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FILED BY FAX

ALAMEDA COUNTY

May 30, 2018

CLERK OF
THE SUPERIOR COURT
By Alicia Espinoza, Deputy

CASE NUMBER:

RG16811677

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

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

13 Plaintiff,

14 vs.

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

18 Defendants.

) Case No.: RG16811677

) **CLASS ACTION**

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

- 19)
20) (1) **Conditionally Certifying a**
21) **Settlement Class;**
22) (2) **Appointing Class Representative,**
23) **Class Counsel, and Claims**
24) **Administrator;**
25) (3) **Preliminarily Approving Settlement;**
26) (4) **Authorizing Class Notice; and**
27) (5) **Scheduling a Final Approval Hearing.**

28) Date: June 1, 2018

) Time: 10:00 a.m.

) Courtroom: 21

) Judge: Hon. Robert McGuiness

) Complaint Filed: April 14, 2016

) Reservation Number: 4-1949680

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1 I. INTRODUCTION.

2 Delivery driver Wayne Mauldin claims that his former employer, snack-food giant Frito-Lay,
3 failed, systematically, to make timely payment of overtime wages in violation of Labor Code Section
4 204b,¹ and failed, systematically, to report these wages on the appropriate wage statements in
5 violation of Labor Code Section 226(a).² On behalf of a class of delivery drivers, Mauldin seeks
6 damages for the late-payment violations and statutory penalties for the wage statement violations.³
7 On behalf of the State of California, he seeks civil penalties for these violations through a "private
8 attorneys general" (or "PAGA") action. Labor Code Sec. 2698 *et seq.*

9 Mauldin and Frito-Lay have agreed to a class-wide settlement in the amount of \$800,000.
10 Mauldin now brings this motion seeking conditional certification of a settlement class; appointment
11 of the class representative, class counsel, and claims administrator; preliminary approval of the
12

13
14 ¹ Labor Code Sec. 204b reads as follows:

15 *"Section 204 shall be inapplicable to employees paid on a weekly basis on a regular day designated*
16 *by the employer in advance of the rendition of services as the regular payday.*

17 *"Labor performed by a weekly-paid employee during any calendar week and prior to or on the*
18 *regular payday shall be paid for not later than the regular payday of the employer for such weekly-*
19 *paid employee falling during the following calendar week.*

20 *"Labor performed by a weekly-paid employee during any calendar week and subsequent to the*
21 *regular payday shall be paid for not later than seven days after the regular payday of the employer*
22 *for such weekly-paid employee falling during the following calendar week."*

23
24 ² Labor Code Sec. 226(a) reads in pertinent part as follows:

25 *"(a) An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her*
26 *employee . . . an accurate itemized statement in writing showing (1) gross wages earned, . . . , (9) all*
27 *applicable hourly rates in effect during the pay period and the corresponding number of hours*
28 *worked at each hourly rate by the employee. . . ."*

³ Labor Code Sec. 226(e)(1) reads in pertinent part as follows:

"(e)(1) An employee suffering injury as a result of a knowing and intentional failure by an employer
to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars
(\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per
employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four
thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees."

1 settlement; authorization of class notice; and the scheduling of a final approval hearing.

2 In addition, the parties have not been able to agree on the distribution of one small part of the
3 proceeds, but they have agreed to abide by whatever the Court says. They have agreed that \$60,000
4 of the settlement amount should be apportioned to the PAGA action, 75% of which (\$45,000)
5 indisputably should go to the Labor & Workforce Development Agency. The remaining 25%
6 (\$15,000) is in dispute. The Labor Code says that it should go to "the aggrieved employees," but the
7 parties disagree about whether that means all aggrieved employees or just those aggrieved employees
8 who brought suit. They ask the Court to decide.

10 **II. SUMMARY OF FACTS, LAW, AND PROCEDURAL HISTORY.**

11 **A. Parties.**

12 Frito-Lay (*i.e.*, Rolling Frito-Lay Sales, LP and Frito-Lay, Inc.) creates tasty, processed snacks
13 including Fritos corn chips and Lay's potato chips. Frito-Lay employs certain local delivery drivers,
14 known as "Route Sales Associates," to deliver these snacks to retail outlets, such as grocery stores,
15 throughout California.⁴ Wayne Mauldin was employed as one such RSA from July 2013 until
16 November 2015. Declaration of Mauldin in Support of Motion ("Mauldin Dec."), par. 2.

18 **B. Pertinent Facts.**

19 Frito-Lay's "work week" is defined as Sunday at 12:00 a.m. through Saturday at 11:59 p.m.
20 Declaration of Joseph Clapp in Support of Motion ("Clapp Dec."), par. 2. Its "payday" is defined as
21 every Friday.⁵ *Id.* During the Class Period, the payday for a particular workweek, however, was the
22 Friday *before* the Saturday that ends the workweek. *Id.* For example, if the workweek began on
23 Sunday, April 1, and ended on Saturday, April 7, the payday for that workweek was Friday, April 6.

26 ⁴ Frito-Lay also employs other local delivery drivers, known as "Route Sales Representatives," who
27 are not part of this lawsuit or this settlement.

28 ⁵ If a payday falls on a holiday, Frito-Lay makes appropriate adjustments to the pay schedule.

1 Frito-Lay paid for all *non-overtime* hours worked during a workweek on the regular payday.
2 *Id.*, par. 3. Thus, for example, on April 6 Frito-Lay would pay all non-overtime hours worked during
3 the week of April 1 through 7 (even non-overtime hours that were to be worked on April 7).

4 When RSAs worked *overtime* hours during a workweek, however, they were not paid on the
5 regular payday (*i.e.*, on April 6). Nor were they paid on the following payday (*i.e.*, April 13).
6 Instead, they were paid these overtime wages on the second-following payday (*i.e.*, April 20), and the
7 overtime wages were reported on that payday's wage statement. *Id.*

9 **C. Claimed Labor Code Violations.**

10 Mauldin claims (A) that Frito-Lay paid the overtime wages that were earned by RSAs from
11 Monday through Friday⁶ of a workweek later than the date required by Labor Code Section 204b, and
12 (B) that the weekly paystubs failed to accurately show gross wages and fails to show that week's
13 overtime hours and wages. This section will briefly explain these theories of liability.

15 **1. Labor Code Section 204b Requires Payment No Later Than "the Regular Payday 16 . . . Falling During the Following Calendar Week."**

17 Labor Code Section 204b provides in pertinent part:

18 *"Labor performed by a weekly-paid employee during any calendar week and prior to or*
19 *on the regular payday shall be paid for not later than the regular payday of the employer*
for such weekly-paid employee falling during the following calendar week."

20 RSAs were paid weekly, and thus their "labor performed . . . during any calendar week"⁷ that
21 was performed "prior to or on the regular payday" – *i.e.*, work performed from Sunday through
22

23
24 ⁶ Overtime worked on Saturday may legitimately be paid on the payday for the second following pay
25 period pursuant to Labor Code Section 204b, which reads in part:

26 *"Labor performed by a weekly-paid employee during any calendar week and subsequent to the*
27 *regular payday shall be paid for not later than seven days after the regular payday of the employer*
for such weekly-paid employee falling during the following calendar week."

