



From: Norma Dale

Fax: 15108172665

To:

Fax: (510) 267-5739

Page: 2 of 77

11/29/2018 2:30 PM

1 JOSEPH CLAPP, Esq., SBN 99194
2 AIMAN-SMITH & MARCY
3 7767 Oakport Street, Suite 1150
4 Oakland, California 94621
5 Telephone: 510/590-7115
6 Facsimile: 510/562-6830
7 Email: jc@asmlawyers.com
8
9 Attorneys for Plaintiff and Class Counsel
10

FILED BY FAX

ALAMEDA COUNTY

November 29, 2018

CLERK OF
THE SUPERIOR COURT
By Alicia Espinoza, Deputy

CASE NUMBER:

RG16811677

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

WAYNE MAULDIN, an individual, on behalf of
himself and all others similarly situated,

Plaintiff,

vs.

ROLLING FRITO-LAY SALES, LP, a Delaware
Limited Partnership; FRITO-LAY, INC., a
Delaware Corporation; and DOES 1 through 25,

Defendants.

Case No.: RG16811677

CLASS ACTION**Plaintiff's Memorandum in Support of Motion
for an Order**

- (1) Finally Approving Class Settlement;
- (2) Awarding Reasonable Attorney's Fees;
- (3) Awarding Reasonable Costs;
- (4) Awarding Incentive Award;
- (5) Awarding PAGA Penalties;
- (6) Awarding Claims Administration Fees;
and
- (7) Scheduling Compliance Hearing.

Date: Dec. 21, 2018

Time: 9:00 a.m.

Courtroom: 21

Judge: Hon. Robert McGuiness

Complaint Filed: April 14, 2016

Reservation Number: R-1970331

TABLE OF CONTENTS

INTRODUCTION	1
THEORIES OF LIABILITY.....	1
PROCEDURAL HISTORY OF SETTLEMENT.....	2
A. Preliminarily-Approved Settlement.....	2
B. Notice to Class and LWDA.....	3
REQUEST NO. ONE: FINAL APPROVAL OF SETTLEMENT AS FAIR, ADEQUATE, AND REASONABLE.....	4
REQUEST NO. TWO: AWARD OF REASONABLE ATTORNEYS' FEES.....	6
A. Percentage Method.....	6
B. Lodestar Adjustment Method	7
1. Reasonable Hours.....	7
2. Reasonable Rates.....	7
3. Lodestar.....	7
4. Lodestar Adjustments.....	8
REQUEST NO. THREE: AWARD OF COSTS.....	8
REQUEST NO. FOUR: INCENTIVE AWARD.....	9
REQUIEST NO. FIVE: PAGA PENALTIES.....	12
REQUEST NO. SIX: CLAIMS ADMINISTRATION FEES.....	13
REQUEST NO. SEVEN: COMPLIANCE HEARING.....	13
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<i>Clark v. American Residential Services LLC</i> (2009) 175 Cal.App.4th 785.....	9
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794.....	4, 5
<i>In re Microsoft I-V Cases</i> (2006) 135 Cal.App.4th 706.....	4
<i>Ketchum v. Moses</i> (2001) 24 Cal.4th 1122.....	7, 8
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....	5, 6
<i>Laffite v. Robert Half Internat. Inc.</i> (2016) 1 Cal.5th 480.....	6, 7
<i>Lealao v. Beneficial California, Inc.</i> (2000) 82 Cal.App.4th 19.....	7
<i>PLMC Group, Inc.</i> (2000) 22 Cal.4th 1084.....	7
<i>Schulz v. Jeppesen Sanderson, Inc.</i> (2018) 27 Cal.App.5th 1167.....	6
<i>Villalpando v. Exel Direct Inc.</i> , 2014 U.S. Dist. LEXIS 42622 at *63 (N.D. Ca. 2014).....	5
<i>Weeks v. Baker & McKenzie</i> (1998) 63 Cal.App.4th 1128.....	8
<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal.App.4th 224.....	8

