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

NICHOLAS TOSTA, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

FORMULATION TECHNOLOGY
INCORPORATED, a California
Corporation; and DOES 1 through 20,
inclusive;

Defendants.

Case No.: CV-22-000189
*[Assigned to Hon. Judge Sonny S. Sandhu, Dept
24, for all purposes]*

**DECLARATION OF BRIAN J. MANKIN IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

Hearing

Date: June 7, 2023

Time: 8:30 a.m.

Dept.: 24

Complaint filed: January 14, 2022

I, Brian J. Mankin, state and declare:

1. I am an attorney licensed to practice before all of the courts of the State of California. I manage the employment department within my firm where I am also a Partner. I represent Plaintiff in this action and I am thoroughly familiar with and have personal knowledge of all of the facts set forth herein. I submit this declaration in support of Plaintiff's Motion for Preliminary Approval of this Class Action Settlement. If called as a witness, I could and would competently testify thereto.

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1 **COUNSEL’S EXPERIENCE**

2 2. I have been a member, in good standing, of the State Bar of California since 2001.
3 I am admitted to practice in the United States District Courts for the Central and Southern
4 District of California and the Ninth Circuit Court of Appeal and have tried cases in various
5 courts in California.

6 3. I have handled over 500 employee vs. employer litigation matters during my 22
7 years in practice. Over the last 15 years, my practice has almost entirely consisted of
8 representing employees, the majority of which has included class action and representative
9 action wage and hour matters. In total, I have handled over 250 class action and representative
10 action wage/hour cases, and have been appointed by the court as class counsel and have received
11 final court approval and judgment in close to half of those actions to date, and anticipate
12 receiving final approval in many more of those in the future.

13 4. As part of these settlements and judgments, I have recovered in excess of \$250
14 million in damages for my clients and the class members (who often work as nurses, ambulance
15 drivers, technicians, warehouse workers, truck drivers, sales, professional occupations and
16 countless other trades). As of the end of last year, my team and I held the record for the largest
17 known PAGA-only case in California’s history as of that time - a \$12.5 million-dollar court
18 approved settlement, which followed extensive litigation, summary adjudication and writs to the
19 CA Supreme Court against a Fortune 50 company (*Garcia v. Macy’s*, San Bernardino Superior
20 Court).

21 5. I have tried two class and PAGA cases against Fortune 100 companies. In 2018, I
22 was lead counsel in a PAGA case that my firm tried to the bench in the Orange County Superior
23 Court and received a \$425,000 judgment. In 2019, I was co-counsel in a class action case
24 against Walmart that was tried to the jury in District Court for the Central District, wherein the
25 jury awarded Plaintiffs over \$6 million. Following the successful outcome in trial, both cases
26 were appealed.

27 6. Over the last five consecutive years, I have been selected by my peers as a “Super
28 Lawyer” in Employment Litigation, a distinction that only 5% of lawyers receive.

BRIEF SUMMARY OF THE SETTLEMENT

7. Following a contested but productive mediation, Plaintiff and Defendant (collectively, the “Parties”) entered into a Class Action and PAGA Settlement Agreement resolving the wage and hour claims of the putative class (the “Settlement Agreement”), which is attached hereto as **Exhibit A**. The Settlement Agreement seeks to release and discharge Defendant from the claims brought against it in exchange for Defendant’s agreement to pay \$300,000 on a non-reversionary, non-claims made basis (each Class Member will receive his/her share of the Net Settlement Amount without having to submit a claim form or take any action, except for those who opt-out). Plaintiff seeks to represent a class of all current and former non-exempt (hourly paid) employees employed by Defendant in California at any time during the Class Period of January 14, 2018, through February 15, 2023.

8. Under the terms of the Settlement Agreement, Defendant will not oppose Class Counsel’s application for a reasonable award of attorneys’ fees not to exceed one-third of the Settlement Amount, Class Counsel’s litigation expenses not to exceed \$15,000, settlement administrator costs of \$6,000, PAGA Penalties of \$30,000 of which \$22,500 will be paid to the LWDA and the remaining \$7,500 will be paid to the Aggrieved Employees, and a service award not to exceed \$10,000 to Plaintiff. After subtracting the agreed-upon deductions from the Settlement Amount, approximately \$139,000 will be available to pay approximately 120 Class Members who do not opt-out of the settlement, as follows:

<i>Settlement Amount</i>	\$ 300,000.00
Attorneys’ Fees (1/3)	\$ 100,000.00
Litigation Costs (not to exceed)	\$ 15,000.00
Administrator Costs	\$ 6,000.00
PAGA Penalties	\$ 30,000.00
Class Representative Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 139,000.00

9. Assuming 120 Class Members, the average payment to each Class Member will be approximately \$1,158 (\$139,000 / 120). However, the actual payment will be calculated on a pro-rata basis according to the number of Weeks Worked by each Class Member during the Class Period, with each Work Week having a value of approximately \$11.58 (\$139,000 / 12,000

1 estimated Work Weeks). In addition, approximately 85 Aggrieved Employees will receive a share
2 of the \$7,500 PAGA Penalties (25% of the total \$30,000 allocation), calculated pro-rata based on
3 Weeks Worked during the PAGA Period.

4 10. Each Class Member will receive the Notice, explaining the nature of the case, and
5 the process for participating, objecting and opting-out, and advising of his/her estimated
6 settlement payment and the number of Weeks Worked he/she is credited with working during
7 the Class Period (attached hereto as **Exhibit B**).

8 **PROCEDURAL BACKGROUND**

9 11. My office has performed considerable work and diligently investigated and
10 prosecuted this case to a successful conclusion. Our work has resulted in the creation of a
11 significant settlement fund for the benefit of the Class. We efficiently communicated and
12 exchanged information informally with Defense counsel which enabled the parties to
13 successfully settle the case. Because of the risks involved in litigating the case and the contested
14 legal and factual issues, I believe this settlement to be fair, reasonable, and adequate.

15 12. After being retained by Plaintiff, we submitted a letter to the California Labor
16 Workforce Development Agency (the "LWDA") for civil penalties under the Private Attorney
17 General Act of 2004 (the "PAGA"), which is attached hereto as **Exhibit C**, and simultaneously
18 sent a letter to Defendant requesting the production of his personnel and timekeeping records to
19 further evaluate the wage and hour claims. The LWDA ultimately declined to assert jurisdiction
20 over the PAGA, thereby giving Plaintiff the right to bring PAGA claims.

21 13. On January 14, 2018, we filed a putative class and representative PAGA
22 complaint alleging: (1) failure to pay minimum wages, (2) failure to pay overtime, (3) failure to
23 provide meal periods, (4) failure to provide rest breaks, (5) failure to timely pay final wages, (6)
24 failure to provide accurate itemized wage statements, (7) unfair and unlawful competition
25 pursuant to California Bus. and Prof. Code §§ 17200 *et seq.*, and (8)-(14) related PAGA claims.

26 14. Defendant retained counsel and immediately began to defend the case. Then,
27 after early discussions among counsel, the Parties agreed to attend private mediation.

28 ///

1 15. In preparation for the mediation, the Parties informally exchanged documents and
2 information that allowed both sides to calculate the potential damages and evaluate potential risk,
3 including policies and procedures pertaining to each claim alleged, and statistics relating to the
4 number of current and former employees, number of shifts, pay periods worked and other things.
5 FTI also provided their written policies and practices and a robust sampling of payroll and
6 timekeeping records for Class Members. This information enabled my office and, presumably,
7 Defense counsel to take a deep dive into the claims. Additionally, during this process, my office
8 analyzed, researched, and investigated the potential issues, including matters related to the
9 calculation of damages, trial, and appellate issues and risks.

10 16. On February 15, 2023, Plaintiff and FTI participated in mediation before Glenn
11 Lerman, Esq. a well-respected employment mediator. The matter resolved at mediation and the
12 Parties entered into the Settlement Agreement submitted herewith. The Parties now seek the
13 Court's preliminary approval of the Settlement.

14 **THE WAGE AND HOUR CLAIMS, CLASS COUNSEL'S INVESTIGATION, AND**
15 **EVALUATION OF THE SETTLEMENT**

16 17. The putative Class in this case consists of approximately 120 similarly situated
17 non-exempt employees who worked for FTI during the Class Period, and Plaintiff alleged
18 numerous wage and hour violations on behalf of the Class Members. However, Defendant
19 vigorously contested and denied each of Plaintiff's material allegations on the merits and as to
20 the propriety of a class action or PAGA representative action, as discussed herein.