28 ⁷ The "calendar week" runs from Sunday through Saturday (*County of Sonoma v. Sanborn* (1934) 1

1 Friday – must be paid "not later than" the "regular payday . . . falling during the following calendar
2 week." In other words, if an RSA worked 50 hours from Sunday, April 1, through Friday, April 6,
3 the RSA must be paid for that labor "not later than" the next week's regular payday – in this example,
4 Friday, April 13.

5 And Frito-Lay complied with this requirement for the 40 *non*-overtime hours because it paid the
6 wages earned for these hours on that week's regular payday, April 6. In fact, Frito-Lay paid the
7 wages for these non-overtime hours a week *before* the statutory deadline.

9 But Frito-Lay did not pay the wages for the 10 *overtime* hours on the regular payday, April 6. It
10 did not pay the overtime wages by the statutory deadline, that is, "not later than" the next week's
11 regular payday, April 13. Instead, Frito-Lay waited until the payday for the second following week,
12 April 20, to make payment on these overtime wages.

13 Mauldin claims that this practice, which applied to all RSAs, violated Labor Code Section 204b.

14
15 **2. Labor Code Section 226(a) Requires Frito-Lay to Provide an Accurate Pay Stub**
16 **Each Payday.**

17 Labor Code Section 226(a) requires that Frito-Lay furnish an accurate and itemized wage
18 statement ("pay stub") on each payday. This pay stub must show, among other things, gross wages
19 and all applicable hourly rates of pay in effect during the pay period and the corresponding number of
20 hours worked at each hourly rate.

21 The pay stubs that Frito-Lay provided fails to comply with these requirements because they did
22 not provide all this information for that workweek. Clapp Dec., par. 4. Instead, the information on
23 overtime premiums was not provided until the payday that occurred two weeks later, when the late
24 overtime was paid.

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26
27
28 Cal.App.2d 26, 31), and thus corresponds to Frito-Lay's workweek.

1 **D. Plaintiff's First Amended Complaint.**

2 Mauldin's First Amended Complaint alleges four causes of action. The first cause of action, a
3 class claim on behalf of all RSAs in California, alleges a violation of the duty imposed by Labor
4 Code Section 204b to pay all wages earned during a calendar week no later than the regular payday
5 falling during the following calendar week. First Amended Complaint (FAC) 2:22-3:2. The second
6 cause of action, a class claim on behalf of all RSAs in California, alleges a violation of the duty
7 imposed by Labor Code Section 226(a) to provide a pay stub that accurately states the hours worked
8 (and associated rates of pay) during a workweek, along with the wages earned. FAC 3:4-16. The
9 third cause of action, a PAGA action on behalf of the State of California, seeks civil penalties for this
10 same violation. FAC 3:17-4:3. The fourth cause of action, also a PAGA action, seeks civil penalties
11 for the violation of the duty imposed by Labor Code Section 204b to pay all wages earned in a week
12 by the following week's regular payday. FAC 4:5-18.
13

14 **E. Mediation and Subsequent Negotiations.**

15 On June 1, 2017, the parties mediated this case before nationally-renowned mediator Michael
16 Dickstein, Esq., but that effort failed. Clapp Dec., par. 5. The mediator and the parties continued
17 intensive negotiations thereafter, however, and several months later they finally agreed on the
18 \$800,000 settlement, which was memorialized in a memorandum of understanding that was fully-
19 executed on November 8, 2017. *Id.*
20

21 When the parties then began negotiating the long-form settlement agreement, they became
22 embroiled in numerous disagreements over its terms. Clapp Dec., par. 6. These disagreements were
23 not fully resolved until May 2018 when the parties finally entered into the formal settlement
24 agreement. Clapp Dec., par. 7 and Ex. "Settlement Agreement" (hereinafter, "SA").
25

26 **III. SETTLEMENT TERMS.**

27 The settlement agreement (A) defines the class of those who will release claims; (B) defines the
28

1 scope of the claims they release; (C) describes how the \$800,000 that Frito-Lay pays for that release,
2 and will be distributed; (D) and details the procedures for putative class members to object or opt out.

3 **A. Class Definition.**

4 Solely for the purposes of this settlement, the class is defined as "All persons who worked for
5 Defendants as Route Sales Associates (RSAs) in the State of California at any time from March 8,
6 2015 through the date of Preliminary Approval." SA at 1:14-24. Class members will be determined
7 based on Frito-Lay's records. *Id.* at 16:25-28. These records indicate that the class consists of
8 approximately 1,771 members. Clapp Dec., par. 8.

9
10 According to the settlement agreement, certification of the class shall be binding only if the
11 settlement is consummated. SA at 2:4-3:2.

12 **B. Scope of Class Release.**

13 According to the Settlement Agreement, the class will release Frito-Lay and associated entities
14 to the fullest extent permitted by law from all claims arising out of alleged violations of Labor Code
15 Section 204b or Labor Code Section 226 that were or might have been asserted based on facts alleged
16 in the Action, regardless of theory and regardless of remedy. SA at 7:6-9:10.

17 **C. Payment and Allocation of Settlement Funds.**

18 As part of the settlement, Frito-Lay will create a Settlement Fund in the amount of \$800,000.
19 Settlement Agreement at 11:1-3. This Settlement Fund will be allocated as follows:

20 (a) Payments of Individual Payment Awards to Class Members that will total approximately
21 **\$454,000;**

22 (b) Payment of fees to Class Counsel in an amount to be set by the Court, but which can be no
23 more than 30% of the total settlement amount, which would be **\$240,000;**

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

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

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

5 (f) Payment of PAGA civil penalties in the amount of **\$60,000**, of which 75% (\$45,000) will be
6 paid to the California Labor and Workforce Development Agency (LWDA) and 25% (\$15,000) will
7 be paid either to the Named Plaintiff or to all RSAs, as the Court directs. SA at 11:1-12:14.

9 **D. The Formula for Distributing the Individual Settlement Awards.**

10 The amount to be distributed to Class Members is approximately \$454,000, which will be
11 allocated to the Class Members on a pro rata basis that depends on the number of workweeks each
12 Class Member worked. SA at 12:21-14:7. Thus, for example, if the total number of workweeks that
13 were worked by all Class Members was 30,000, and a particular Class Member worked 52 weeks,
14 then the amount that would be paid to this Class Member would be determined by this formula: 52
15 workweeks/30,000 workweeks x \$454,000, which would total approximately \$787. *Id.* at 13:22-25.

17 **E. Administration of Class Settlement.**

18 All administration of class notices, communications, and disbursements will be performed by
19 Rust Consulting, a nationally recognized claims administrator. SA at 19:23-20:11. The class notice
20 will advise each potential class member of the approximate amount of that member's Individual
21 Payment Award to enable that member to decide whether or not to opt out of the settlement. SA, Ex.
22 1 (Class Notice), at 3, par. 8. The Individual Payment Awards will be mailed to the class members
23 within 45 days of the "Effective Date" of the settlement, which will most likely be 60 days after
24 service of entry of judgment. SA at 24:20-28; 6:9-7:2.