Statutes

Cal. Rule of Court 3.769.....	4
Labor Code § 204b.....	2
Labor Code § 204(b)(1).....	5
Labor Code § 204(d).....	5
Labor Code § 226(a).....	2
Labor Code § 2698.....	12
Labor Code § 2699(i).....	12
Labor Code § 2699(1)(2).....	4, 12, 13

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

Mauldin now brings this motion seeking the final approval of this settlement, including awards of reasonable attorney's fees (\$240,000), costs (\$11,000), an incentive award (\$15,000), PAGA penalties (\$60,000), and claims administration fees (\$20,000). The amount to be distributed to class members is \$454,000. Mauldin also seeks to schedule a final compliance hearing after distribution of all the settlement proceeds.

Frito-Lay (*i.e.*, Rolling Frito-Lay Sales, LP and Frito-Lay, Inc.), employs local drivers ("Route Sales Associates" or "RSAs") to deliver its tasty snacks to grocery stores. Wayne Mauldin was employed as one such RSA. Declaration of Mauldin in Support of Motion (Mauldin Dec.), par. 2.

Mauldin's First Amended Complaint alleges four causes of action. The first cause of action, a class claim on behalf of all RSAs in California, alleges a violation of the duty imposed by Labor Code Section 204b to pay all wages earned during a calendar week no later than the regular payday falling during the following calendar week. First Amended Complaint (FAC) 2:22-3:2 (filed May 3, 2018). The second cause of action, a class claim on behalf of all RSAs in California, alleges a

1 violation of the duty imposed by Labor Code Section 226(a) to provide a pay stub that accurately
2 states the hours worked (and associated rates of pay) during a workweek, along with the wages
3 earned. FAC 3:4-16. The third cause of action, a Labor Code Private Attorneys General Act of 2004
4 ("PAGA") claim on behalf of the State of California, seeks civil penalties for the late payment
5 violation alleged in the first cause of action. FAC 3:17-4:3. The fourth cause of action, also a
6 PAGA claim, seeks civil penalties for the wage statement violation alleged in the second cause of
7 action. FAC 4:5-18.
8

9 10 PROCEDURAL HISTORY OF SETTLEMENT

11 **A. Preliminarily-Approved Settlement.**

12 Settlement discussions spanned a year, from June 2017 when the matter was initially mediated
13 before Michael Dickstein until the last hurdles to settlement were overcome in May 2018. Clapp
14 Dec., par. 5. The resulting settlement agreement defined the class as "All persons who worked for
15 Defendants as Route Sales Associates (RSAs) in the State of California at any time from March 8,
16 2015 through the date of Preliminary Approval [*i.e.*, June 1, 2018]." Settlement Agreement (SA) at
17 1:14-24.⁸ The class will release Frito-Lay from all claims arising out of violations of Labor Code
18 Section 204b or Labor Code Section 226, regardless of legal theory and regardless of remedy. SA at
19 2:4-3:2. SA at 7:6-9:10.
20
21

22 In return, Frito-Lay will create a Settlement Fund in the amount of \$800,000. SA at 11:1-3.
23 This Settlement Fund will be allocated as follows:

24 (a) Payments of Individual Payment Awards to Class Members that will total **\$454,000**;

25 (b) Payment of fees to Class Counsel in an amount to be set by the Court, but which can be no
26

27
28 ⁸ The settlement agreement was attached as Exhibit "Settlement Agreement" to the Declaration of Joseph Clapp in Support of Motion for Conditional Certification and Preliminary Approval, which was

1 more than 30% of the total settlement amount, which would be **\$240,000**;

2 (c) Payment of costs incurred in an amount to be set by the Court, but which can be no more
3 than **\$11,000**;

4 (d) Payment of a service payment to Wayne Mauldin, the Class Representative, in an amount to
5 be set by the Court, but which can be no more than **\$15,000**;

6 (e) Payment of administration costs to the Claims Administrator in an amount to be set by the
7 Court, but which can be no more than **\$20,000**;

8 (f) Payment of PAGA civil penalties in the amount of **\$60,000**, of which 75% (\$45,000) will be
9 paid to the California Labor and Workforce Development Agency (LWDA) and 25% (\$15,000) will
10 be paid to Wayne Mauldin. SA at 11:1-12:14; Preliminary Approval Order, June 1, 2018.