21 18. In preparation for mediation, Peter Carlson, a senior associate within my office,
22 and I formulated a damages model and risk analysis based upon detailed data obtained through
23 informal discovery and information exchanges. The summary of the claims below is based on
24 calculations by our expert and us, and the risks that we potentially faced, giving significant credit
25 to the defenses that Defendant raised or would likely raise in further proceedings. Following the
26 informal exchange and other information provided by Defendant, we estimated the following
27 data points through the date of mediation: (1) 120 Class Members, (2) 63 *former* Class Members
28 for purposes of Labor Code § 203, (3) 12,000 workweeks, (4) 57,500 shifts worked, and (4)

1 approximately 2,500 biweekly wage statements during the PAGA Period. From these metrics,
2 and when factoring in claim certification probabilities and liability probabilities, we formulated
3 detailed damages models to value the claims in preparation for mediation and to reach a realistic
4 and reasonable resolution.

5 19. Here, there were three categories of claims alleged by Plaintiff: (1) unpaid wage
6 claims under various theories, (2) meal and rest break violations, and (3) derivative claims for
7 waiting time and wage statement penalties due to the other alleged violations.

8 20. As to the unpaid wage claims, Plaintiff alleged three theories of liability. First,
9 Plaintiff alleged that FTI failed to pay all required minimum and overtime wages due to a
10 practice that required Class Members to complete pre-shift temperature checks and screenings
11 prior to clocking in. Second, Plaintiff claimed that Defendant, at times, paid bonuses to Class
12 Members yet failed to include that additional compensation in the regular rate for purposes of
13 calculating overtime wages. Third, Plaintiff argued that Defendant utilized a rounding policy that
14 was not neutral in application, thus violating California law. In total, Plaintiff's counsel
15 estimated the maximum value of these unpaid wages to be \$48,000. But FTI vehemently
16 opposed these unpaid wage claims on the merits and as to the propriety of class certification.
17 Due to the defenses and arguments raised, Plaintiff assigned a 20% risk for each respective
18 unpaid wage claim at the class certification stage and an additional 20% risk on the merits. In
19 sum, Plaintiff's counsel calculated the risk-adjusted value of the unpaid wage claims as \$30,720.

20 21. Plaintiff also alleged meal and rest break claims against Defendant. Given the
21 total number of shifts at issue (an estimate of 57,500), and when incorporating violation rates
22 from expert review of the timekeeping records and other evidence, Plaintiff's counsel estimated a
23 35.5% violation rate for meal breaks and a 50% violation rate for rest breaks, leading to 20,413
24 alleged meal violations and 28,750 alleged rest break violations. This established a maximum
25 potential value for these claims of \$663,700 (49,163 violations multiplied by the average hourly
26 rate of \$13.50 as the applicable premium rate under § 226.7).

27 22. However, FTI raised numerous arguments in response to this claim, including that
28 it maintained fully compliant written policies and specifically authorized the Class Members to

1 take meal and rest breaks, meaning that no one had a reason or cause to miss a break or take a
2 short/late break. Therefore, Defendant asserted that a fact-finder would have to determine for
3 each Class Member whether a break was missed and why, and why a break was noncompliant or
4 nonexistent, because if it was by the employee's choice, no liability attaches to Defendant.
5 These defenses are factored into Plaintiff's analysis in two ways. First, these issues raise
6 questions regarding whether the meal and rest break claims could be certified, and Plaintiffs
7 placed a 20% risk at the class certification stage for meal periods and a 40% risk for rest breaks.
8 Second, these defenses also go toward the merits given the evidentiary question of proving the
9 number of meal and rest violations. As such, Plaintiff placed a 20% risk on the merits for meal
10 breaks, and an additional 40% risk on the merits for rest breaks, setting the risk-adjusted value
11 for the combined meal and rest break claims at \$316,093.

12 23. Finally, Plaintiff alleged claims for waiting time penalties and wage statement
13 violations. But these claims were entirely derivative of the claims above, meaning that they only
14 had merit if the claims for unpaid wages or meal/rest breaks were successful. The maximum
15 values for these claims were as follows: (1) \$214,326 for waiting time penalties [63 former
16 employees x \$13.50 per hour x 8.4 hours per day x 30 days], and (2) \$245,750 for wage
17 statement violations [2,500 wage statements at the \$50/\$100 formula under § 226(e)].

18 24. But FTI raised a variety of defenses to these derivative claims that impacted the
19 valuation. Namely, FTI argued that the wage statements did not violate Labor Code § 226 and,
20 even if there was a "technical" violation, Plaintiff would be unable to prove the required
21 "knowing and intentional" and "injury" elements. Based on these facts and defenses, Plaintiff
22 placed a nominal 20% risk at class certification (mirroring the claims on which the wage
23 statement claim was based) and estimated another 30% risk the merits, leading to a risk-adjusted
24 value of \$137,620 for the wage statement claims.

25 25. Then, as to the waiting time penalty claim, Plaintiff's valuation had to account for
26 the fact that this claim was derivative of the unpaid wage and meal/rest break claims and, if those
27 claims failed at certification or on the merits, there would be no waiting time penalties owed, so
28 the same risks for those claims applied to this claim. Furthermore, even if the unpaid wage

and/or meal/rest claims succeeded at certification and on the merits, Plaintiff would have to prove that the violations (if any existed) were “willful” under the meaning of Labor Code § 203. And, here, Defendant argued there was no “willful” violation since they had compliant written policies and any deviations therefrom were inadvertent and unintentional. As a result of this analysis, Plaintiff’s counsel applied a 30% risk at class certification and a 40% risk on the merits, leading to a risk-adjusted value of \$90,016.

26. In sum, when factoring in the defenses and risks of ongoing litigation, Plaintiff estimates the risk-adjusted class recovery as follows:

•	Unpaid Wage Claims	\$	30,720
•	Meal and Rest Break Claims	\$	316,093
•	Wage Statement Claims	\$	137,620
•	Waiting Time Penalty Claims	\$	<u>90,016</u>
•	Total Risk Adjusted Penalties and Damages	\$	574,449

THE SETTLEMENT IS FAIR, JUST, AND REASONABLE

27. The settlement was the product of extensive arm’s length negotiations, facilitated by an experienced mediator. Though cordial and professional, the settlement negotiations were adversarial and non-collusive in nature. The settlement reached is the product of substantial effort by the parties and their counsel. Although we believed that there was a possibility of certifying the claims, we recognized the potential risk, expense, and complexity posed by litigation, such as unfavorable decisions on class certification, summary judgment, at trial and/or on the damages awarded, and/or on an appeal that can take several more years to litigate.

28. The settlement will result in a fair payment to each class member based on the number of Weeks Worked during the Class Period. As set forth hereinabove, we have diligently investigated the claims and defenses on behalf of the Class Members and worked to achieve a resolution of the claims to maximize the recovery by avoiding further expenditure of attorneys’ fees and costs. After evaluating the significant risks attendant with further litigation described above and weighing them against the benefits of a known compromise and settlement as set forth in the Settlement Agreement, settlement on the terms agreed to is believed to be in the best

1 interest of Plaintiff and the Class, and is a fair and reasonable resolution of the claims alleged.

2 29. My office brought to bear a great deal of experience in negotiating the settlement
3 of this case. As detailed herein, we engaged in the necessary discovery and investigation, making
4 it possible to exercise informed judgment throughout the settlement process, including
5 significant document review (e.g. documents pertaining to Defendant's policies and procedures,
6 personnel documents, among others), and conducted an extensive analysis of the detailed class-
7 wide data provided by Defendant.

8 30. Based on my experience in other cases, including wage and hour matters, I
9 believe I am qualified to evaluate the class claims and viability of defenses in this class action.
10 In this case, the recovery for each class member is reasonable, fair, and adequate, and a
11 settlement at this time is in the best interests of the class. The settlement provides each class
12 member with compensation for the alleged violations when viewed in relation to the costs and
13 risks inherent in obtaining class certification and proceeding to trial.

14 31. My office, as well as Defendant's counsel, fully endorse the terms and conditions
15 of the settlement as set forth in the abovementioned Settlement Agreement.

16 32. Of course, the settlement amount represents a compromise figure, taking into
17 account the various risks surrounding class certification and the merits of Defendant's asserted
18 defense. Nevertheless, the settlement provides for fair and adequate payments to the class
19 members, with no reversion to Defendant.

20 **PLAINTIFF'S REQUESTED ENHANCEMENT PAYMENT**

21 33. Plaintiff seeks an enhancement payment (Service Award) of \$10,000 for his
22 service to the class, which I believe is fair and warranted. Mr. Tosta came forward in an effort to
23 effectuate a policy and practice change that benefitted all other Class Members, and to recover
24 unpaid wages. He assumed significant risk in bringing this litigation—namely, had he lost, he
25 could have been ordered to pay Defendant's costs.

