropriate so long as such issues may effectively be managed.” *Id.* This is especially
7 so where the key difference between class members solely concerns their respective amounts of damages.
8 *See id.* As a general rule, if a defendant’s liability can be determined by facts common to all members, a
9 class will be certified even if the members must individually prove their damages. *See Hicks v. Kaufman*
10 *& Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.

11 In this case, the Settlement Class meets these requirements. Plaintiffs submit that Defendants’
12 liability arises from the same set of facts and legal questions that apply to and are answered equally as to
13 all Class Members. Plaintiffs allege Class Members were subjected to a common practice in that
14 Defendants: failed to, *inter alia*, provide meal periods and rest periods, including premiums, failed to
15 reimburse for business expenses, failed to provide all vacation pay, failed to provide compliant wage
16 statements and failed to pay all wages due upon separation of employment.

17 The Court accordingly should certify the Settlement Class for purposes of settlement under Code
18 of Civil Procedure section 382 and Rule of Court 3.769(c).

19 3. Typicality of Plaintiffs’ Claims

20 Typicality “requires a showing that the class representative has claims or defenses typical of the
21 class.” *See, e.g., Fireside Bank v. Super. Ct. (Gonzalez)* (2007) 40 Cal.4th 1069, 1090. This focuses on
22 “the nature of the claim or defense of the class representative, and not to the specific facts from which it
23 arose or the relief sought.” *Hanon v. Dataproducts Corp.* (9th Cir. 1992) 976 F.2d 497, 508 (internal
24 citations omitted). “The test of typicality ‘is whether other members have the same or similar injury,
25 whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class
26 members have been injured by the same course of conduct.’” *Id.*

27 Under these standards, Plaintiffs’ claims are typical of those of the class members. Like Class
28 Members, Plaintiffs were hourly non-exempt employees of Defendants in California. (Setareh Decl., ¶

12.) Plaintiffs allege they were not paid for all hours worked, were not provided with compliant meal periods and rest breaks, and did not receive accurate wage statements. (*Id.*) See *Classen, supra*, 145 Cal. App. 3d at 46 (representative plaintiffs need not have all claims or identical interests with class members; they need only have claims that are “typical of the class”); see also *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, 1347 (representative plaintiffs need not suffer all of the exact same damages as every class member). Accordingly, Plaintiffs pursue claims typical of the class they seek to represent.

4. Adequacy of Plaintiffs and Class Counsel to Represent the Class

The adequacy requirement is met where the named plaintiffs are represented by counsel qualified to conduct the litigation and the plaintiffs’ interest in the litigation is not antagonistic to the classes interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450-51. In other words, where the named plaintiffs have adequate counsel, they may represent the entire class absent any disabling conflicts of interest that might hinder the named plaintiffs’ ability to represent the class. *Id.*

In this case, Plaintiffs have no conflict of interest with absent Settlement Class Members and have agreed to place the classes interests above their own. (Setareh Decl., ¶ 12.) See *Global Minerals, supra*, 113 Cal.App.4th at 851 (the inquiry into the adequacy of a class representative is intended to uncover any conflicts between the plaintiff and the class he or she seeks to represent). Setareh Law Group is experienced in wage and hour class action litigation and has no conflicts of interest with absent Class Members. (Setareh Decl., ¶¶ 4-6, 12.) Thus, this Court should appoint Plaintiffs as Class Representatives for the Settlement Class and appoint their counsel as Class Counsel.

B. STANDARD FOR GRANTING PRELIMINARY SETTLEMENT APPROVAL

Cases brought as class actions may only be settled upon court approval and then only after a determination that the settlement is fair, adequate, and reasonable is made. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. Courts have broad discretion to make this determination and consider factors, such as the strength of plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, and the reaction of the class members to the proposed settlement. *Id.*; *Dunk*, 48 Cal.App.4th at 1800-01; *Reed*

1 v. *United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, 336. “[A] presumption of fairness exists
2 where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are
3 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation;
4 and (4) the percentage of objectors is small.” *Dunk, supra*, at 1802; *see also Chaves v. Netflix, Inc.* (2008)
5 162 Cal.App.4th 43, 52.

6 California Rule of Court 3.769 sets forth the procedures for settlement of class actions in
7 California. A two-step process is required. First, the court preliminarily approves the settlement and the
8 class members are notified as directed by the court. Cal. Rule of Court 3.769(c)-(f). “The notice must
9 contain an explanation of the proposed settlement and the procedures for class members to follow in filing
10 written objections to it and in arranging to appear at the settlement hearing and state any objections to the
11 proposed settlement.” Cal. Rule of Court 3.769(f). Second, the court conducts a final approval hearing to
12 inquire into the fairness of the proposed settlement. Cal. Rule of Court 3.769(g). If the court approves
13 the settlement, a judgment is entered with provision for continued jurisdiction for the enforcement of the
14 judgment. Cal. Rule of Court 3.769(h).