11 Thus, the amount to be distributed to Class Members is **\$454,000**, which will be allocated to the
12 Class Members on a pro rata basis that depends on the number of workweeks that each Class Member
13 worked. SA at 12:21-14:7. Administration of the settlement is being performed by Rust Consulting.
14 SA at 19:23-20:11.

15 On June 1, 2018, this court preliminarily approved the class settlement. Preliminary Approval
16 Order, filed June 1, 2018.

17 **B. Notice to Class and LWDA.**

18 The Preliminary Approval Order authorized Rust to send an approved form of notice to putative
19 class members. Preliminary Approval Order at 4:4-13. Rust mailed the notice to 1,773 putative class
20 members on July 16, 2018. Declaration of Mills in Support of Motion (Mills Dec.), par. 8. Only one
21 putative class member opted out of the settlement. *Id.*, par. 11. Not a single class member has
22 objected to the settlement. *Id.*, par. 12.

23 In addition, the settlement provides \$60,000 for the compromise of claims for PAGA civil
24

25
26
27
28 filed on May 29, 2018.

1 penalties. Any settlement of PAGA claims requires court approval. Labor Code Sec. 2699(1)(2). To
2 protect the State's interest, a proposed settlement must be submitted to the California Labor &
3 Workforce Development Agency. *Id.* Mauldin complied with this obligation by serving the LWDA
4 with the proposed settlement, as well as with the papers on the motion for preliminary approval, on
5 May 25, 2018. Clapp Dec., par. 6. The LWDA has not submitted any objection to the settlement.
6 *Id.*⁹

7
8 In sum: the settlement has already been preliminarily approved by the court, and although both
9 the putative class members and the LWDA were properly notified of its terms, nobody has objected.
10

11 **REQUEST NO. ONE: FINAL APPROVAL OF SETTLEMENT AS FAIR, ADEQUATE,**
12 **AND REASONABLE.**

13 This class action settlement requires Court approval after a final approval hearing. Cal. Rule
14 of Court 3.769. The Court's task is to determine whether the settlement proposed is "fair, adequate,
15 and reasonable." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The Court's inquiry
16 "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the
17 product of fraud or overreaching by, or collusion between, the negotiating parties, and that the
18 settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.*
19

20 When a settlement is reached through arm's length negotiations, after sufficient investigation
21 and discovery, by experienced counsel, with few if any objectors, the Court should recognize that the
22 settlement is entitled to a presumption of fairness. *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th
23 706, 723. This settlement was reached after a year's worth of protracted negotiations mediated by a
24 nationally-renowned mediator, after several rounds of discovery and informal disclosures, by
25

26
27 ⁹ In addition, Mauldin will serve the LWDA with the papers supporting this motion for final approval
28 of the settlement. Clapp Dec., par. 7.

1 prosecuting counsel who has devoted many years of his life to wage & hour class actions, but without
2 one, single class member who objected to the fairness of the settlement. Clapp Dec., par. 8-10, 22;
3 Mills Dec., par. 12. Mauldin submits that this settlement has earned the favorable presumption of
4 fairness.

5
6 Moreover, the conclusion that this was settlement falls "within the ballpark of reasonableness"
7 may be supported by such factors as the value of the case and the fairness of the distribution. *Kullar*
8 *v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133; *Dunk v. Ford Motor Co.*, 48
9 Cal.App.4th 1794, 1801.