26 34. Plaintiff provided invaluable assistance to my office and the Class in this case,
27 including providing factual background for the Class Complaint; reviewing the litigation
28 documents; providing information and documents about Defendant's policies and practices;

1 participating in phone calls to discuss litigation and settlement strategy; and reviewing the
2 settlement documents. Plaintiff agreed to participate in this case with no guarantee of personal
3 benefit. At final approval, Plaintiff will submit a comprehensive declaration setting forth all of
4 the reasons why he believes that the service award should be approved.

5 **ADEQUACY OF COUNSEL AND THE PROVISIONAL REASONABLENESS OF THE**
6 **REQUESTED FEES AND COSTS**

7 35. As set forth above, I have handled over 250 class and representative actions, have
8 been appointed as class counsel and have successfully resolved over half of those cases, and
9 many others remain pending and will successfully resolve in the future.

10 36. When this case was taken on a contingency fee basis, with my firm agreeing to
11 assume responsibility for all litigation costs, the ultimate result was far from certain. In the
12 course of this litigation, my firm paid all costs including filing fees, court costs, research fees,
13 and mediation costs. There was never a guarantee that we would recoup those expenditures.

14 37. It is my experience that attorney fee awards of one-third of a common fund
15 settlement is the standard in California. In this case, Plaintiff's counsel agreed to seek one-third
16 of the Settlement Amount for attorneys' fees. Defendants do not oppose this fee request. The fee
17 is further warranted because it is within the range of reasonableness typically awarded in class
18 actions. The litigation costs are reasonably capped at \$20,000 and will be based on the actual
19 amount of costs incurred at the time of final approval.

20 **SETTLEMENT ADMINISTRATOR**

21 38. The parties request that the Court appoint Phoenix Class Action Administration
22 Solutions to serve as the Administrator. Phoenix is experienced in administering class action
23 settlements, and has provided a proposal to administer this settlement for a total of \$6,000, which
24 is attached hereto as **Exhibit D**.

25 **SUBMISSION TO THE LWDA**

26 39. Plaintiff has concurrently submitted the settlement to the LWDA in accordance
27 with Labor Code § 2699(1)(2). The proof of submission is attached hereto as **Exhibit E**.

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41. The proposed Notice is attached as **Exhibit B**.

43. Phoenix's proposal to administer the Settlement is attached hereto as **Exhibit D**.

45. For the foregoing reasons, it is respectfully requested that the Court grant preliminary approval of the settlement as being fair, reasonable, and in the best interests of the Class, as well as preliminarily approve the requested attorneys' fees, costs, and enhancement of the settlement to the Class Representative.

By: Brian J. Mankin
Brian J. Mankin, Esq.

EXHIBIT “A”

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Attorneys for Defendant Formulation Technology Incorporated

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

NICHOLAS TOSTA, individually, on a
representative basis, and on behalf of all
others similarly situated;

Plaintiff,

vs.

FORMULATION TECHNOLOGY
INCORPORATED, a California Corporation;
and DOES 1 through 20, inclusive;

Defendants.

Case No.: CV-22-000189
*[Assigned to Hon. Judge Sonny S. Sandhu,
Dept 24, for all purposes]*

**CLASS ACTION AND PAGA
SETTLEMENT AGREEMENT AND
RELEASE OF CLAIMS**

This Class Action Settlement Agreement and Release of Claims is entered into by and

between Plaintiff Nicholas Tosta, individually and on behalf of all others similarly situated, and on behalf of the State of California, and Defendant Formulation Technology Incorporated and is approved by their respective counsel of record, subject to the terms and conditions hereof and the Court's approval.

A. Definitions

1. "Action" or "Lawsuit" means and refers to the case entitled *Nicholas Tosta v. Formulation Technology Incorporated, et al.*, Stanislaus County Superior Court, Case No. CV-22-000189.

2. "Administrator" means and refers to Phoenix Class Action Administration Solutions, the third-party class action settlement administrator agreed to by the Parties, that will provide the Notice to the Class Members and distribute the settlement amounts as described in this Agreement.

3. "Administration Costs" means the costs payable from the Settlement Amount to the Administrator for administering this Settlement, including, but not limited to, printing, distributing, and tracking documents for this Settlement, tax reporting, and deposit of the employee and employer share of payroll taxes, unclaimed property due diligence, reporting and remittance obligations, distributing the Settlement Amount, and providing necessary reports and declarations, as requested by the Parties. The Administration Costs shall be paid from the Settlement Amount, including, if necessary, any such costs in excess of the amount represented by the Administrator as being the maximum costs necessary to administer the Settlement.

4. "Aggrieved Employee(s)" means all current and former non-exempt (hourly paid) employees employed by Defendant in California at any time during the PAGA Period.

5. "Agreement" or "Settlement Agreement" or "Settlement" shall mean this Class Action and PAGA Settlement Agreement and Release of Claims.

6. "Class" is defined all current and former non-exempt (hourly paid) employees employed by Defendant in California at any time during the Class Period.

7. "Class Member(s)" refers to individual members of the Class.

8. "Class Counsel" refers to Brian Mankin and Peter Carlson of Lauby, Mankin &

Lauby LLP.

9. “Class Data” means a complete list that Defendant will diligently and in good faith compile from their records and provide to the Administrator on one spreadsheet which shall include, for each Class Member, the individual’s full name; last known address; Social Security Number; total Weeks Worked during the PAGA Period and the Class Period.

10. “Class Period” is deemed to be any time during the period of January 14, 2018, through February 15, 2023.

11. “Class Representative” or “Plaintiff” means and refers to Plaintiff Nicholas Tosta.

12. “Complaint” refers to the operative class and PAGA representative action complaint filed in the Stanislaus County Superior Court on January 14, 2022.

13. “Court” (or “Judge”) means the California Superior Court, County of Stanislaus.

14. “Defendant” means and refers to Formulation Technology Incorporated.

15. “Defendant’s Counsel” or “Defense Counsel” means and refers to Jackson Lewis, P.C.

16. “Effective Date” means the latest of the following dates: (i) if no Class Member timely and properly intervenes, or files a motion to vacate the judgment approving the Settlement Agreement under Code of Civil Procedure § 663, then the date of the Court’s Notice of Entry of Order regarding Final Approval of the Settlement; (ii) if a Class Member intervenes, or files a motion to vacate the judgment approving the Settlement Agreement, then sixty-one (61) calendar days following the date the Court enters an order granting Final Approval, assuming no appeal is filed; or (iii) if a timely appeal is filed, then the date of final resolution of that appeal or other collateral attack (including any requests for rehearing and/or petitions for *certiorari*), resulting in final judicial approval of the Settlement.

17. “Escalator Clause:” Defendant represents that there are approximately 120 Class Members, who collectively worked a total of approximately 12,000 Workweeks during the Class Period. If the total count of 12,000 Workweeks (as contained in the Class Data) increases by more than 10% of this number (*i.e.*, above 13,200 Workweeks), then the Settlement Amount shall increase by \$25.00 for each Workweek above 13,200.

1 18. “Final Approval” refers to the order of the Court granting final approval of this
2 Settlement Agreement and entering a judgment approving this Agreement on substantially the
3 terms provided herein or as may be modified by subsequent agreement of the Parties.

4 19. “Individual Class Payment” refers to each Participating Class Members share of
5 the Net Settlement Amount, as further discussed in Paragraph 47(c) below.

6 20. “Individual PAGA Payment” refers to each Aggrieved Employees share of the
7 PAGA Penalties, as further discussed in Paragraph 47(c) below.

8 21. “Settlement Amount” is \$300,000.00, subject to the Escalator Clause and
9 exclusive of Defendant’s obligation to fund its share of payroll taxes, as further discussed in
10 Paragraph 48(c) below.

11 22. “Net Settlement Amount” shall have the meaning ascribed to it in Paragraph 47(b)
12 below.

13 23. “Notice” means the notice of proposed class settlement that will be sent to the
14 Class Members and which will advise each Class Member of the settlement and his or her
15 estimated Individual Class Payment and Individual PAGA Payment and will further advise of the
16 setting of a Final Approval Hearing.

17 24. “Response Deadline” is 45 calendar days from the date the Notice is mailed to the
18 Class Members.

19 25. “Objecting Class Member” means a Class Member, other than Plaintiff, who
20 submits a valid and timely objection to the terms of this Agreement, pursuant to Paragraph 68(c)
21 below.