15 In deciding whether to grant preliminary approval, courts are to give “due regard” to “what is
16 otherwise a private consensual agreement between the parties.” *Sutter Health Uninsured Pricing Cases*
17 (2009) 171 Cal.App.4th 495, 505. When approving a settlement, “the court need not ‘reach any ultimate
18 conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the
19 very uncertainty of the outcome in litigation and avoidance of wasteful and expensive litigation that induce
20 consensual settlements.’” *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268.² The court’s
21 inquiry must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the
22 product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement,
23 taken as a whole, is fair, reasonable and adequate to all concerned. *Id.*

24
25
26 ² The California Supreme Court has suggested that trial courts, in the absence of controlling California
27 authority, utilize class action procedures of the Federal Rules of Civil Procedure. *See LaSala v.*
28 *American Sav. & Loan Ass’n* (1971) 5 Cal.3d 864, 872. Thus, the Court may look to federal authorities
in ruling on this motion.

1 **C. THIS COURT SHOULD GRANT THIS MOTION AND ISSUE AN ORDER**
2 **PRELIMINARILY APPROVING THE SETTLEMENT BECAUSE IT IS**
3 **FAIR, ADEQUATE, AND REASONABLE**

4
5 1. Settlement Resulted From Serious, Informed, Non-Collusive Negotiations

6 The Parties reached this settlement only after they conducted extensive and protracted arm's-length
7 negotiations through an experienced and knowledgeable mediator, David Rotman. (Setareh Decl., ¶ 11.)
8 The Parties have not engaged in any collusion or improper negotiations. Plaintiffs and Defendants do not
9 have any agreements regarding the proposed Settlement that are not reflected in the Settlement.

10 2. Sufficient Fact Investigation and Discovery Has Occurred to Assess the
11 Fairness of the Settlement

12 As discussed above, Plaintiffs' counsel engaged in extensive investigation and informal written
13 discovery that has allowed them to evaluate the merits of the Class Members' claims and Defendants'
14 defenses as well as the range of possible recoverable damages. (*Id.*, ¶¶ 8-11.) Based on Plaintiffs'
15 counsel's investigation and discovery, Plaintiffs and their counsel are of the opinion that this settlement is
16 fair, reasonable, adequate, and in the Class Members' best interest. (*Id.*) Plaintiffs' counsel's investigation
17 and discovery are more than sufficient to warrant their and Plaintiffs' decision to enter into the Settlement.
18 (*Id.*)

19 The Parties have conducted an extensive investigation of the facts and the law, including, *inter*
20 *alia*, Defendants providing Named Plaintiffs with all employment policies and procedures for
21 Plaintiffs and the putative class members, and Defendants providing Named Plaintiffs with a random
22 sample of time and pay records for approximately 800 putative class members. Overall, Defendants
23 produced over 76,000 pages of documents in this matter. Counsel for the Parties further investigated
24 the applicable law as applied to the facts discovered regarding the alleged claims of Plaintiffs and
25 potential defenses thereto and the damages claimed by Plaintiffs. (Settlement, ¶ IV.)

26 Plaintiffs propounded Requests for Production of Documents and both Special and Form
27 Interrogatories upon Defendants as to its policies, procedures, and practices with respect to the alleged
28 wage and hour claims during the Class Period, as to the identification of and time and payroll records

1 for the putative class members, and as to Plaintiffs. (Setareh Decl., ¶ 9.)

2 Plaintiffs hired an expert to hire analyze the produced data with respect to potential damages and
3 penalties in preparation for mediation. (*Id.* ¶ 10.) From the data and other documents obtained from
4 Defendants pertaining to the Class and Defendants’ policies, Plaintiffs’ expert was able to analyze the data
5 sampling, and Plaintiffs were then able to thoroughly assess the merits of each claim. (*Id.*)

6 3. Plaintiffs’ Counsel Are Experienced Class Action and Employment Attorneys
7 and the Amount of Attorneys’ Fees Sought Are Appropriate

8 As detailed more completely in the declarations of Shaun Setareh of the Setareh Law Group,
9 Plaintiffs’ counsel are particularly experienced in employment law and wage and hour class actions.
10 (Setareh Decl., ¶¶ 4-6, 15.)