10 Mauldin submits that \$800,000 is a reasonable settlement value. He brings class claims under
11 Labor Code Section 204b for damages caused by late payment of overtime wages and under Labor
12 Code Section 226 for statutory penalties for inaccurate wage statements. It is doubtful whether he
13 can successfully sue under Section 204b, however, because this section probably does not give rise to
14 a private cause of action. *Villalpando v. Exel Direct Inc.*, 2014 U.S. Dist. LEXIS 42622 at *63 (N.D.
15 Ca. 2014). If the action were to succeed, however, the amount of damages – the interest on the week-
16 late payment, would most likely be in the range of \$30,000 to \$35,000. Clapp Dec., par. 11. On the
17 other hand, the claim for penalties for inaccurate wage statements could yield as much as \$4,000,000.
18
19 *Id.*, par. 12.

20 But this potential, \$4 million recovery is subject to several risks. First, the risk of
21 substantively losing the underlying statutory interpretation argument of whether the payments
22 violated the Labor Code. Frito-Lay contends that Labor Code Section 204(d) permits normal wages
23 to be paid as late as seven calendar days following the close of the payroll period, and that Labor
24 Code Section 204(b)(1) permits overtime wages to be paid no later than the next payday. Clapp Dec.,
25 par. 13. Thus, according to Frito-Lay's argument, the overtime wages were paid on time.

26
27 Second, Frito-Lay employees sign arbitration agreements waiving the right to bring class
28

1 actions. Mauldin Dec., par. 3. If this settlement is not approved, then Frito-Lay will be able to raise
2 this class waiver as a defense to certification. SA at 2:19-3:2. Thus, "the risk of maintaining class
3 action status through trial" is an overwhelming risk. *Kullar*, 168 Cal.App.4th 116, 128.

4 Finally, a settlement amount must account for the expense of continued litigation and the
5 delay in payment. Absent settlement, litigation is bound to be costly and protracted. Clapp, par. 14.

6 Thus, Mauldin submits that an \$800,000 settlement falls well within the "ballpark of
7 reasonableness" and merits the approval of this Court.
8

9
10 **REQUEST NO. TWO: AWARD OF REASONABLE ATTORNEY'S FEES.**

11 The settlement allocates 30% of the settlement fund, or \$240,000, for the payment of
12 attorney's fees to class counsel, at the Court's discretion. SA at 11:8-11. If the Court awards some
13 lesser sum, the difference will revert to Frito-Lay, not to the class. *Id.* at 12:6-8.

14 When a party has recovered a monetary fund that benefits a class, principles of unjust
15 enrichment permit a court to exercise its equitable power to award an attorney's fee so that the cost of
16 hiring the attorney is spread throughout the benefitted class. *Laffite v. Robert Half Internat. Inc.*
17 (2016) 1 Cal.5th 480, 488-489. The goal of the award must be to provide reasonable compensation to
18 class counsel for undertaking and successfully prosecuting the class claims. *Id.* at 504. The Court
19 may calculate this reasonable fee by using either the percentage-of-the-recovery method or the
20 lodestar adjustment method. *Id.*
21

22 **A. Percentage Method.**

23 Mauldin asks the Court to choose the percentage method and award class counsel 30% of the
24 fund, which is well in line with similar class actions. *Schulz v. Jeppesen Sanderson, Inc.* (2018) 27
25 Cal.App.5th 1167, 1175 ("we note that 31 percent is not out of line with awards in class actions,
26 which, like this case, involve attorney fees to be paid by a protected class and that require court
27
28

1 approval"). According to this method, the Court would award a fee of \$240,000.

2 **B. Lodestar Adjustment Method.**

3 Of course, the Court may choose to use the lodestar adjustment method to calculate the fee, or
4 it may choose to use the lodestar adjustment method as a cross-check on the reasonableness of the
5 percentage fee. *Laffite*, 1 Cal.5th 480, 504, 506. According to the lodestar adjustment method, the
6 lodestar is calculated by multiplying the number of hours reasonably dedicated to prosecuting the
7 case by a reasonable hourly rate. *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26.
8 Once the lodestar is fixed, the Court may adjust the award by applying a multiplier that takes various
9 circumstances into account. *Id.*

11 **1. Reasonable Hours.**

12 The "reasonable hours" factor of the lodestar formula must include all the hours reasonably
13 spent in prosecuting the case. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133. The number of hours
14 reasonably devoted to the prosecution of this case totals 275.52. Clapp Dec., par. 15-21.