22 26. “PAGA Penalties” means the amount that the Parties have agreed to pay to the
23 Labor and Workforce Development Agency (“LWDA”) in connection with the California Labor
24 Code Private Attorneys General Act of 2004 (Cal. Lab. Code §§ 2698, *et seq.*, “PAGA”), as well
25 as the Individual PAGA payment allocated to each Aggrieved Employee.

26 27. “PAGA Period” is deemed to be any time during the period of January 14, 2021,
27 through February 15, 2023.

28 28. “Participating Class Member” means any and all Class Members who are deemed

1 to participate and receive an Individual Class Payment and do not opt-out by submitting timely
2 valid Requests for Exclusion.

3 29. “Parties” or “Settling Parties” mean Plaintiff and Defendant, collectively.

4 30. “Preliminary Approval Date” means the date the Court approves the Settlement
5 Agreement and enters the Preliminary Approval Order.

6 31. “Preliminary Approval Order” means the judicial Order to be entered by the
7 Court, upon the application or motion of the Plaintiff, preliminarily approving this Settlement
8 and providing for the issuance of the Notice Packet to the Class, an opportunity to opt out of the
9 Settlement, an opportunity to submit timely objections to the Settlement, and setting a final
10 approval hearing on the fairness of the terms of Settlement, including approval of attorneys’ fees
11 and costs. Provided that the motion is consistent with the terms herein, Defendant will not object
12 to Plaintiff’s motion for preliminary approval but will be provided with an opportunity to review
13 and comment upon the motion before it is filed.

14 32. “QSF” means the Qualified Settlement Fund set up by the Administrator for the
15 benefit of the Participating Class Members and Aggrieved Employees, and from which the
16 settlement payments shall be made.

17 33. “Released Class Claims” or “Class Claims” by the Participating Class Members
18 upon Final Approval of the Settlement will include all claims stated in the operative Complaint
19 and those based solely upon the facts in the Complaint, including: (a) failure to pay minimum
20 wages, (b) failure to pay overtime wages, (c) failure to provide meal periods, (d) failure to
21 provide rest breaks, (e) failure to failure to timely pay wages upon separation of employment, (f)
22 failure to provide accurate itemized wage statements, (g) unfair and unlawful competition, and
23 (j) all other claims for statutory penalties based on the facts or claims alleged in the Complaint.

24 34. “Released PAGA Claims” or “PAGA Claims” means any and all PAGA claims
25 that Plaintiff alleged against the Released Parties, on behalf of himself and the State of
26 California, based on the facts stated in the Complaint in the Action and in the LWDA notice
27 letter, including all PAGA claims seeking civil penalties that premised upon (a) failure to pay
28 minimum wages, (b) failure to pay overtime wages, (c) failure to provide meal periods, (d)

1 failure to provide rest breaks, (e) failure to failure to timely pay wages each period and upon
2 separation of employment, (f) failure to provide accurate itemized wage statements, and (g) all
3 other claims for civil penalties recoverable under the Private Attorneys General Act, Labor Code
4 §§ 2698 *et seq.* based on the facts or claims alleged in the Complaint. The time period governing
5 the Released PAGA Claims shall be any time during the PAGA Period.

6 35. “Released Parties” means Defendant, and its parents, subsidiaries, directors,
7 owners, shareholders, officers, agents, attorneys, servants, joint employers and employees, past
8 and present, and each of them and anyone acting in concert with foregoing.

9 36. “Release” shall mean the release and discharge of the Released Class Claims by
10 Plaintiff and all Participating Class Members and their assignees.

11 37. “Request for Exclusion” shall have the meaning ascribed to it in Paragraph 68(a)
12 below.

13 38. “Service Payment” or “Service Award” means the amount approved by the Court
14 to be paid to Class Representative Nicholas Tosta in addition to his Individual Class Payment as
15 a Participating Class Member and Individual PAGA Payment as an Aggrieved Employee.

16 39. “Work Weeks” or “Weeks Worked” in the context of a Class Member means any
17 and all work weeks during the Class Period during which the Class Member worked at least one
18 day for Defendant. Likewise, in the context of Aggrieved Employees, it means any and all
19 weeks worked during the PAGA Period during which the Aggrieved Employee worked at least
20 one day for Defendant.

21 **B. General Terms**

22 40. On January 14, 2022, Plaintiff filed a putative class and representative PAGA
23 action in the Stanislaus County Superior Court, alleging Class Claims and PAGA Claims,
24 including: (a) failure to pay minimum wages, (b) failure to pay overtime wages, (c) failure to
25 provide meal periods, (d) failure to provide rest breaks, (e) failure to failure to timely pay wages
26 each period and upon separation of employment, (f) failure to provide accurate itemized wage
27 statements, (g) unfair and unlawful competition

28 41. Defendant denies Plaintiff’s claims and allegations and contends that the Action is

1 not suitable for class certification.

2 42. The Class Representative believes he can proceed with the representative and
3 class claims, that the Action is meritorious, and that class certification is appropriate.

4 43. The Parties have conducted a thorough investigation into the facts of the Action.
5 This includes conducting an extensive exchange of informal discovery, including a sampling of
6 payroll and timekeeping records for Class Members. Class Counsel is both knowledgeable about
7 and has done extensive research with respect to the applicable law and potential defenses to the
8 claims of the Class. Class Counsel has diligently pursued an investigation of the Class
9 Members' claims against Defendant. Based on the foregoing data and on their own independent
10 investigation and evaluation, Class Counsel is of the opinion that the settlement with Defendant
11 for the consideration and on the terms set forth in this Settlement Agreement is fair, reasonable,
12 and adequate and is in the best interest of the Class Members in light of all known facts and
13 circumstances, including the risk of significant delay and uncertainty associated with litigation,
14 various defenses asserted by Defendant, and numerous potential appellate issues.

15 44. On February 15, 2023, Plaintiff and Defendant participated in a full-day
16 mediation with Glenn Lerman, Esq., a well-respected wage-and-hour mediator. At the
17 conclusion of mediation and extensive arms-length negotiations, the Parties reached a global
18 settlement and entered into a Memorandum of Understanding.

19 45. The Parties agree that neither the Parties' Settlement, this Agreement, nor the acts
20 to be performed or judgment to be entered pursuant to the terms of the Settlement and
21 Agreement, shall be construed as an admission by Defendant of any wrongdoing or violation of
22 any statute or law or liability on the claims or allegations in the Action.

23 46. Stipulation for Class Certification. For settlement purposes only, Defendant will
24 stipulate that the Class Members described herein who do not Request Exclusion from the Class
25 may be conditionally certified as a Class. This stipulation to certification is in no way an
26 admission that class action certification is proper and shall not be admissible in this or in any
27 other action except for the sole purposes of enforcing this Agreement. Should, for whatever
28 reason, the Court fail to issue Final Approval, the Parties' stipulation to class certification as part

of the Settlement shall become null and void ab initio and shall have no bearing on, and shall not be admissible in connection with, the issue of whether certification would be appropriate in a non-settlement context. Defendant expressly reserves its rights and declares that it would continue to oppose class certification and the substantive merits of the case should the Court fail to issue Final Approval. Plaintiff expressly reserves his rights and declares that he will continue to pursue class certification and a trial should the Court fail to issue Final Approval.

C. Terms of Settlement

47. The financial terms of the Settlement are as follows:

(a) Settlement Amount: The Parties agree to settle this Action for the Settlement Amount, subject to the Escalator Clause and Defendant's obligation to separately pay its share of payroll taxes on the wage portion of the Individual Class Payments, which is the maximum amount that will be paid by Defendant and includes Individual Class Payments, Class Counsel's Attorneys' Fees and Costs Award, the Service Payment to the Class Representative, Administration Costs, and PAGA Penalties.

(b) Net Settlement Amount: The "Net Settlement Amount" is defined as the Settlement Amount less the Attorneys' Fees and Costs Award, the Service Payment to the Class Representative as awarded by the Court, the Administration Costs, and PAGA Penalties. If the Court reduces the Attorneys' Fees and Costs Award, Service Award, or Administrator Costs, or either increases or decreases the amount allocated to the PAGA Penalties, the difference shall be placed in the Net Settlement Amount and allocated to the Class.

(c) The Individual Class Payment for each Class Member will be calculated by the Administrator using the Class Data provided by Defendant as follows. Compensable workweeks will be all Weeks Worked by the Class Members during the Class Period. The dollars per compensable work week will be calculated by dividing the total Weeks Worked by Class Members into the Net Settlement Amount to determine a per work week value ("Workweek Value"). The Workweek Value will be multiplied by the number of Weeks Worked by a Participating Class Member during the Class Period to determine the distribution for a Participating Class Member. If there are any timely submitted Requests for Exclusion, the

1 Administrator shall proportionately increase the Individual Class Payments for each Participating
2 Class Member so that the amount actually distributed to Participating Class Members equals
3 100% of the Net Settlement Amount.