26 **F. Reasonable Attorney's Fees and Costs.**

27 As part of the settlement, Class Counsel will receive up to 30% of the total settlement, or
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1 \$240,000, in attorney's fees and \$11,000 in costs, and Mauldin will receive up to \$15,000 as a service
2 payment, subject to Court's independent determination of the reasonableness of these payments. SA
3 at 14:27-15:22. Class Counsel will file a motion for fees and costs to be heard in connection with the
4 final approval hearing. *Id.* at 24:8-13. Frito-Lay has agreed not to oppose the motion so long as it
5 does not seek more than the amounts stated above. *Id.* at 14:28-15:22. If, however, the Court awards
6 less than these amounts, the difference reverts to Frito-Lay and not to class members. *Id.* at 12:6-8.
7 In that case, the total settlement amount will be less than \$800,000.
8

9 **G. Objections to Settlement.**

10 Any Class Member wishing to object to this Settlement may file objections and supporting
11 memoranda with the Court, and shall also serve counsel for the parties, not later than 30 days after
12 service of the Class Notice. SA at 22:4-9. Any RSA who has opted out of the class is precluded
13 from submitting an objection to the Settlement. *Id.* at 23:8-11.
14

15 **IV. REQUEST NO. 1: CONDITIONAL CERTIFICATION** 16 **FOR PURPOSES OF SETTLEMENT.**

17 To effectuate this settlement, Mauldin moves for conditional class certification. Class actions
18 are authorized by C.C.P. §382 "when the question is one of a common or general interest, of many
19 persons, or when the parties are numerous, and it is impractical to bring them all before the court."
20 To establish the usefulness of the class procedure, Mauldin "must demonstrate [A] the existence of an
21 ascertainable and sufficiently numerous class, [B] a well-defined community of interest, and [C]
22 substantial benefits from certification that render proceedings as a class superior to the alternatives.
23 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021. This section will
24 demonstrate the satisfaction of these requirements.
25

26 **A. Ascertainable and Numerous Class.**

27 The "ascertainability" requirement is designed to satisfy the due process concern that notice can
28 be given to those who will be bound, and it is determined by examining the criteria contained in the

1 class definition, the means for identifying those who satisfy these criteria, and the size of the class.
2 *Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal.App.4th 639, 647-648.

3 In this settlement, the class is defined as "all persons who worked for Defendants as Route Sales
4 Associates (RSAs) in the State of California at any time from March 8, 2015 through the date of
5 Preliminary Approval." SA at 14-24. This properly defines the class criteria in terms of "objective
6 characteristics and common transactional facts" that are "sufficient to allow a member of that group
7 to identify himself as having a right to recover based on the description." *Ghazaryan v. Diva*
8 *Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531-1533. Those who satisfy these criteria can
9 readily be ascertained from Frito-Lay's employment records. See I.W.C. Wage Order 9-2001, §7, 8
10 C.C.R. Sec. 11090, §7 (required employment records must be kept at least three years).

11 And they have been. According to Frito-Lay's records, there are approximately 1,771 putative
12 class members who satisfy these criteria. Clapp Dec., par. 8. Joinder of such a large number, of
13 course, is not practical. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1531 n.5 (190
14 members sufficiently numerous).

15 Thus, the class is both sufficiently ascertainable and sufficiently numerous to warrant class
16 treatment.

17 **B. Well-Defined Community of Interest.**

18 The "well-defined community of interest" requirement consists of three factors: "(1)
19 predominant common questions of law or fact; (2) class representatives with claims or defenses
20 typical of the class; and (3) class representatives who can adequately represent the class." *Brinker*, 53
21 Cal.4th 1004, 1021.

22 **1. Common Questions of Law Predominate Over Any Individual Issues.**

23 The "predominance" inquiry asks "whether the issues which may be jointly tried, when
24 compared with those requiring separate adjudication, are so numerous or substantial that the
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1 maintenance of a class action would be advantageous to the judicial process and to the litigants."
2 *Brinker*, 53 Cal.4th 1004, 1021. To answer this question, the court "must examine the plaintiffs
3 theory of recovery" and "assess the nature of the legal and factual disputes likely to be presented."
4 *Id.* at 1025.

5 Plaintiff has raised two class-wide theories of recovery: First, that Frito-Lay's maintained a
6 uniform, class-wide policy of paying for overtime wages earned on the Monday through Friday on
7 the Friday of the second week following the workweek, and that this practice constituted a late
8 payment in violation of Labor Code Section 204b; and second, that Frito-Lay maintained a uniform,
9 class-wide policy of providing a wage statement for these overtime wages and hours on that same
10 payday, and that this practice constituted a late wage statement in violation of Labor Code Section
11 226(a). First Amended Complaint at 2:22-3:15. These two theories present two legal issues:
12 Whether the practice of paying overtime wages on the second Friday following the end of the
13 workweek complied with Labor Code Section 204b's timing-of-payment requirement, and whether
14 the practice of reporting overtime wages on that same Friday's pay stub complied with Labor Code
15 Section 226(a)'s accurate-wage-statement requirement.

16 There are no individual issues that must be resolved, except for the amount of the recovery, and
17 it is a general rule that "if the defendant's liability can be determined by facts common to all members
18 of the class, a class will be certified even if the members must individually prove their damages."
19 *Brinker*, 53 Cal.4th 1004, 1022. Thus, these two common legal issues are so substantial, relative to
20 the individual issues, that a class action would provide efficiencies and economies that would serve to
21 benefit the litigants and the judicial process. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34
22 Cal.4th 319, 339-340 (multiplicity of trials would cause enormous expense and inefficiencies and
23 deter legitimate claimants from seeking redress). For this reason, "Claims alleging that a uniform
24 policy consistently applied to a group of employees is in violation of the wage and hour laws are of
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1 the sort routinely, and properly, found suitable for class treatment." *Brinker*, 53 Cal.4th 1004, 1033.

2 **2. The Class Representative's Claims Are Typical.**

3 The purpose of the "typicality" factor "is to assure that the interest of the named representative
4 aligns with the interests of the class." *Martinez v. Joe's Crab Shack Holdings* (2014) 231
5 Cal.App.4th 362, 375. The test "is whether other members have the same or similar injury, whether
6 the action is based on conduct which is not unique to the named plaintiffs, and whether other class
7 members have been injured by the same course of conduct." *Id.*

8
9 Mauldin alleges that Frito-Lay's payment and paystub policies apply uniformly to all the RSAs.
10 First Amended Complaint at 1:24-28, 3:7-11. As a result, each one who was paid overtime premiums
11 late, including Mauldin, have suffered the same injury. If Mauldin's theories of liability are correct,
12 then each was paid late and each received inaccurate wage statements. In short, Mauldin's interest
13 and the class's interests align.

14 **3. Class Counsel and the Class Representative Will Adequately Represent the Class.**

15 Adequacy of representation depends upon whether Mauldin or his counsel have any conflicts of
16 interests with other class members, and whether Mauldin and his counsel can and will prosecute the
17 action competently and vigorously. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir.
18 2011).