15 The Court, of course, should review the time records submitted by counsel to weed out
16 inefficient or duplicative hours. *Ketchum*, 24 Cal.4th 1122, 1132. In order to avoid such duplication,
17 the records submitted exclude most of the hours in which attorneys confer with others in the firm, and
18 virtually all time spent on emails or telephone calls. Clapp Dec., par. 17.

19 **2. Reasonable Rates.**

20 The "reasonable hourly rate" factor of the lodestar formula is the prevailing rate charged by
21 attorneys of similar skill and experience in the relevant legal community. *PLCM Group, Inc.* (2000)
22 22 Cal.4th 1084, 1095. Based on his skill and experience, class counsel believes that his reasonable
23 rate is \$750 per hour. Clapp Dec., par. 22-25.

24 **3. Lodestar.**

25 Multiplying the hours expended (275.52 hrs) by the hourly rate (\$750/hr) yields a lodestar in
26 the amount of \$206,637.50. Clapp Dec., par. 26.

1 **4. Lodestar Adjustments.**

2 The court should consider whether to enhance the lodestar in order “to fix a fee at the fair
3 market value for the particular action.” *Ketchum*, 24 Cal.4th 1122, 1132. To approximate that fair
4 market value, the court should determine, retrospectively, “whether the litigation involved a
5 contingent risk or required extraordinary legal skill.” *Id.*

6 In this case, class counsel was hired on a contingency fee contract. Clapp Dec., par. 27. A
7 contingent fee “must be higher than a fee for the same legal services paid as they are performed”
8 because the contingent fee “compensates the lawyer not only for the legal services he renders but for
9 the loan of those services. *Ketchum*, 24 Cal.4th 1122, 1132. Moreover, “The implicit interest rate on
10 such a loan is higher because the risk of default . . . is much higher than that of conventional loans.”
11 *Id.* at 1132-1133. Therefore, “A lawyer who both bears the risk of not being paid and provides legal
12 services is not receiving the fair market value of his work if he is only paid for the second of these
13 functions.” *Id.* at 1133. Thus, the contingent nature of the recovery should lead the Court to enhance
14 the raw lodestar fee.

15 In addition, the Court should find that the prosecution of this case required the exercise of
16 great skill. Just as the proof of the pudding is in the eating, the proof of the skill required lies in the
17 fact that counsel not only resolved a complex and risky case, but delivered a substantial recovery to
18 the class members. This skill also should lead the Court to enhance the raw lodestar fee.

19 California law permits the application of multipliers to enhance the lodestar much more
20 readily than does federal law. *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1172-1173.
21 Multipliers frequently range from 2 to 4 or even higher. *Wershba v. Apple Computer, Inc.* (2001) 91
22 Cal.App.4th 224, 255. In this case, a modest multiplier of 1.16 would align the lodestar adjustment
23 method with the percentage-of-the-fund’s benchmark. As a result of this cross-check, the Court may
24 conclude that the request for an award of fees in the amount of \$240,000 is well-justified.

25
26 **REQUEST NO. THREE: AWARD OF COSTS.**

27 The settlement agreement in this case provides that Mauldin may apply for reimbursement of
28 his litigation expenses up to the amount of \$11,000. SA at 11:11-12. (His actual expenses, to date,

1 are \$11,027.52.) Clapp Dec., par. 28. Thus, Mauldin requests an award of \$11,000 to reimburse his
2 litigation expenses.

3
4 **REQUEST NO. FOUR: INCENTIVE AWARD.**

5 The settlement agreement provides, in the Court's discretion, for an incentive award to the
6 Class Representative, Wayne Mauldin, in the amount of \$15,000. SA at 15:19-25. If the Court
7 awards some lesser sum, the difference will revert to Frito-Lay, not to the class. *Id.* at 12:6-8.