4 (d) Allocation of Individual Class Payments: The Individual Class Payments
5 to Participating Class Members will be allocated as follows: 20% will be allocated as wages
6 subject to withholding of all applicable local, state and federal taxes; and 80% will be allocated
7 for interest and statutory penalties (pursuant to, *e.g.*, California Labor Code sections 203, 210,
8 226) from which no taxes will be withheld. The Administrator will issue to each Participating
9 Class Member an Internal Revenue Service Form W-2 and comparable state forms with respect
10 to the wage allocation and a Form 1099 with respect to the penalties and interest allocations.

11 (e) Service Payment to Class Representative: The amount, if any, awarded to
12 the Class Representative as a Service Payment will be set by the Court in its discretion, not to
13 exceed \$10,000, in exchange for the service that Plaintiff performed on behalf of the Class.
14 Defendant agrees not to oppose this request. The Service Payment to Plaintiff will be paid out of
15 the Settlement Amount. The Class Representative will be issued an IRS Form 1099 in
16 connection with this payment. Plaintiff shall be solely and legally responsible to pay all
17 applicable taxes on this payment. The Parties agree that any amount awarded as the Service
18 Payment to Plaintiff less than the requested amount shall not be a basis for Class Counsel to void
19 this Settlement Agreement. Should the Court approve a lesser amount for the Service Payment,
20 the difference shall be added to the Net Settlement Amount to be distributed to the Participating
21 Class Members.

22 (f) Attorneys' Fees and Costs Award: Defendant agrees to not oppose a
23 request by Class Counsel to the Court for an award of attorneys' fees of one-third of the
24 Settlement Amount, plus reasonable litigation costs not to exceed \$15,000 ("Attorney's Fees and
25 Cost Award"). Defendant agrees not to oppose any contention by Class Counsel that attorneys'
26 fees should be based on the common fund theory. The Attorney's Fee and Cost Award shall be
27 paid from the Settlement Amount, and, except for this award, Defendant shall have no further
28 obligation to pay any attorneys' fees, costs, or expenses to Class Counsel. Should the Court

1 approve a lesser amount than what is sought by Class Counsel, the difference shall be added to
2 the Net Settlement Amount to be distributed to the Participating Class Members. Any Court
3 order awarding less than the amount sought by Class Counsel shall not be grounds to rescind the
4 Settlement Agreement or otherwise void the Settlement. The Administrator shall issue to Class
5 Counsel an IRS Form 1099 reflecting the amount of attorneys' fees and costs awarded by the
6 Court.

7 (g) Administration Costs: The fees and other charges of the Administrator
8 will be paid from the Settlement Amount, not to exceed \$6,000, unless (1) the Escalator Clause
9 is triggered (whereby any reasonable increase in Administration Costs shall be paid from the
10 increased Settlement Amount, subject to Court approval), or (2) as otherwise approved by all
11 Parties and the Court.

12 (h) PAGA Penalties: The Parties agree that \$30,000 is allocated to PAGA
13 Penalties, and is to be paid from the Settlement Amount, subject to Court approval. Of this
14 amount, \$22,500 (75%) shall be paid to the LWDA in satisfaction of civil penalties under the
15 Private Attorney General Act of 2004 ("PAGA") and \$7,500 (25%) will form the Individual
16 PAGA Payments to the Aggrieved Employees, which shall be calculated and allocated pro-rata
17 on a Work Week basis, which will be treated entirely as civil penalties and shall be reported as
18 required on an IRS Form 1099. Class Counsel shall give proper notice to the LWDA of the
19 Settlement.

20 (i) Tax Liability: Class Counsel and Defendant make no representations as to
21 the tax treatment or legal effect of settlement amounts called for hereunder, and Plaintiff and the
22 Class Members are not relying on any statement or representation by Class Counsel or Defendant
23 in this regard. Plaintiff, Participating Class Members, and Aggrieved Employees understand and
24 agree that they will be solely responsible for the payment of any taxes and penalties assessed on
25 their respective Individual Class Payments and Individual PAGA Payments, described herein.
26 Forms 1099 will be distributed in the manner required by the Internal Revenue Code of 1986 (the
27 "Code") and consistent with this Agreement. If the Code, the regulations promulgated
28 thereunder, or other applicable tax law, is changed after the date of this Agreement, the processes

1 set forth in this Section may be modified in a manner to bring Defendant into compliance with
2 any such changes. Plaintiff, Participating Class Members, and Aggrieved Employees understand
3 and agree that they will be solely responsible for the payment of any taxes and penalties assessed
4 on their respective payments described herein.

5 (j) CIRCULAR 230 DISCLAIMER. EACH PARTY TO THIS
6 AGREEMENT (FOR PURPOSES OF THIS SECTION, THE “ACKNOWLEDGING PARTY”
7 AND EACH PARTY TO THIS AGREEMENT OTHER THAN THE ACKNOWLEDGING
8 PARTY, AN “OTHER PARTY”) ACKNOWLEDGES AND AGREES THAT (1) NO
9 PROVISION OF THIS AGREEMENT, AND NO WRITTEN COMMUNICATION OR
10 DISCLOSURE BETWEEN OR AMONG THE PARTIES OR THEIR ATTORNEYS AND
11 OTHER ADVISERS, IS OR WAS INTENDED TO BE, NOR SHALL ANY SUCH
12 COMMUNICATION OR DISCLOSURE CONSTITUTE OR BE CONSTRUED OR BE
13 RELIED UPON AS, TAX ADVICE WITHIN THE MEANING OF UNITED STATES
14 TREASURY DEPARTMENT CIRCULAR 230 (31 CFR PART 10, AS AMENDED); (2) THE
15 ACKNOWLEDGING PARTY (A) HAS RELIED EXCLUSIVELY UPON HIS, HER OR ITS
16 OWN, INDEPENDENT LEGAL AND TAX COUNSEL FOR ADVICE (INCLUDING TAX
17 ADVICE) IN CONNECTION WITH THIS AGREEMENT, (B) HAS NOT ENTERED INTO
18 THIS AGREEMENT BASED UPON THE RECOMMENDATION OF ANY OTHER PARTY
19 OR ANY ATTORNEY OR ADVISOR TO ANY OTHER PARTY, AND (C) IS NOT
20 ENTITLED TO RELY UPON ANY COMMUNICATION OR DISCLOSURE BY ANY
21 ATTORNEY OR ADVISOR TO ANY OTHER PARTY TO AVOID ANY TAX PENALTY
22 THAT MAY BE IMPOSED ON THE ACKNOWLEDGING PARTY; AND (3) NO
23 ATTORNEY OR ADVISOR TO ANY OTHER PARTY HAS IMPOSED ANY LIMITATION
24 THAT PROTECTS THE CONFIDENTIALITY OF ANY SUCH ATTORNEY’S OR
25 ADVISER’S TAX STRATEGIES (REGARDLESS OF WHETHER SUCH LIMITATION IS
26 LEGALLY BINDING) UPON DISCLOSURE BY THE ACKNOWLEDGING PARTY OF
27 THE TAX TREATMENT OR TAX STRUCTURE OF ANY TRANSACTION, INCLUDING
28 ANY TRANSACTION CONTEMPLATED BY THIS AGREEMENT.

(k) “Non-Reversionary” Settlement. This is a “non-reversionary” settlement. Under no circumstances will any portion of the Settlement Amount revert to Defendant. Participating Class Members and Aggrieved Employees will not have to make a claim in order to receive an Individual Class Payment or Individual PAGA Payment. Distributions, in the form of Individual Class Payment or Individual PAGA Payments will be made directly to each Participating Class Member and Aggrieved Employee. The Administrator shall be responsible for accurately and timely reporting and remittance obligations with respect to unclaimed funds as a result of a Participating Class Member and/or Aggrieved Employee not cashing any checks delivered pursuant to the Settlement by the check cashing deadline, as set forth herein.

(l) Class Counsel and Plaintiff believe that the Settlement is fair and reasonable and will so represent same to the Court.

D. Release by the Participating Class Members

48. Upon entry of the Final Approval Order and Defendant funding of the Settlement Amount, and except as to such rights or claims as may be created by this Agreement, Plaintiff and the Participating Class Members will forever completely release and discharge the Released Parties from the Released Class Claims for the Class Period.