11 Plaintiffs’ counsel believe that the 33¹/₃% of the SF that they will seek in attorneys’ fees are
12 appropriate in this matter. (Setareh Decl., ¶ 15.) The Court of Appeal has recognized that one factor
13 supporting a lodestar multiplier is comparison to the fees typically earned in contingency fee litigation
14 where the plaintiff’s attorney is awarded fees based on a percentage of the award recovered for the client:
15 “to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in
16 comparable litigation.” *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 50. As the Court
17 knows, contingency fees typically range from one-third to forty percent. Indeed, Setareh Law Group has
18 been awarded 33¹/₃% common-fund attorneys’ fees in numerous class actions. (Setareh Decl., ¶ 15.)

19 Counsel believe the proposed settlement is fair, reasonable, and adequate in light of the
20 complexities of the case, the uncertainties of further litigation, and that it represents a fair and reasonable
21 recovery for the Settlement Class. (Setareh Decl., ¶ 11.)

22 4. The Settlement Is Fair and Reasonable Based on the Strength of Plaintiffs’
23 Case and the Risks and Costs of Further Litigation

24 California courts recognize that “‘the merits of the underlying class claims are not a basis for
25 upsetting the settlement of a class action.’” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224,
26 246 (quoting *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135,
27 1150). The settlement need not provide one-hundred percent of the damages sought in order to be judged
28 reasonable. *Wershba*, 91 Cal.App.4th at 250. “Thus, even if ‘the relief afforded by the proposed settlement

1 is substantially narrower than it would be if the suits were to be successfully litigated,’ this is not a bar to
2 a class settlement because ‘the public interest may indeed be served by a voluntary settlement in which
3 each side gives ground in the interest of avoiding litigation.’” *Id.* (quoting *Air Lines Stewards v. American*
4 *Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109).

5 As to the Labor Code claims for damages, the class’s potential recovery is \$15,640,435.67.
6 (Setareh Decl. ¶ 11.) If the derivative Labor Code section 203 waiting time penalties and section 226
7 inaccurate wage statement penalties are included (those are \$43,951,488 and \$8,087,800) the potential
8 exposure is \$67,679,732.67. However, as the Ninth Circuit has indicated, only damages not penalties need
9 be considered when assessing the fairness of a settlement because the fairness inquiry looks to whether the
10 class members were compensated for “past injuries”. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948,
11 964 (2009.) Further Labor Code section 203 and 226 penalties require a showing of willfulness, and Frito
12 Lay would argue that any failure to pay meal or rest premiums or other amounts owed was not willful. For
13 example, in *Naranjo v. Spectrum Security Services, Inc.*, 17 Cal.5th 1056, 1088 (2024) the California
14 Supreme Court held that section 226 penalties like section 203 penalties, should not be awarded even if
15 liability is established at trial, if the employer presents defenses that were “reasonable, if ultimately
16 unconvincing.”

17 Plaintiffs recognize the challenges they face in certifying a class action and establishing liability
18 on the underlying wage and hour claims. (Setareh Decl. ¶ 11.) An overarching obstacle, is that Plaintiffs
19 and settlement class members signed arbitration agreements that if enforced would preclude them from
20 pursuing claims on a class basis. Plaintiffs estimate that their likelihood of prevailing on all their causes of
21 action (on the derivative Labor Code section 203 and 226 claims, in particular) are extremely low and thus
22 their likelihood of recovering the full amount potentially recoverable is is very unlikely. (*Id.*)

23 For those claims, if any, that are certified for class treatment, Plaintiffs must prevail at a trial on
24 the merits. (*Id.*) In addition to having to prove that Plaintiffs and other workers were not paid for all hours
25 worked, Plaintiffs must establish willfulness with respect to their waiting time penalties claim under Labor
26 Code Section 203 as well as a knowing and intentional violation under Labor Code Section 226 for wage
27 statement penalties. (*Id.*)

28 With respect to the claims asserted on behalf of the Settlement Class in this case, there are

1 significant risks that support the reduced compromise amount. These risks include, but are not limited to,
2 the following:

3 (i) The risk that Defendants' arbitration agreement would be enforced, which would mean
4 that no class claims would be brought.