8 Incentive awards are essential to induce class representatives to devote the time and effort
9 necessary, and to accept the risk involved, in bringing and maintaining class action lawsuits. *Clark v.*
10 *American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807 ("In short, the rationale for
11 making enhancement or incentive awards to named plaintiffs is that they should be compensated for
12 the expense or risk they have incurred in conferring a benefit on other members of the class."). The
13 court should consider such factors as the actions taken by the representative to protect the class, the
14 degree of benefit conferred on the class, the time and effort involved, the risk undertaken, the
15 duration of the litigation, and the personal benefit received by the class representative. *Id.* at 804.

16 Mauldin first contacted the Aiman-Smith & Marcy law firm about wage & hour problems he
17 encountered with Rolling Frito-Lay Sales, LP on August 10, 2015. Mauldin Dec., par. 4. On several
18 occasions that fall he met with two Aiman-Smith & Marcy lawyers to discuss Frito-Lay's pay
19 policies, which involve a complicated, fluctuating-workweek method of calculating overtime. *Id.* He
20 supplied them with all his records relating to his employment, including employee handbooks and
21 itemized wage statements. *Id.* He spent hours with the lawyers analyzing these documents trying to
22 understand how Frito-Lay calculated the amounts due for overtime hours and on which payday Frito-
23 Lay paid for those overtime hours. Mauldin also supplied the lawyers with the arbitration agreement
24 he signed, and spent several more hours discussing whether he would have to arbitrate his claims. *Id.*

25 In November 2015, Frito-Lay engaged in a successful campaign to force Mauldin to quit.
26 Mauldin Dec., par. 5. Thereafter, he spent several more hours in discussions with counsel about a
27 constructive wrongful termination lawsuit. *Id.* Ultimately, he decided that prosecuting a wrongful
28

1 termination lawsuit would detract from, and undercut, any claim for remedies due for systematic
2 wage violations to all the Route Sales Associates employed by Frito-Lay. *Id.* Thus, when he
3 authorized his counsel to pursue claims for untimely overtime payments and for inaccurate wage
4 statements, he understood that he was sacrificing his right to pursue a potentially valuable wrongful
5 discrimination lawsuit. *Id.*

6
7 Between November 2015 and April 2016 Mauldin had numerous telephone conversations
8 with counsel about all aspects of his employment with Frito-Lay, including the regional operating
9 structure for local delivery drivers, the practices for dispatching drivers on routes, the size and makes
10 of the trucks driven by delivery drivers, the tasks performed by drivers before and after they drove
11 the trucks, the tasks performed by drivers while at retail stores, the method of keeping track of time,
12 the method of keeping track of product, and the procedures for the resolution of employee
13 complaints. Mauldin Dec., par. 6.

14
15 Thereafter, for the next year Mauldin had intermittent telephone conversations with counsel
16 each month or so in which they discussed the progress of the case, and he answered any of counsel's
17 questions he had about Frito-Lay's practices. Mauldin Dec., par. 7. Then in May 2017 they began
18 having numerous telephone conversations as they prepared for the mediation of this case. *Id.*
19 Mauldin assisted counsel in preparing the valuation of the remedies that they would seek in
20 mediation, and they discussed the strategy that they would pursue in the mediation. *Id.*

21
22 On June 1, 2017, Mauldin met with counsel for a mediation before Michael Dickstein, Esq.
23 Mauldin Dec., par. 8. Unfortunately, they were not able to conclude a settlement at that time. *Id.*

24 Thereafter, over the next five months, Mauldin and his counsel spoke on the telephone every
25 week or two as follow-on negotiations proceeded with the mediator. Mauldin Dec., par. 9. Their
26 discussions involved not only the various back-and-forth offers made by the parties, but also the
27 underlying disputes about statutory interpretation of Labor Code provisions that lay at the heart of the
28