49. Each Participating Class Member will be deemed to have made the foregoing Release as if by manually signing it.

50. Class Representative, on behalf of himself and the Class, acknowledges and agrees that the claims for unpaid wages and untimely payment of wages in the Action are disputed, and that the payments set forth herein constitute payment of all sums allegedly due to them. Class Representative, on behalf of himself and the Class, acknowledges and agrees that Labor Code § 206.5 is not applicable to the Parties or Settlement. Labor Code § 206.5 provides in pertinent part as follows: “An employer shall not require the execution of any release of any claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made.”

E. Release of PAGA Claims

51. Upon entry of the Final Approval Order and Defendant’s funding of the

1 Settlement Amount, Plaintiff – in his individual capacity and on behalf of the State of California
2 and LWDA – shall completely release and discharge the Released Parties from the Released
3 PAGA Claims for the PAGA Period.

4 52. Regardless of submitting a valid Request for Exclusion, neither Plaintiff nor any
5 Aggrieved Employee shall have the right to opt-out or otherwise exclude themselves from
6 releasing the Released PAGA Claims.

7 53. It is the intent of the Parties that the Final Approval Order shall have full
8 equitable and collateral estoppel and res judicata effect to the fullest extent permitted by law.

9 **F. Release by Plaintiff and Class Representative**

10 54. Class Representative does hereby, for himself and his spouses, heirs, successors,
11 beneficiaries, devisees, legatees, executors, administrators, trustees, conservators, guardians,
12 personal representatives, and assigns forever and completely release and discharge the Released
13 Parties from any and all charges, complaints, claims, liabilities, obligations, promises,
14 agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs,
15 losses, debts, and expenses (including back wages, statutory penalties, civil penalties, liquidated
16 damages, exemplary damages, interest, attorneys' fees, and costs) of any nature whatsoever,
17 from the beginning of time through the execution of this Stipulation, whether known or
18 unknown, suspected or unsuspected, including but not limited to all claims arising out of, based
19 upon, or relating to Class Representative's employment with Defendant or the remuneration for
20 or termination of such employment (the "Class Representative's Claims").

21 55. Without limiting the generality of the foregoing, this general release by Plaintiff
22 includes all federal, state and local statutory claims, federal and state common law claims
23 (including but not limited to those for contract, tort and equity), including without limitation the
24 Americans with Disabilities Act, Age Discrimination in Employment Act, Title VII of the Civil
25 Rights Act of 1964 (as amended), 42 USC sec. 1981, 42 USC sec. 1983, the Fair Labor
26 Standards Act, the Employment Retirement Security Income Act of 1974, the California
27 Constitution, the California Fair Employment and Housing Act, the California Unfair
28 Competition Act (California Business and Professions Code section 17200 et seq.), and the

1 California Labor Code.

2 56. Plaintiff agrees that there is a risk that any injury that he may have suffered by
3 reason of the Released Parties' relationship with him might not now be known, and there is a
4 further risk that said injuries, whether known or unknown at the date of this Settlement
5 Agreement, might possibly become progressively worse, and that as a result thereof further
6 damages may be sustained. Nevertheless, Plaintiff agrees to forever and fully release and
7 discharge the Released Parties, and understands that by the execution of this Settlement
8 Agreement no further claims for any such injuries that existed at the time of the execution of this
9 Settlement Agreement may ever be asserted by Plaintiff with respect to claims arising in the time
10 period from the beginning of time to the execution of this Settlement Agreement.

11 57. Plaintiff expressly waives and relinquishes all rights and benefits afforded by
12 Section 1542 of the Civil Code of the State of California and does so understanding and
13 acknowledging the significance of the waiver of Section 1542. Section 1542 of the Civil Code
14 of the State of California states:

15 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
16 THAT THE CREDITOR OR RELEASING PARTY DOES NOT
17 KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT
18 THE TIME OF EXECUTING THE RELEASE AND THAT, IF
19 KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY
20 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR
21 OR RELEASED PARTY.

22 Notwithstanding the provisions of Section 1542, and for the purpose of implementing a
23 full and complete release and discharge of all parties, Class Representative expressly
24 acknowledges that this Settlement Agreement is intended to include in its effect, without
25 limitation, all claims that Class Representative knew of, as well as all claims that he does not
26 know or suspect to exist in her favor against the Released Parties, or any of them, for the time
27 period from the beginning of time to the execution of this Settlement Agreement, and that this
28 Settlement Agreement contemplates the extinguishment of any such Class Representative's
Claims. Notwithstanding the above, the general release by Class Representative shall not extend
to claims for workers' compensation benefits (including Workers Comp. Case ADJ 11781204),

claims for unemployment benefits, or other claims that may not be released by law.

G. Interim Stay of Proceedings

58. Pending completion of all of the prerequisites necessary to effectuate this Settlement, the Parties agree, subject to Court approval, to a stay of all proceedings in the Action except such as is necessary to effectuate the Settlement.

H. Notice Process

59. Appointment of Administrator. The Parties have agreed to the appointment of the Administrator to perform the duties of a settlement administrator, including mailing the Notice, using standard devices to obtain forwarding addresses, independently reviewing and verifying documentation associated with any claims or opt-out requests, resolving any disputes regarding the calculation or application of the formula for determining the Individual Class Payment and Individual PAGA Payments, drafting and mailing the settlement checks to Participating Class Members and Aggrieved Employees, issuing all necessary tax forms, and performing such other tasks as set forth herein or as the Parties mutually agree or that the Court orders.

60. Disputes Regarding Administration. Any and all disputes relating to administration of the Settlement by the Administrator (except for disputes regarding Class Data) shall be referred to the Court, if necessary, which will have continuing jurisdiction over the terms and conditions of this Agreement, until Plaintiff and Defendant notify the Court that all payments and obligations contemplated by this Agreement have been fully carried out. Prior to presenting any issue to the Court, counsel for the Parties will confer in good faith to resolve the dispute without the necessity of Court intervention. The Administrator shall also be responsible for issuing to Plaintiff, Participating Class Members, and Aggrieved Employees, and Class Counsel any Tax Forms as may be required by law for all amounts paid pursuant to this Agreement.

61. Class Data. Within fourteen (14) days after entry of the Preliminary Approval Order, Defendant shall provide the Class Data to the Administrator. The Administrator will run a check of the Class Members' addresses against those on file with the U.S. Postal Service's National Change of Address List. The Class Data provided to the Administrator will remain

confidential and will not be used or disclosed to anyone, except as required by applicable tax authorities, pursuant to Defendant's express written consent, or by order of the Court. Although Class Counsel will not be provided with the list of Class Data, nothing herein shall prevent Class Counsel from communicating with Class Members regarding the Action and Settlement.

62. Total Workweeks. At least 5 days prior to mailing the Notice, the Administrator shall provide a spreadsheet to Class Counsel and Defense Counsel containing a preliminary calculation of all payments to be paid from the Settlement Amount, including the estimated Individual Class Payments to each Class Member and Individual PAGA Payments to each Aggrieved Employee (a person's name shall be redacted and a control number used in place of the name). In the event that the total Workweeks worked by all Class Members triggers the Escalator Clause, the Administrator shall notify the Parties of the increased Settlement Amount, and related increased payments from the Settlement Amount, including increased Attorneys' Fees and Costs and any increased Administration Costs, all of which shall be subject to Court approval.

63. Notice. The Notice, as approved by the Court, shall be sent by the Administrator to the Class Members, by first class mail, in English, within ten (10) calendar days following the Administrator's receipt of the Class Data. The Administrator shall use standard devices, including a skip trace, to obtain forwarding addresses of Class Members if any envelopes are returned.

64. Returned Notice Packets. The Administrator will take steps to ensure that the Notice is received by all Class Members, including utilization of the National Change of Address Database maintained by the United States Postal Service to review the accuracy of and, if possible, update a mailing address. Notices will be re-mailed to any Class Member for whom an updated address is located within ten (10) calendar days following both the Administrator learning of the failed mailing and its receipt of the updated address. The Notice shall be identical to the original Notice, except that it shall notify the Class Member that the exclusion (opt-out) request or objection must be returned by the later of the Response Deadline or fifteen (15) days after the remailing of the Notice.

1 65. Presumption Regarding Receipt of Notice. It will be conclusively presumed that
2 if an envelope has not been returned to Administrator by the Response Deadline that the Class
3 Member received the Notice.