5 (ii) The risk that Plaintiffs would not be able to prove liability for alleged failure to provide
6 compliant meal periods and rest breaks; or that to establish liability for the failure to provide compliant
7 meal periods and rest breaks would require an individualized inquiry that would prevent these issues from
8 being resolved on a class and/or collective basis. For example, Plaintiffs alleged that Defendants did not
9 maintain accurate records of the start and end times for meal periods taken by employees but that, instead,
10 employees regularly worked through their meal periods (and rest breaks) in order to complete their job
11 duties. Defendants allege that many employees took their meal periods and rest breaks and that in order
12 to prove whether each employee took their meal periods and/or rest breaks would require an individualized
13 inquiry that would prevent this issue from being resolved on a class and/or collective basis.

14 (iii) The risk that Plaintiffs would not recover waiting time and wage statement penalties
15 pursuant to Labor Code sections 203 and 226. Plaintiff might not prove that Defendants acted with the
16 intent necessary for the alleged claims for penalties under Labor Code sections 203 and 226. Specifically,
17 section 203 requires that a plaintiff show the employer committed a "willful" violation of the law in
18 withholding wages. "A good faith dispute that any wages are due will preclude imposition of waiting time
19 penalties under Section 203." 8 Cal. Code Regs. § 13520. Similarly, penalties pursuant to section 226
20 require a "knowing and intentional" violation. Defendants contends that it would present several good
21 faith defenses that would preclude a finding of willfulness under section 203. *See Choate v. Celite Corp.*
22 (2013) 215 Cal.App.4th 1460 (reversing award of section 203 penalties based on good faith defense where
23 underlying wage claim presented issue of first impression). Any such good faith dispute could preclude
24 penalties.

25 (iv) The risk that Defendants' challenged employment policies might not ultimately support
26 class certification or a class-wide liability finding, *see, Duran*, 59 Cal.4th at 14 & fn. 28 (citing Court of
27 Appeal decisions favorable on class certification issue without expressing opinion as to ultimate viability
28 of proposition). Defendants have contended, for example, that it did not have a purported policy of not

1 paying required compensation, but rather a policy of paying compensation and of requiring employees to
2 report any unpaid compensable time, and that any failures to report by employees cannot be legally charged
3 to Defendants and, in any event, involve such highly individualized circumstances as to prevent class and
4 collective certification should this case be litigated. *See, e.g., Morillion v. Royal Packing Co.* (2000) 22
5 Cal.4th 575, 585 (employer not required to pay employees for time spent performing work of which the
6 employer had no knowledge).

7 (v) For the same reasons, liability, damages recovery, and certification risks are heightened
8 given: (1) the risk that uncertainties pertaining to the ultimate legality of Defendants' policies and practices
9 could preclude class-wide awards of statutory penalties under Labor Code section 226(e); (2) the risk that
10 individual differences between settlement Class Members could be construed as pertaining to liability, and
11 not solely to damages, *see, Duran*, 59 Cal.4th at 19; and (3) the risk that class or collective treatment could
12 be deemed improper as to one or more claims except for settlement purposes.

13 (vi) The risk that recovery could not be achieved on a classwide basis due to arbitration
14 agreements that Defendants allege are binding;

15 (vii) The risk that any civil penalties award under PAGA could be reduced by the Court in its
16 discretion, which would materially impact the recovery by the Class. *See* Labor Code section 2699(e)(1).

17 (viii) The risk that lengthy appellate litigation could ensue as to both liability and certification
18 issues, with associated litigation risk and costs, further enhances the value of a confirmed settlement as
19 opposed to unpredictable litigation.

20 (ix) Although the PAGA penalties calculated by Plaintiffs' expert amounts to an extravagant
21 \$65,763,100 that amount is not likely to bear fruit in this case. Most significantly, the ultimate decision as
22 to the amount of penalties is always up to the discretion of the Court. Labor Code § 2699(e)(2) states: "In
23 any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a)
24 or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if,
25 based on the facts and circumstances of the particular case, to do otherwise would result in an award that
26 is unjust, arbitrary and oppressive, or confiscatory." *See e.g., Fleming v. Covidien Inc.*, 2011 WL 7563047, at
27 *3-4 (C.D. Cal. Aug. 12, 2011) (invoking § 2699(e)(2) and reducing PAGA penalty award from \$2.8 million to
28 \$500,000). And the same risks that apply to the underlying Labor Code claims apply to the PAGA claim.