1 lawsuit. *Id.*

2 In late October 2017, Mauldin and counsel discussed in detail the options available for
3 settlement. Mauldin Dec., par. 10. Mauldin weighed the pros and cons of settlement, and finally
4 decided, after much deliberation, that the proposed settlement should be accepted. *Id.* Thereafter,
5 Mauldin and counsel discussed in detail the complicated, written memorandum of understanding that
6 had been prepared by Frito-Lay's counsel. *Id.* Mauldin then had several more conversations with
7 counsel as they negotiated the language of this MOU. *Id.*

9 Approximately a month thereafter, Frito-Lay sent its proposed long-form settlement
10 agreement. Mauldin Dec., par. 11. Over the next six months or so, Mauldin and his counsel had
11 innumerable telephone conversations about various disputes concerning the language of the
12 agreement, and after understanding the disputes Mauldin would direct counsel to pursue one line of
13 argument or another. *Id.*

15 After the settlement agreement was finally signed in May 2018, Mauldin had a series of
16 telephone conversations with counsel in preparation for the motion for preliminary approval.
17 Mauldin Dec., par. 12. Then, during the past few months, he had telephone discussions with counsel
18 in which they discussed the progress of the settlement and the class notice process. *Id.*

19 Finally, in November 2018 Mauldin had telephone conversations with counsel in which they
20 discussed the final approval process and this declaration. Mauldin Dec., par. 13.

22 Mauldin was the only class representative, and thus these necessary efforts could not be
23 shared with others. As a result, Mauldin submits that he has devoted innumerable hours to assisting
24 in the initiation and prosecution of this class action. He also understood that the amount of money
25 that he would personally receive from such a class action would be minimal – his portion of the
26 payout for class claims will be approximately \$339.94. Mauldin Dec., par. 16. He understood that
27 undertaking this task involved substantial risk as well. He understood when he agreed to pursue this
28

1 litigation that if he lost, the court might award substantial court costs against him. Mauldin Dec., par.
2 14. He understood that his name would be in the public records as one who had sued his employer
3 for wage & hour violations, and that many potential employers would be disinclined to hire such a
4 "troublemaker." *Id.*, par. 15.

5
6 Mauldin also sacrificed his own potentially lucrative wrongful termination lawsuit so that it
7 would not interfere in litigation that sought remedies for the wage & hour violations that Frito-Lay
8 was committing against all of the RSAs. *Id.*, par. 5. He devoted this time and effort, accepted these
9 risks, and sacrificed his own self-interest in order to prosecute claims that will serve to compensate
10 1772 RSAs for Frito-Lay's practice of paying overtime wages a week after the legal deadline. He
11 submits that an incentive award of \$15,000 would serve as just compensation for the time, efforts,
12 and risk he incurred to confer this benefit on the other class members.

13
14
15 **REQUEST NO. FIVE: PAGA PENALTIES.**

16 Mauldin has brought claims for civil penalties under the California Private Attorney's General
17 Act of 2004. Labor Code §2698 *et seq.* A portion of the settlement—\$60,000—has been allocated
18 for civil penalties recoverable under PAGA. SA, par. 11:12-18. On May 25, 2018 this proposed
19 settlement was submitted to the Labor and Workforce Development Agency for its input, as required
20 by Labor Code Section 2699(1)(2). Clapp Dec., par. 6. The LWDA has not objected to this
21 settlement. *Id.*

22
23 The Labor Code requires that these civil penalties "shall be distributed as follows: 75 percent
24 to the Labor and Workforce Development Agency. . .; and 25 percent to the aggrieved employees."
25 Labor Code §2699(i). According to this Court's tentative ruling on the motion for preliminary
26 approval, the 25 percent must be distributed to Plaintiff Wayne Mauldin, the aggrieved employee
27 who initiated and prosecuted the claims for PAGA penalties. Court's May 31, 2018 Tentative Ruling.

28 Thus, pursuant to the terms of the settlement, Mauldin requests that the Court approve the

1 amount of the PAGA penalties, *i.e.*, \$60,000, and order that it be distributed 75%, or \$45,000, to the
2 LWDA, and 25%, or \$15,000, to Plaintiff Wayne Mauldin. Labor Code Sec. 2699(1)(2) ("The
3 superior court shall review and approve any settlement of any civil action filed pursuant to this
4 part.").