4 66. Disputes Regarding Class Data. Class Members are deemed to participate in the
5 Settlement unless they opt-out, and Aggrieved Employees may not opt out of the Released
6 PAGA Claims. The Notice will inform Class Members of his/her estimated Individual Class
7 Payment and Individual PAGA Payment, as well as the number of weeks he/she worked during
8 the Class Period and the PAGA Period. Class Members may dispute their Weeks Worked if they
9 feel they should be credited with more Weeks Worked in the Class Period and/or PAGA Period
10 in California than Defendant's records show by timely submitting evidence to the Administrator.
11 Defendant's records will be presumed determinative absent reliable evidence to rebut
12 Defendant's records, but the Administrator will evaluate the evidence submitted by the Class
13 Member and provide the evidence submitted to Class Counsel and Defense Counsel who agree to
14 meet and confer in good faith about the evidence to determine the Class Member's actual
15 number of Work Weeks and estimated Individual Class Payment and Individual PAGA Payment.
16 If Class Counsel and Defense Counsel are unable to agree, they agree to submit the dispute to the
17 Court to render a final decision. Class Members and Aggrieved Employees will have until the
18 Response Deadline to dispute Weeks Worked, object or opt out, unless extended by the Court.

19 67. Declaration of Due Diligence. The Administrator shall provide counsel for the
20 Parties, at least twenty-five (25) days prior to the final approval hearing, a declaration of due
21 diligence and proof of mailing with regard to the mailing of the Notice.

22 68. Class Members' Rights. Each Class Member will be fully advised of the
23 Settlement, the ability to object to the settlement, and the ability to opt-out or request exclusion
24 from the Class Claims portion of the Settlement. The Notice will inform the Class Members of
25 the Court-established deadlines for filing objections or requesting exclusion from the Settlement
26 in accordance with the following guidelines:

27 (a) Requests for Exclusion from Class. Any Class Member, other than
28 Plaintiff, may request to be excluded from the Class by submitting a "Request for Exclusion" to

1 the Administrator, postmarked on or before the Response Deadline. The Request for Exclusion
2 should state:

3 “I WISH TO BE EXCLUDED FROM THE CLASS IN THE
4 FORMULATION TECHNOLOGY LAWSUIT. I UNDERSTAND
5 THAT IF I ASK TO BE EXCLUDED FROM THE SETTLEMENT
6 CLASS, I WILL NOT RECEIVE MY INDIVIDUAL CLASS
7 PAYMENT FROM THIS LAWSUIT.”

8 To be valid, any Request for Exclusion must include the full name, address, telephone
9 number, last four digits of the social security number or date of birth, and signature of the Class
10 Member requesting exclusion. The Request for Exclusion must be returned by mail to the
11 Administrator at the specified address set forth in the Notice. Any such Request must be made in
12 accordance with the terms set forth in the Notice. A Request for Exclusion will be timely only if
13 postmarked by the Response Deadline, unless the Parties otherwise agree in writing. Any Class
14 Member who timely requests exclusion in compliance with these requirements: (i) will not have
15 any rights under this Agreement, including the right to object, appeal or comment on the
16 Settlement; (ii) will not be entitled to receive the Individual Class Payment under this
17 Agreement; and (iii) will not be bound by this Agreement, or the Judgment. Any Class Member
18 who is an Aggrieved Employee who requests timely exclusion will still be subject to the
19 Released PAGA Claims to the fullest extent permitted by law and receive an Individual PAGA
20 Payment. All Parties and their counsel, including Defendant’s respective members, member
21 managers, owners, officers, and directors, shall not encourage or solicit opt-outs or objections,
22 directly or indirectly, through any means.

23 (b) Binding Effect on Participating Class Members. All Participating Class
24 Members will: (i) be bound by the terms and conditions of this Agreement, the Judgment, and
25 the releases set forth herein; and (ii) except as otherwise provided herein, will be deemed to have
26 waived all objections and oppositions to the fairness, reasonableness, and adequacy of the
27 Settlement.

28 (c) Objections to Settlement. Any Class Member, other than Plaintiff, who

1 does not submit a valid and timely Request for Exclusion may object to the terms of this
2 Agreement. To object, a Class Member shall inform the Administrator, in writing, of his or her
3 objection which must be postmarked by the Response Deadline at the address set forth in the
4 Notice. Such objection shall include the Objecting Class Member's full name, address,
5 telephone number, last four digits of the social security number or date of birth, signature, and
6 dates of employment with Defendant, in addition to the case name and number, the basis for the
7 objection, including any legal support and each specific reason in support of the objection, as
8 well as any documentation or evidence in support thereof, and, if the Objecting Class Member is
9 represented by counsel, the name and address of his or her counsel. The Administrator shall
10 provide objections, if any, to Class Counsel and Defense Counsel within three (3) calendar days
11 of receipt, and the Administrator shall attach the same to its declaration of due diligence and file
12 with the Court prior to the Final Approval Hearing. An Objecting Class Member remains
13 eligible to receive monetary compensation from the Settlement. Plaintiff and Defendant shall not
14 be responsible for any fees, costs, or expenses incurred by an Objecting Class Member and/or his
15 or her counsel related to any objections to the Settlement. Submitting an objection does not
16 preserve the right to appeal a final judgment. Rather, the right to appeal is preserved by
17 becoming a party of record by timely and properly intervening or filing a motion to vacate the
18 judgment under Code of Civil Procedure § 663.

19 (d) Failure to Object. Any Class Member who does not timely and properly
20 become a party of record by intervening or filing a motion to vacate the judgment waives any
21 and all rights to appeal from the Judgment, including all rights to any post-judgment proceeding
22 and appellate proceeding, such as a motion to vacate judgment, motion for new trial, a motion
23 under California Code of Civil Procedure section 473, and extraordinary writs.

24 (e) Responses to Objections. Counsel for the Parties may file a response to
25 any objections submitted by an Objecting Class Member at least five (5) court days before the
26 date of the Final Approval Hearing.

27 (f) Class Members will have until the Response Deadline to object or submit
28 a Request for Exclusion to the Administrator by U.S. Mail. The Administrator shall disclose

jointly to Class Counsel and Defense Counsel what objections or Requests for Exclusion were timely submitted on a weekly basis, and upon the request of Class Counsel or Defense Counsel.

69. Funding of the Settlement Amount. Defendant shall deposit the Settlement Amount, plus Defendant's share of payroll taxes owed on Individual Class Payments, with the Administrator within fifteen (15) days after the Effective Date.

70. Distribution of Funds. No later than ten (10) calendar days after the deposit of the Settlement Amount by Defendant, the Administrator shall mail the Individual Class Payments to the Participating Class Members, the Individual PAGA Payments to the Aggrieved Employees, the payment to Class Counsel for the Attorneys' Fees and Costs Award, any Service Payment to the Class Representative, the payment to the LWDA for PAGA Penalties, and will pay itself the Administration Costs.

71. Deadline for Cashing Settlement Checks. Participating Class Members and Aggrieved Employees shall have 180 calendar days after mailing by the Administrator to cash their settlement checks. The release will be binding upon all Participating Class Members who do not cash their checks within the 180-day period. In the event that any settlement check is returned to the Administrator within 180 days of mailing, the Administrator will, within five (5) business days of receipt of the returned settlement check, perform a skip trace to locate the individual, and notify Defense Counsel and Class Counsel of the results. If a new address is located by these means, the Administrator will have ten (10) business days to re-issue the check. Neither Defendant, Defense Counsel, Class Counsel, Plaintiff, nor the Administrator will have any liability for lost or stolen settlement checks, forged signatures on settlement checks, or unauthorized negotiation of settlement checks. Without limiting the foregoing, in the event a Participating Class Member and/or Aggrieved Employee notifies the Administrator that he or she believes that a settlement check has been lost or stolen, the Administrator shall immediately stop payment on such check. If the check in question has not been negotiated prior to the stop payment order, the Administrator will issue a replacement check.

(a) If any Participating Class Member's check is not cashed within the time periods noted above, the check will be void and a stop-payment will be issued, and the

1 Administrator shall issue the unclaimed funds to the California State Controller's Office in the
2 name of the Class Member.

3 (b) If any Aggrieved Employee's check is not cashed within the time periods
4 noted above, the check will be void and a stop-payment will be issued, and the Administrator
5 shall issue the unclaimed funds to the California State Controller's Office in the name of the
6 Aggrieved Employee.

7 **I. Duties of the Parties Prior to the Court's Approval**

8 72. Promptly after execution of this Agreement, Plaintiff will move the Court for
9 Preliminary Approval of this Settlement and entry of the Preliminary Approval Order
10 accomplishing the following:

- 11 (a) Approving as to form and content the proposed Notice;
12 (b) Directing the mailing of the Notice by first class mail to the Class
13 Members;
14 (c) Preliminarily approving this Settlement;
15 (d) Preliminarily certifying the class for purposes of this Settlement;
16 (e) Advising the LWDA of the proposed Settlement; and
17 (f) Scheduling the Final Approval Hearing on the issue of whether this
18 Settlement should be finally approved as fair, reasonable and adequate.