19
20 Neither Mauldin nor his counsel knows of any conflict with any other class member, and both
21 intend to prosecute this case vigorously. Mauldin Dec., par. 2; Clapp Dec., par. 9. Mauldin's counsel
22 has more than 36 years of experience in prosecuting wage-and-hour claims and more than 17 years of
23 experience in prosecuting wage-and-hour class actions on behalf of employees. Clapp Dec., par. 10.
24 He has been appointed lead class counsel in numerous class cases, in both state and federal courts,
25 and is one of the very few who has been the lead trial lawyer in a wage-and-hour, class-action trial.
26 Clapp Dec., par. 11-14. Moreover, counsel's law firm has all the resources needed to
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1 prosecute this action to its conclusion. Clapp Dec., par. 15.

2 In sum: Because common issues are likely to predominate over individual issues, because
3 Mauldin's claims are typical of those that could be raised by the other RSAs, and because Mauldin
4 and his counsel likely to prove adequate representatives, there is a well-defined community of interest
5 that binds all the RSAs together into one cohesive class.
6

7 **C. The Benefits of a Class Procedure Render It Superior to Alternatives.**

8 Which procedure for resolving the RSA's late-payment and wage-statement claims would yield
9 superior benefits? The obvious procedural alternative to class litigation, of course, would be
10 individual lawsuits—approximately 1,771 individual lawsuits. *Sav-On Drug Stores, Inc. v. Superior*
11 *Court* (2004) 34 Cal.4th 319, 339n.10 ("The relevant comparison lies between the costs and benefits
12 of adjudicating plaintiffs' claims in a class action and the costs and benefits of proceeding by
13 numerous separate actions—not between the complexity of a class suit that must accommodate some
14 individual inquiries and the absence of any remedial proceeding whatsoever."). A class procedure
15 would serve to eliminate this repetitious litigation of individual issues, thus enabling the court to
16 more efficiently deploy its scant resources. *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th
17 715, 741. Avoiding this inefficient multiplicity of trials would also serve the economic interests of
18 the parties themselves. *Sav-On Drugs v. Superior Court*, 34 Cal.4th 319, 340 ("It would be neither
19 efficient, nor fair to anyone, including defendants, to force multiple trials to hear the same evidence
20 and decide the same issues.").

21
22
23 In addition, the class procedure is superior to individual lawsuits because it promotes the
24 public's interest in the vigorous enforcement of minimum labor standards. *Id.*; see also Labor Code
25 Sec. 90.5a) ("It is the policy of this state to vigorously enforce minimum labor standards. . . ."). The
26 class procedure "provides small claimants with a method of obtaining redress for claims which would
27 otherwise be too small to warrant individual litigation. *Sav-On Drugs v. Superior Court*, 34 Cal.4th
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1 319, 340. The potential monetary recoveries that RSAs could obtain in individual suits for the late-
2 payment and wage-statement claims are woefully insufficient to justify the expense of counsel to
3 litigate individual claims, and as a result, realistically, these claims will be abandoned *en masse* if the
4 class is not certified. Thus, a failure to certify would result "in a failure of justice in our judicial
5 system." *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 434.
6

7 In sum, a class action is the best procedure for adjudicating these claims, the class coheres, and
8 the numerous members are ascertainable. Mauldin submits that the Court should certify this class.

9 **V. REQUEST NO. 2: APPOINTMENT OF CLASS REPRESENTATIVE,**
10 **CLASS COUNSEL, AND CLAIMS ADMINISTRATOR.**

11 As set forth above in Section IV.B.3, *supra* (Adequacy of Representation), Mauldin's claims
12 are typical of the claims alleged on behalf of the other RSAs; he has no conflict with any other RSA;
13 and he intends to vigorously prosecute this case to resolution. Mauldin Dec., par. 4. He and class
14 counsel request that the court appoint him to represent the class in this action.

15 Also as set forth above, Mauldin's counsel has sufficient qualifications, experience, and
16 expertise to prosecute this wage-and-hour class action. Clapp Dec., par. 10-15. Mauldin requests
17 that the court appoint Joseph Clapp, Esq., of Aiman-Smith & Marcy, as class counsel.
18

19 In addition, Mauldin and class counsel request that the court appoint Rust Consulting, Inc., a
20 nationally-recognized firm, as the claims administrator. Clapp Dec., par. 16.

21 **VI. REQUEST NO. 3: PRELIMINARY APPROVAL OF SETTLEMENT.**

22 A class action may not be settled without court approval, which requires three steps:
23 preliminary approval of the settlement after submission of a written motion; dissemination of notice
24 to putative class members; and a final approval hearing. Cal. Rule of Court 3.769. Mauldin requests
25 that the Court take the first step and grant preliminary approval of the settlement.
26

27 The reason that court approval is necessary is to protect members of the class, "whose rights
28 may not have been given due regard by the negotiating parties." *Dunk v. Ford Motor Co.* (1996) 48

1 Cal.App.4th 1794, 1801. The Court must determine whether the settlement proposed is "fair,
2 adequate, and reasonable." *Id.* The Court's inquiry, however, is a limited one, because the Court
3 should afford "due regard" for what is, essentially, a "private consensual agreement." *Id.* Therefore,
4 the inquiry "must be limited to the extent necessary to reach a reasoned judgment (A) that the
5 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
6 parties, and (B) that the settlement, taken as a whole, is fair, reasonable and adequate to all
7 concerned." *Id.*

9 **A. This Agreement Was the Product of Arm's Length Negotiations.**

10 The Court should recognize "an initial presumption of fairness when a proposed class
11 settlement was . . . negotiated at arm's length by counsel for the class." *Kullar v. Foot Locker Retail,*
12 *Inc.* (2008) 168 Cal.App.116, 130. In this case, the history of settlement negotiations demonstrates
13 the utter lack of any fraud, overreaching, or collusion. *Dunk v. Ford Motor Co.*, 48 Cal.App.4th
14 1794, 1801.

16 The "involvement of a qualified mediator" provides some evidence of an "arm's length"
17 settlement. *Kullar*, 168 Cal.App.4th 116, 129. The case was initially mediated, on June 1, 2017,
18 before Michael Dickstein, Esq., a nationally-renowned wage-and-law class action mediator. *See,*
19 *e.g., Hens v. ClientLogic Operating Corp.*, 2010 U.S. Dist. Lexis 139126, at *2-3 (W.D.N.Y.)
20 ("nationally-recognized mediator"); Clapp Dec., par. 17 and Ex. "Dickstein CV." The matter did not
21 settle at that time. Thereafter, the parties continued to negotiate, through Mediator Dickstein, over
22 the following five months, until he was finally able to persuade the parties to sign a memorandum of
23 understanding in late October and early November 2017. Clapp Dec., par. 18.

25 Further evidence of an "arm's length" settlement consists in the "competency and integrity of
26 [class] counsel." As described above, class counsel has prosecuted numerous wage-and-hour class
27 actions over many years and is one of the very, very few who have actually brought a class action to
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1 trial. In this action, class counsel has diligently prosecuted this action by promulgating extensive
2 discovery and thereby obtaining all the factual information necessary to negotiate a reasonable
3 memorandum of understanding. Clapp Dec., par. 19. Most importantly, this factual information
4 consists of Frito-Lay's policies governing the timing of the payment of overtime premiums and the
5 contents of associated wage statements, the number of potential class members, and the number of
6 their workweeks. *Id.* This is the information that is necessary to evaluate Frito-Lay's exposure in this
7 matter. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1802 (information adequate if sufficient
8 to reach an intelligent opinion of the probabilities of success and an educated assessment of all other
9 relevant factors such as the complexity, expense, and likely duration of the litigation).