5
6
REQUEST NO. SIX: CLAIMS ADMINISTRATION FEES.

7
8 The settlement agreement provided for claims administration fees not to exceed \$20,000. The
9 administrator, Rust Consulting, estimates that the total cost for administration will be \$20,000. Mills
10 Dec. of Mills, par. 13.

11
12 **REQUEST NO. SEVEN: COMPLIANCE HEARING**

13 The Court's tentative ruling on the motion for preliminary approval provides that 10 percent
14 of the attorney's fee awarded shall be held in the claims administrator's trust fund until the Court
15 approves the final accounting, and it states that the Court will set a final compliance hearing
16 approximately 60 days after the distribution process is completed. Court's May 31, 2018 Tentative
17 Ruling. The settlement agreement provides that in the absence of an appeal the "Effective Date" of
18 the settlement shall be 60 days after the date of final approval. SA at 6:9-7:2. Assuming the Court
19 grants final approval on December 21, 2018, the "Effective Date" would be February 19, 2019. The
20 settlement agreement provides that the administration of the agreement must be completed within 180
21 days of the Effective Date, or approximately June 19, 2019. SA at 25:22-26. Thus, Mauldin requests
22 that the Court set a compliance hearing date 60 days later, on approximately August 19, 2019.

23
24 **CONCLUSION**

25 For the foregoing reasons, Plaintiffs request that the Court issue an order:

- 26 1. Granting final approval of the class settlement;
27 2. Awarding attorney's fees in the amount of \$240,000 to class counsel;
28 3. Awarding costs in the amount of \$11,000 to class counsel;

1 4. Awarding an incentive award of \$15,000 to Plaintiff Wayne Mauldin;

2 5. Awarding PAGA penalties in the amount of \$60,000, to be distributed \$45,000 to the
3 California Labor & Workforce Development Agency and \$15,000 to Plaintiff Wayne
4 Mauldin;

5 6. Awarding claims administration fees of \$20,000 to Rust Consulting, Inc.; and

6 7. Scheduling a final compliance hearing to be held on approximately August 19, 2019. Ten
7 percent of the attorney's fees awarded should be withheld from payment by the Claims Administrator
8 until after this compliance hearing is completed and the Court approves the final accounting.

9
10 Respectfully submitted,

11
12 Dated: November 29, 2018

aiman-smith marcy

13
14 
15 Joseph Clapp, Esq.
16 Attorneys for Plaintiff
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I, the undersigned, hereby declare: I am employed in the County of Alameda, California; I am over eighteen years of age and not a party to the within action. I am either admitted to practice before this Court or employed in the Office of an attorney admitted to practice in this Court. My business address is 7677 Oakport St., Suite 1150, Oakland, California 94621.

On this date, I served the following:

Plaintiff's Memorandum in Support of Motion for an Order

- (1) Finally Approving Class Settlement;**
- (2) Awarding Reasonable Attorney's Fees;**
- (3) Awarding Reasonable Costs;**
- (4) Awarding Incentive Award;**
- (5) Awarding PAGA Penalties;**
- (6) Awarding Claims Administration Fees;**
- and**
- (7) Scheduling Compliance Hearing.**

by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

Samantha D. Hardy, Esq. Tara M. Duester, Esq. Sheppard Mullin Richter & Hampton LLP 501 West Broadway, 19 th Floor San Diego, California 92101-3598	Attorneys for Defendants ROLLING FRITO-LAY SALES, LP and FRITO-LAY, INC.
California Labor and Workforce Development Agency Attn. PAGA Administrator 1515 Clay Street, Ste. 801 Oakland, CA 94612	

- X [By Mail] I caused such envelope, with postage fully prepaid, to be placed in the United States mail at Oakland, California.
- ___ [By Personal Service] I caused such envelope to be delivered by hand to the above address.
- ___ [By E-Mail] I caused such document to be delivered by electronic transmission/e-mail to the above addressee.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: November 29, 2018


Norma Dale