1 In these respects, Defendants strongly denies any liability and the propriety of class certification
2 for any reason other than settlement. (*Id.*) Continued litigation of this lawsuit presented Plaintiffs and
3 Defendants with substantial legal risks that were (and continue to be) very difficult to assess. (*Id.*)

4 In light of the uncertainties of protracted litigation, the Settlement amount reflects a fair and
5 reasonable recovery for the Class Members. (*Id.*) The Settlement amount is, of course, a compromise
6 figure. (*Id.*) By necessity, it took into account risks related to liability, damages, class action certification,
7 and all the defenses asserted by Defendants as to all such matters. (*Id.*) Moreover, each settlement Class
8 Member will be given the opportunity to opt out of the Settlement, allowing those who feel they have
9 claims that are greater than the benefits they can receive under this Settlement to pursue their own claims.
10 (*Id.*)

11 **D. THE COURT SHOULD GRANT THIS MOTION AND ISSUE AN ORDER**
12 **DIRECTING THAT NOTICE BE SENT**
13

14 “The notice given to the class must fairly apprise the class members of the terms of the proposed
15 compromise and of the options open to dissenting class members.” *Trotsky v. L.A. Fed. Sav. & Loan Ass’n*
16 (1975) 48 Cal.App.3d 134, 151-52. “The notice must be structured to enable class members to decide
17 whether to intervene or object, ‘opt out,’ or accept the settlement.” *Id.* at 152. Class notice must strike a
18 balance between thoroughness and the need to avoid unduly complicating the content of the notice and
19 confusing class members. *Wershba*, 91 Cal.App.4th at 252. Furthermore, an appropriate notice is one
20 which has a reasonable chance of reaching the class members. *Cartt v. Superior Court* (1975) 50
21 Cal.App.3d 960, 974.

22 The Class Notice explains in plain and easily understood language what the case is about; the class
23 definition and claims; the settlement amount and approximate individual amount each Class Member will
24 receive; the requested amounts to be paid to class counsel and as an enhancement award to the class
25 representatives; the rights of class members to opt out or object to the Settlement’s terms and the process
26 by which they can do so; the binding effect of the Settlement on those who do not request exclusion,
27 including a description of the claims being released; and the particulars of the final fairness hearing.
28 (Settlement, ¶ X E2a, Ex. 1.)

1 The Parties' proposed plan for directing notice to the Class is also the best notice that is practicable
2 under the circumstances. Using last-known addresses provided by Defendants or found through a NCOA
3 database search, the Settlement Administrator will send the Notice by First Class U.S. Mail to all Class
4 Members. (*Id.*, ¶ X B4c.) Further, the Settlement Administrator will perform a computer or other search
5 using the social security number of the individual to obtain the correct address of any Class Members for
6 whom the Notice is returned as undeliverable and will attempt re-mailing. (*Id.*)

7 **E. THE COURT SHOULD SET A HEARING FOR FINAL APPROVAL**

8 Finally, the Court should set a formal hearing to conduct an inquiry into the fairness of the proposed
9 settlement. Cal. Rule Ct. 3.769(e), (g). At the hearing, proponents of the Settlement may explain and
10 describe the terms and conditions and offer argument of settlement approval. Members of the Settlement
11 Class, or their counsel, may also appear and offer evidence and testimony in opposition to the Stipulation
12 of Settlement. The Parties request that the hearing on final approval of the settlement be set as soon as
13 may be convenient for the Court.

14 **VI. CONCLUSION**

15 For the foregoing reasons, the Parties respectfully submit that the Settlement's terms are fair,
16 adequate, and reasonable and that it is in the best interest of the Class Members. Under the applicable
17 class action criteria and guidelines, this Class should be conditionally certified, the Settlement should be
18 preliminarily approved, the Class should be notified regarding the Settlement, and the Court should
19 schedule a final approval hearing.

20 DATED: September 19, 2024

SETAREH LAW GROUP

21
22 /s/ Farrah Grant

SHAUN SETAREH

THOMAS SEGAL

FARRAH GRANT

Attorneys for Plaintiffs

RICHARD BOOTH, CHERYL FERRO

and BRETT BURKETT



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RICHARD BOOTH vs FRITO-LAY, INC., A DELAWARE CORPORATION, et al.

Case Number: 21STCV46151 Case Type: Civil Unlimited Category: Other Employment Complaint Case
Date Filed: 2021-12-17 Location: Stanley Mosk Courthouse - Department 72

Reservation

Case Name:

RICHARD BOOTH vs FRITO-LAY, INC., A DELAWARE CORPORATION, et al.

Case Number:

21STCV46151

Type:

Motion re: (Motion for Preliminary Approval)

Status:

RESERVED

Filing Party:

Richard Booth (Plaintiff)

Location:

Stanley Mosk Courthouse - Department 72

Date/Time:

12/03/2024 8:30 AM

Number of Motions:

1

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Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	0.00	1	0.00
TOTAL			\$0.00

Payment

Amount:

\$0.00

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