11 Moreover, class counsel's intensive involvement in this case did not end with the signing of
12 the memorandum of understanding. The parties found themselves at loggerheads over many of the
13 terms of the long-form agreement, and, as a result, counsel devoted several more months to
14 negotiating a long-form agreement. Ultimately, counsel was able to negotiate all of the parties'
15 disputes—with the exception of one⁸—but was not able to do so until May 2018. Clapp Dec., par.
16 20.

18 Thus, an experienced class counsel obtained all relevant data and, through the intermediation
19 of a renowned mediator, and after extraordinarily-difficult and protracted negotiations, was finally
20 able to conclude a class settlement. The presumption of fairness that should be afforded to this arm's
21 length agreement was hard-earned.

23 **B. The Settlement Is Fair, Reasonable, and Adequate to All.**

24 To approve a settlement, "the court must at least satisfy itself that the class settlement is
25 within the 'ballpark' of reasonableness." *Kullar*, 168 Cal.App.4th 116, 133. Although the Court
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27
28 ⁸ The one exception, which the parties request the Court to resolve, involves the distribution of
\$15,000 in civil PAGA penalties. This request will be discussed in detail in Section VI.B.4., *infra*.

1 should consider all relevant factors,⁹ such as (1) the value of the case, (2) the fairness of the
2 distribution, (3) the views of counsel, and (4) the presence of a governmental participant, ultimately
3 "the trial court's determination is nothing more than an amalgam of delicate balancing, gross
4 approximations, and rough justice." *Dunk*, 48 Cal.App.4th 1794, 1801.

5
6 **1. \$800,000 Is a Reasonable Settlement Value.**

7 Whether \$800,000 is a reasonable amount to settle this case depends upon the strength of
8 Mauldin's case, meaning (a) the potential recovery, discounted by (b) the substantive and procedural
9 risks involved and (c) the costs of delay and expense that would be associated with further litigation.

10 **a. The Potential Recovery for the Class.**

11 Mauldin brings a class claim under Labor Code Section 204b for damages caused by late
12 payment of overtime wage and a class claim under Labor Code Section 226 for statutory penalties for
13 inaccurate wage statements. But it is very doubtful whether Mauldin and other RSAs can recover any
14 damages at all on the first claim because it is doubtful whether there is a private right of action at all
15 to enforce Labor Code Section 204b. The matter has never been decided by California appellate
16 courts, but federal district courts have held that a violation of a related section, Labor Code Section
17 204, does not give rise to a private cause of action. *See, e.g., Villalpando v. Exel Direct Inc.*, 2014
18 U.S. Dis. LEXIS 42622 at *63 (N.D. CA. 2014) ("The undersigned agrees . . . that a provision
19 addressing the *timing* of wage payments does not appear to give rise to a claim for unpaid wages such
20 that [Labor Code] § 218 would indicate a clear legislative intent to create a private right of action
21 under [Labor Code] § 204.").

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26 ⁹ The Court "should consider relevant factors, such as the strength of plaintiffs' case, the risk,
27 expense, complexity and likely duration of further litigation, the risk of maintaining class action
28 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, the presence of a governmental participant,
and the reaction of class members to the proposed settlement." *Dunk*, 48 Cal.App.4th 1794, 1801.

1 If the drivers can pursue a Labor Code §204b class claim for damages, the amount sought
2 would be the interest due for the late payment. We can estimate that amount by making certain
3 liberal assumptions: First, if the drivers averaged \$100 in late overtime payments each pay period,
4 and the interest rate was 10% annually, then for each driver the amount of interest due during a year
5 would be \$10.¹⁰ If there are 1,000 active drivers, then the total annual interest for that year would be
6 \$10,000. Since the class period runs from March 8, 2015 until the date of preliminary approval—
7 approximately 3.23 years—the class recovery would in the rather paltry range of \$30,000-\$35,000.

9 On the other hand, the second class claim for violation of Labor Code Section 226(e)(1)
10 provides a statutory penalty for employees who suffer injury due to the employer's knowing and
11 intentional failure to provide an accurate wage statement. This penalty is capped, however, at
12 \$4,000. Labor Code §226(e)(1). Thus, assuming 1,771 drivers, then this statutory penalty would be
13 much more substantial than the Labor Code Section 204b damages, but it could not exceed
14 \$4,000,000 (excluding costs and attorney's fees).

16 **b. Risks and Costs of Further Litigation.**

17 Thus, Frito-Lay's exposure to the class is, in gross, roughly \$4,000,000. There are substantial
18 risks and costs to further litigation, however, that make it unlikely that this gross amount will be
19 realized, or at least realized any time soon.

20 First, of course, there is the substantive risk that Mauldin will not be able to establish the
21 underlying claim that the timing of the payment violated the law. As set forth in Section C.1. and
22 C.2., *supra*, Mauldin argues that, pursuant to Labor Code Section 204b, payment of overtime
23 premiums earned on the Monday through the Friday of a workweek must be paid no later than the
24 payday (Friday) on the following workweek. Frito-Lay disagrees. It argues that the timing of
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28 ¹⁰ Each weekly paycheck would extinguish liability for the previous week's late-payment and create a
new liability. The effect would be a constant interest accruing at 10% on the average \$100 principal.

1 payment provisions of Labor Code 204, rather than Labor Code Section 204b, applies. Frito-Lay
2 contends that Labor Code Section 204(d) permits normal wages to be paid as late as seven calendar
3 days following the close of the payroll period, and that Labor Code Section 204(b)(1) (not to be
4 confused with Labor Code Section 204b) permits overtime wages to be paid no later than the payday
5 for the next regular payroll period thereafter. Thus, according to Frito-Lay's argument, employees
6 who earn normal wages for work performed between Monday, April 1 and Friday, April 6, need not
7 be paid until Saturday, April 14, and "wages earned for labor in excess of the normal work period
8 [i.e., overtime wages] shall be paid no later than the payday for the next regular payroll period."
9 Labor Code §204(b)(1). The payday for "the next regular payroll period" would be Friday, April 20,
10 the date that Frito-Lay would pay those overtime wages.
11

12 Thus, the crux dispute involves the interpretation of complicated, statutory language in Labor
13 Code Sections 204 and 204b. There is scant relevant case law, so an exhaustive examination of the
14 legislative history will most likely be required if this matter must be resolved through adjudication.
15

16 But the magnitude of this substantive risk that Mauldin might lose his argument of statutory
17 interpretation, while real, is dwarfed by the magnitude of a greater risk, a procedural one. As a
18 condition of Mauldin's employment, he was forced to enter into Frito-Lay's form agreement waiving
19 any right to bring a class or collective action. Mauldin Dec., par. 5, Ex. "Dispute Resolution
20 Program" ("This Program is a condition of your employment. . . ."; "The employee and company
21 each agree, that there shall be no class or collective action arising from any employee's claims(s). . .
22 ."). While employees may waive the right to bring a class action, they are barred by public policy
23 from waiving PAGA claims. *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th
24 348, 388-389. As a result, Mauldin originally brought this action as a PAGA-only case seeking civil
25 penalties. As part of the settlement, however, the parties agreed to expand the case to permit Mauldin
26 to bring a class action on behalf of RSAs for their damages and their statutory penalties. This
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1 expansion of the case, however, is done at the sufferance of Frito-Lay, and if the settlement is not
2 consummated, then Frito-Lay will be able to raise the class action waiver as a defense to class
3 certification. As a result, "the risk of maintaining class action status through trial" is not merely
4 problematic; it is an overwhelming factor of risk in this litigation. *Kullar*, 168 Cal.App.4th 116, 128.

5 In addition to discounting Frito-Lay's \$4,000,000 exposure by the substantive risk of losing
6 and the procedural risk of decertification, the amount should also be discounted to account for the
7 expense of continued litigation and the delay in payment. *Dunk*, 48 Cal.App.4th 1794, 1801. If the
8 matter must be adjudicated, it is likely that the computation of damages and statutory penalties will
9 require extensive work by an expert economist, which is likely to cost scores of thousands of dollars.
10 Clapp Dec., par. 21. And class litigation would likely to span another year or two in the trial court.
11 *Id.*, par. 22. If the Court were to enter judgment for any substantial judgment, it is likely that Frito-
12 Lay would appeal, further delaying distribution of any judgment for years. *Id.*

13 Thus, Mauldin submits that given these risks and costs of continued litigation, an \$800,000
14 settlement that soon will provide substantial benefits to class members falls well within "the ballpark
15 of reasonableness."

16 **2. The Distribution of Settlement Proceeds Is Fair to All.**

17 The proposed \$800,000 settlement will provide a substantial recovery for class members.
18 After attorney's fees (\$240,000), costs (\$11,000), class representative service payment (\$15,000)
19 claim administration expenses (\$20,000), and PAGA payments (\$60,000), at least \$454,000 will be
20 distributed to the approximately 1,800 class members—an average of more than \$250 apiece to
21 compensate for the injury of a portion of their wages, their overtime wages, being paid six days late.
22 SA at 11:1-18.

23 This \$454,000 payment to the class members will be distributed fairly, in proportion to the
24 number of weeks they worked. SA at 13:14-14:2.

1 **3. Views of Counsel.**

2 In deciding whether to approve this settlement, the Court should consider the experience and
3 informed view of counsel. As set forth above, putative class counsel has devoted his entire career to
4 protecting the workplace rights of employees. He has 36 years of wage-and-hour litigation
5 experience and 17 years of class-action litigation experience. In this case, he has spent scores of
6 hours researching the law applicable to all potential claims in this case. Clapp Dec., par. 22. He is
7 fully informed of the pertinent facts because he has conducted extensive investigation and discovery.
8 In discovery, he has propounded four sets of admissions, two sets of document requests, special
9 interrogatories, form interrogatories-employment law, form interrogatories-general, supplemental
10 interrogatories, and supplemental interrogatories. He engaged in extensive meet and confer
11 negotiations about Frito-Lay's responses to these discovery requests, and as a result Frito-Lay
12 produced all the information that Mauldin required for mediation, including, most importantly, the
13 policies governing the timing of wage payments and wage statements, the number of potential class
14 members, and the number of workweeks that were worked by those class members. *Id.*

15 Based on this experience, this expertise, this research, and this knowledge of the facts,
16 putative class counsel wholeheartedly recommends that the Court approve this proposed settlement.
17 Clapp Dec., par. 23.

18 **4. The Presence of the Labor and Workforce Development Agency.**

19 In addition to his class claims, Mauldin has brought a claim for civil penalties under the
20 California Private Attorney's General Act of 2004. Labor Code §2698 *et seq.* A portion of the
21 settlement—\$60,000—has been allocated for civil penalties recoverable under PAGA. This proposed
22 settlement is being submitted to the Labor and Workforce Development Agency for its input. Clapp
23 Dec., par. 24. *See also* Labor Code §2699(1)(2) ("The proposed settlement shall be submitted to the
24 agency at the same time that it is submitted to the court."). Settlement of the PAGA action requires
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1 approval by this Court. Labor Code §2699(l)(1) ("The superior court shall review and approve any
2 settlement of any civil action filed pursuant to this part.").

3 These civil penalties "shall be distributed as follows: 75 percent to the Labor and Workforce
4 Development Agency. . .; and 25 percent to the aggrieved employees." Labor Code §2699(i). Thus,
5 pursuant to the terms of the settlement, 75%, or \$45,000, will be distributed to the Agency, and 25%,
6 or \$15,000, will be distributed "to the aggrieved employees."

7
8 But who are these "aggrieved employees" who should receive this \$15,000 payment? Should
9 it be Mauldin alone, or should it be all the RSAs? Mauldin and Frito-Lay disagree on this point and
10 have not been able to resolve their disagreement, except that both are willing to abide by whatever
11 this Court decides, *provided however that both sides agree the funds must be distributed in a*
12 *manner that results in a binding release of PAGA claims by all Class Members.*

13
14 Mauldin's Position Regarding Distribution of PAGA Penalties

15 Mauldin believes that the main argument for the payment to be distributed to all RSAs, rather
16 than just to Mauldin, is simple—that is what the California Supreme Court says:

17 "A PAGA representative action is therefore a type of qui tam action. 'Traditionally, the
18 requirements for enforcement by a citizen in a *qui tam* action have been (1) that the statute
19 exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way,
20 the informer be authorized to bring suit to recover the penalty.' The PAGA conforms to these
21 traditional criteria, except that *a portion of the penalty goes no only to the citizen bringing the*
suit but to all employees affected by the Labor Code violation." *Iskanian v. CLS*
Transportation Los Angeles LLC (2014) 59 Cal.4th 348, 382 (emphasis added; internal
citation omitted).

22 Since the *Iskanian* decision did not deal with the distribution of PAGA proceeds, its statement
23 that the 25% goes to all aggrieved employees is dictum. *See Santisas v. Goodin* (1998) 17 Cal.4th
24 599, 620 ("An appellate decision is not authority for everything said in the court's opinion but only
25 'for the points actually involved and actually decided.'"). Though not controlling, of course, dictum
26 from the Supreme Court 'carries persuasive weight and should be followed where it demonstrates a
27 thorough analysis of the issue or reflects compelling logic.' *Manufacturers Life Ins. Co. v. Superior*
28

1 *Court* (1995) 10 Cal.4th 257, 287 (Mosk, concurring).

2 Mauldin contends that this dictum satisfies neither of these criteria because it was just a
3 passing statement, and that a more thorough analysis would demonstrate that the 25% should be
4 distributed to him. Perhaps the best such analysis supporting this view comes from the district court
5 case of *Cunningham v. Leslie's Poolmart, Inc.*, 2013 U.S. Dist. Lexis 90256 at *6, n.1 (C.D. CA
6 2013). The *Cunningham* court set forth two reasons for deciding that the 25% should go to the
7 employee who brought the lawsuit, rather than to all employees, one based on the absence of any
8 procedure for distributing money to other employees, and one based on the basic mechanism
9 animating any *qui tam* statute – incentivizing a bounty-hunter to go into Black Gulch and bring back
10 Deadeye Dick, dead or alive.
11

12 Here is what *Cunningham* has to say about the first reason, PAGA's lack of any procedure for
13 distributing money to other employees:
14

15 "the best interpretation of PAGA is that the penalties not distributed to the Labor Workforce
16 Development Agency are distributed to the individual employee who brought the action. The
17 strongest consideration in favor of this interpretation is that the statute contains no provisions
18 for distributing any portion of the recovery to non-party employees, even though PAGA
19 contains detailed procedures setting out how a representative action is litigated. *See* Cal. Lab.
20 Code §2699.3. Moreover, the California Supreme Court has held that, under California law,
non-party employees need not be given notice of representative actions under PAGA. *See*
Arias, 46 Cal.4th at 986-987. The lack of mandatory notice means that non-parties are never
notified about their right to a portion of the recovery in a PAGA action, which implies that no
such right exists." *Cunningham*, 2013 U.S. Dist. Lexis 90256 at *6, n.1.

21 It does seem odd that the Legislature would go to all the trouble of setting forth a procedure
22 for detailed notice to the Labor and Workforce Development Agency, but then neglect to set forth
23 any procedure at all for notifying non-party employees of their right to receive money and no
24 procedure at all for distributing this money to the employees. Moreover, requiring that the money go
25 to non-party employees might have the pernicious effect of building into the process substantial
26 transaction costs, and possibly even satellite litigation. If the Legislature had intended this, it
27 presumably would have said so.
28

1 But the second reason identified by *Cunningham* is perhaps even more compelling:

2 "Finally, since the purpose of PAGA is to create incentives for private litigants to bring
3 actions enforcing the Labor Code, not to provide restitution to aggrieved employees,
4 rewarding prevailing litigants with a substantial recovery promotes PAGA's purpose."
Cunningham, 2013 U.S. Dist. Lexis 90256 at *6, n.1.

5 As background, the penalties recovered in a PAGA action are *civil* penalties. In other words,
6 they are penalties owed to the State, not to the employees. *Iskanian*, 59 Cal.4th 348, 381 ("The civil
7 penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to
8 which employees may be entitled in their individual capacities."). In essence, a PAGA suit is "a law
9 enforcement action designed to benefit the public and not to benefit private parties." *Arias*, 46
10 Cal.4th 969, 986. As a result, an employee who brings a PAGA suit for these civil penalties does so
11 as the agent or proxy of the Labor and Workforce Development Agency. *Id.* The employee brings
12 the suit "on behalf of the state" because "the state is the real party in interest." *Iskanian*, 59 Cal.4th
13 348, 387.
14

15 The Legislature created this action to supplement the law-enforcement actions of
16 inadequately-funded state agencies. *Arias*, 46 Cal.4th 969, 980. The mechanism devised was by the
17 Legislature to accomplish this purpose was to grant a bounty to any aggrieved employee who
18 recovered these civil penalties on behalf of the State. But, as the *Cunningham* court noted, it would
19 disable this mechanism if the incentive were distributed to all employees rather than to the employee
20 who brought the suit. If a notice tacked in the sheriff's office in some dusty town in the Wild West
21 posted a reward of \$500 for someone to go capture Deadeye Dick, but then also said that the \$500
22 would be paid to all the townspeople rather than just to the bounty hunter, then how many bounty
23 hunters would accept that challenge?
24

25
26 There is no doubt that PAGA's language is somewhat ambiguous on this point. It states that a
27 PAGA action may be brought by an aggrieved employee "on behalf of himself or herself and other
28 current or former employees." Labor Code §2699(a), (g)(1). But, as our Supreme Court has noted, it

1 is the state, not these employees, who is the "real party in interest" in an action for these civil
2 penalties. *Iskanian*, 59 Cal.4th 348, 387. The aggrieved employee represents "the same legal right
3 and interest as the state labor enforcement agencies." *Id.* As a result, the employee brings the action
4 "on behalf of the state," and as its "agent" or "proxy." *Id.* at 387, 389. The PAGA action "functions
5 as a substitute for an action brought by the government itself." *Id.* at 387.
6

7 That, however, poses something of a conundrum: What could the Legislature have meant
8 when it said that an aggrieved employee brings the action on behalf of other aggrieved employees?

9 Perhaps the Legislature simply intended to indicate that an employee could bring a PAGA
10 claim based on a Labor Code violation that was systematic, *e.g.*, a failure to pay wages on time to an
11 entire group of drivers. It then, in that sense, would be an action "on behalf of current or former
12 employees." But it would not be an action "on behalf of current or former employees" in the sense
13 that it is an action for the *benefit* of those employees. The other employees are not real parties in
14 interest; in fact, they are not parties at all, in any sense of the word. *Arias*, 46 Cal.4th 969, 986-987.
15

16 This reading might be bolstered by the section of PAGA that describes the distribution of the
17 collected civil penalties. This section reads, in pertinent part, that "civil penalties [a] *recovered by*
18 *aggrieved employees* shall be distributed as follows: 75 percent to the Labor and Workforce
19 Development Agency . . .; and 25 percent to [b] *the aggrieved employees*." Labor Code §2699(i)
20 (emphasis added)). Let us look first at the second use of "aggrieved employees," designated in this
21 Memorandum with a "[b]." Who is included within this set of "the aggrieved employees," that is,
22 those who receive the 25 percent? Linguistically, it must be those "aggrieved employees" referred to
23 in the first use, designated with an [a]. But, critically, [a] does not include all "aggrieved employees";
24 it includes *only those aggrieved employees who recovered civil penalties*. Thus, it would seem this
25 language suggests that the 25% should go to those aggrieved employees who actually recovered the
26 civil penalties by bringing a PAGA action.
27
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1 Mauldin is the aggrieved employee who recovered these civil penalties. Not any other
2 employee. He submits that both the language of the statute and the evident purpose of this *qui tam*
3 statute would best be served by awarding the 25% to him. But regardless how the Court decides,
4 Mauldin asks the Court to preliminarily approve this settlement.

5 Frito-Lay's Position Regarding Distribution of PAGA Penalties

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7 Frito-Lay believes that both the plain language of the law, and a plain sense of
8 fairness, require the PAGA funds to be distributed to all Class Members. If the funds are not so
9 distributed, Mauldin will keep funds associated with violations against *other Class Members*, while
10 those Class Member release their claims, lose the right to seek PAGA penalties on their own behalf,
11 and get nothing in return. Frito-Lay simply does not believe this was the intention of the Legislature.
12 First and foremost, Frito-Lay maintains that both PAGA itself and the California Supreme Court
13 explicitly state this is how it should be distributed.
14

15 Frito-Lay disagrees with Mauldin's interpretation of Labor Code Section 2699. The plain
16 language of Section 2699(c) defines "aggrieved employee" as "*any person* who was employed by the
17 alleged violator and against whom one or more of the alleged violations was committed." Importantly,
18 the labor code does not define it as only *one employee*, but as *any person* who fits this description.
19 Section 2699(f)(2) goes on to explain that penalties are available in the amount of "one hundred dollars
20 (\$100) for *each* aggrieved employee per pay period for the initial violation and two hundred dollars
21 (\$200) for *each* aggrieved employee per pay period for each subsequent violation." Finally, section
22 2699(i) plainly dictates that the 25% of the penalty amount must go "to the *aggrieved employees*"
23 (plural).

24 Mauldin based his damages calculation on the idea that he was representing everyone who fell
25 within the definition of "aggrieved employee," and sought penalties for each week worked by each
26 such aggrieved employee during the Class Period. He nevertheless argues that he is entitled to retain
27 these penalties. It seems to stretch the bounds of both a logical interpretation of the language of the
28 statute itself, as well as sound public policy, to assume the legislature intended to create a device for

1 individuals to recover penalties on behalf of other employees and then keep those penalties, rather than
2 sharing them with employees whose harm gave rise to those penalties in the first place.

3 This interpretation is explicitly supported by California Supreme Court case law. In *Iskanian v.*
4 *CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348, the Court stated:

5 A PAGA representative action is therefore a type of *qui tam* action. 'Traditionally, the
6 requirements for enforcement by a citizen in a *qui tam* action have been (1) that the
7 statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that,
8 in some way, the informer be authorized to bring suit to recover the penalty.' The PAGA
conforms to these traditional criteria, except that *a portion of the penalty goes not only to*
the citizen bringing the suit but to all employees affected by the Labor Code violation.

9 *Id.* at 382 (emphasis added; internal citation omitted). In other words, the Supreme Court already
10 explicitly considered (not in dicta) and rejected Mauldin's argument that the funds need not be
11 distributed across affected employees because this is a *qui tam* action – and held that they *did* need to
12 be distributed. This is precisely what Frito-Lay believes is appropriate here. Put simply, distributing
13 the funds among the aggrieved employees is not only what is contemplated by PAGA itself and
14 confirmed by the Supreme Court, it is also the only fair and equitable manner in which to distribute
15 them. Notwithstanding Mauldin's argument that PAGA may not explain clearly how to distribute
16 these funds, the most logical conclusion is not that one employee has the right or ability to release
17 other employees' claims and keep the money paid in exchange for that release for him or herself.
18 Instead, the more obvious conclusion is that in California, where wage and hour class actions are
19 prevalent, and claims administrators who do just this abound, it is clear to all parties how to distribute
20 wage and hour settlement proceeds. This argument is specious for exactly this reason. California
21 Code of Civil Procedure 382, which allows for class actions, does not provide specifics for
22 distribution either. Those funds are nevertheless understood to be, and are, distributed to the Class
23 Members. Notably, Mauldin in this very same case does not argue that the Labor Code penalties
24 should not be distributed across the class, because CCP 382 does not explain how to do that. He
25 simply assumes they will be so distributed. Yet he inexplicably argues that it is different for the
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27
28

1 PAGA penalties. There is simply no rationale in either the text of the statutes, the case law, or logic
2 and fairness, for this distinction. As such, PAGA penalties should be distributed in the same manner
3 as Labor Code penalties – to the employees who are releasing claims against Frito-Lay, in exchange
4 for the Company paying those penalties.

5 The parties have agreed to abide by the Court's decision on this issue, *on the explicit*
6 *condition that the PAGA release be valid as to all Class Members.* In other words, the value of the
7 Settlement to Frito-Lay is contingent on a ruling from the court that all Class Members have released
8 their PAGA claims through the Class Period. If distribution to all Class Members is required in order
9 for their releases to be valid and binding, Frito-Lay and Mauldin have agreed to distribute the funds
10 accordingly.
11

12 **VII. REQUEST NO. 4: NOTICE TO THE CLASS.**

13 If the Court conditionally certifies a settlement class and preliminarily approves the
14 settlement, it should direct notice to the potential class members. Cal. Rule of Court 3.766. A form
15 of the proposed notice is attached to the Settlement Agreement. Exhibit Settlement Agreement, Ex.
16 A ("Class Notice"). The Class Notice describes class claims and the nature of the action (*id.*, par. 1),
17 the class definition (*id.*), the terms of the settlement (*id.*, par. 7), the estimated amount of each class
18 member's recovery (*id.*, par. 8), the procedure for obtaining a recovery (*id.*, par. 10), the procedure for
19 opting out of the class (*id.*, par. 12), and the procedure of objecting to the settlement (*id.*, par. 16). It
20 informs class members that they may hire their own attorney (*id.*, par. 6), and it informs them of the
21 binding nature of a class judgment (*id.*, par. 11).
22

23 The Settlement Agreement provides that the Class Notice will be mailed within 45 days of
24 preliminary approval. SA at 20:17-19.
25

26 **VIII. REQUEST NO. 5: FINAL APPROVAL HEARING.**

27 The Court may finally approve this settlement as fair, reasonable, and adequate only after a
28

1 final hearing which is held after appropriate notice has been directed to the class. Cal. Rule of Court
2 3.769. Mauldin proposes that the Final Approval Hearing be scheduled for a convenient date that is
3 approximately 120 days after the date of preliminary approval. SA at 19:5-13.

4
5 **IX. CONCLUSION.**

6 Mauldin and his counsel recommend this class settlement because the class members will
7 receive substantial compensation for the injury of receiving their overtime wages late. They request that the
8 Court conditionally certify a settlement class of California RSAs, appoint the appropriate representatives,
9 preliminarily approve the settlement, approve notice to the class, and schedule a Final Approval Hearing. In
10 addition, they request that the Court decide whether 25% of the PAGA penalty should go to Mauldin or to all
11 the RSAs.

12 Respectfully submitted,

13
14 Dated: May 25, 2018

aiman-smith marcy

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17 Joseph Clapp, Esq.
Attorneys for Plaintiff
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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) Conditionally Certifying a Settlement Class; (2) Appointing Class Representative, Class Counsel, and Claims Administrator; (3) Preliminarily Approving Settlement; (4) Authorizing Class Notice; and (5) Scheduling a Final Approval 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.
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☒ [By Mail] I caused such envelope, with postage fully prepaid, to be placed in the United States mail at Oakland, California.

☐ [By Overnight Delivery, UPS Next Day Air, C.C.P. § 1013(c)] UPS is a provider of overnight delivery services. I placed the above described document(s) in an envelope or package designated for use by UPS and delivered said designated envelope to an authorized Office or drop box of UPS at Oakland, California, with delivery fees for overnight delivery fully prepaid, and addressed to the addressee(s) above.

☐ [By Facsimile Transmission, C.C.P. § 1013(e),(f)] I caused such document to be transmitted by facsimile transmission to a facsimile machine maintained by the person(s) listed in the attached service list and at the fax numbers on that list which are the facsimile numbers last given by the addressee(s) on documents filed in this cause. I received electronic confirmation that said transmission had occurred.

☐ [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: May 25, 2018



Norma Dale