19 **J. Duties of the Parties Following Court's Final Approval**

20 73. In connection with the Final Approval Hearing provided for in this Agreement,
21 Class Counsel shall submit a proposed Final Approval Order:

- 22 (a) Approving the Settlement, adjudging the terms thereof to be fair,
23 reasonable and adequate, and directing consummation of its terms and provisions;
24 (b) Approving Class Counsel's application for an award of attorneys' fees and
25 reimbursement of litigation costs and expenses, the Service Payment to the Class Representative,
26 and the payment to the Administrator for costs of administering the settlement; and
27 (c) Entering judgment approving settlement.
28

1 **K. Voiding the Agreement**

2 74. If the Court fails or refuses to issue the Final Approval Order or fails to approve
3 any material condition of this Agreement which effects a fundamental change of the Settlement,
4 the entire Agreement shall be rendered voidable and unenforceable as to all Parties herein at the
5 option of either Party.

6 75. If the Settlement is voided or fails for any reason, Plaintiff and Defendant will
7 have no further obligations under the Settlement, including any obligation by Defendant to pay
8 the Settlement Amount, or any amounts that otherwise would have been owed under this
9 Settlement.

10 76. If the Settlement is voided or fails for any reason, any costs incurred by the
11 Administrator shall be borne equally by Defendant and Plaintiff, unless otherwise specified in
12 this Agreement.

13 **L. Other Terms**

14 77. Waiver. The waiver by one Party of any breach of this Agreement by another
15 Party shall not be deemed a waiver of any other prior or subsequent breach of this Agreement.

16 78. Parties' Authority. The signatories hereto represent that they are fully authorized
17 to enter into this Agreement and bind the Parties hereto to the terms and conditions hereof.

18 79. Mutual Full Cooperation. The Parties agree to fully cooperate with each other to
19 accomplish the terms of this Agreement, including but not limited to, execution of such
20 documents and to take such other action as may reasonably be necessary to implement the terms
21 of this Agreement. The Parties to this Agreement shall use their best efforts, including all efforts
22 contemplated by this Agreement and any other efforts that may become necessary by order of the
23 Court, or otherwise, to effectuate this Agreement and the terms set forth herein. As soon as
24 practicable after execution of this Agreement, Class Counsel shall, with the assistance and
25 cooperation of Defendant and Defense Counsel, take all necessary steps to secure the Court's
26 preliminary and final approval of the settlement, and the final entry of judgment.

27 80. Defendant's Right to Withdraw. The Parties agree that if more than ten percent
28 (10%) of the Class Members opt out of the Settlement by submitting valid and timely Requests

1 for Exclusion as set forth in this Agreement, Defendant shall have the right in its sole discretion
2 to rescind and void this Settlement Agreement within Fourteen (14) calendar days from the day
3 the Administrator furnishes the parties with the number of valid and timely Requests for
4 Exclusion. If Defendant exercises this option, Defendant shall pay all Administration Costs
5 incurred up to that date.

6 81. No Prior Assignments. The Parties hereto represent, covenant, and warrant that
7 they have not, directly or indirectly, assigned, transferred, encumbered, or purported to assign,
8 transfer, or encumber to any person or entity any portion of any liability, claim, demand, action,
9 cause of action or rights released and discharged by this Agreement.

10 82. No Admission. Defendant denies any and all liability to Plaintiff and/or any Class
11 Member and/or Aggrieved Employee in this Action, as to any and all causes of action that were
12 asserted or that might have been asserted in this Action. Nonetheless, Defendant wishes to settle
13 and compromise the matters at issue in the Complaint to avoid further substantial expense and
14 the inconvenience and distraction of protracted and burdensome litigation. Defendant has taken
15 into account the uncertainty and risks inherent in litigation, and without conceding any infirmity
16 in the defenses that it has asserted or could assert against Plaintiff, have determined that it is
17 desirable and beneficial that Plaintiff' claims be settled in the manner and upon the terms and
18 conditions set forth in this Agreement.

19 83. Inadmissibility of Agreement. Whether or not the Court issues the Final Approval
20 Order, nothing contained herein, nor the consummation of this Agreement, is to be construed or
21 deemed an admission of liability, culpability, negligence, or wrongdoing on the part of
22 Defendant or any of the other Released Parties. Each of the Parties hereto has entered into this
23 Agreement with the intention of avoiding further disputes and litigation with the attendant
24 inconvenience and expenses. This Agreement is a settlement document, and it, along with all
25 related documents such as the notices, and motions for preliminary and final approval, shall,
26 pursuant to California Evidence Code section 1152 and/or Federal Rule of Evidence 408, be
27 inadmissible in evidence in any proceeding, except an action or proceeding to approve the
28 settlement, and/or interpret or enforce this Agreement. The stipulation for class certification as

part of this Agreement is for settlement purposes only and if, for any reason the settlement is not approved, the stipulation will be of no force or effect.

84. No Publicity. The Parties will not publicize the Settlement or disclose it to third parties prior to the Court granting Preliminary Approval, except as required or necessary to effectuate its terms and comply with law. After the Final Approval Date, Class Counsel and Class Representative agree that they will not discuss the Settlement with the media, any settlement and verdict reporting service, any social media postings or other Internet postings. Nothing herein shall be construed to prevent Class Counsel from the public filing of motions or other case materials in the Action related to seeking and obtaining Court approval of this Settlement and the related awards of attorneys' fees and costs, or to communications with Class Members or their representatives about this Settlement, including through the posting of Court-filed documents on Class Counsel's websites for access solely by the Class Members, or to prevent the Parties or their representatives from communicating with financial or legal advisors regarding the Settlement. In response to any media inquiry, Class Counsel may state only that the Action has been settled on terms mutually agreeable to the Parties.

85. Notices. Unless otherwise specifically provided herein, all notices, demands or other communications given hereunder shall be in writing and shall be deemed to have been duly given as of the third business day after mailing by United States registered or certified mail, return receipt requested, addressed:

To the Class:

Brian J. Mankin
brian@lmlfirm.com
Lauby, Mankin & Lauby LLP
5198 Arlington Ave, PMB 513
Riverside, CA 92504
Tel: (951) 320-1444 | Fax: (951) 320-1445

To Defendant:

Kevin M. Erwin, Esq.
Kevin.Erwin@jacksonlewis.com
JACKSON LEWIS P.C.
200 Spectrum Center Drive, #500

Irvine, CA 92618
Tel: (949) 885-1360 | Fax: (949) 885-1380

86. Construction. The Parties hereto agree that the terms and conditions of this Agreement are the result of lengthy, intensive arms' length negotiations between the Parties and that this Agreement shall not be construed in favor of or against any Party by reason of the extent to which any Party or his or its counsel participated in the drafting of this Agreement. Plaintiff and Defendant expressly waive the common-law and statutory rule of construction that ambiguities should be construed against the drafter of an agreement and further agree, covenant, and represent that the language in all parts of this Agreement shall be in all cases construed as a whole, according to its fair meaning.

87. Captions and Interpretations. Paragraph titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this Agreement or any provision hereof. Each term of this Agreement is contractual and not merely a recital.

88. Modification. This Agreement may not be changed, altered, or modified, except in writing and signed by the Parties hereto, and approved by the Court. This Settlement Agreement may not be discharged except by performance in accordance with its terms or by a writing signed by all of the Parties hereto.

89. Dispute Resolution. Prior to instituting legal action to enforce the provisions of this Agreement or to declare rights and/or obligations under this Agreement, a Party shall provide written notice to the other Party and allow an opportunity to cure the alleged deficiencies, and Plaintiff and Defendant may agree to seek the help of the Mediator to resolve any dispute they are unable to resolve informally. During this period, the Parties shall bear their own attorneys' fees and costs. This provision shall not apply to any legal action or other proceeding instituted by any person or entity other than Plaintiff or Defendant.

90. Choice of Law. This Settlement Agreement shall be governed by and construed, enforced and administered in accordance with the laws of the State of California, without regard to its conflicts-of-law rules.

1 91. Integration Clause. This Settlement Agreement contains the entire agreement
2 between the Parties relating to the settlement and transaction contemplated hereby, and all prior
3 or contemporaneous agreements, understandings, representations, and statements, whether oral
4 or written and whether by a Party or such Party's legal counsel, are merged herein. No rights
5 hereunder may be waived except in writing.

6 92. Binding On Assigns. This Agreement shall be binding upon and inure to the
7 benefit of the Parties hereto and their respective heirs, trustees, executors, administrators,
8 successors and assigns.

9 93. Signatures of All Class Members Unnecessary to be Binding. It is agreed that,
10 because the members of the Class are numerous, it is impossible or impractical to have each
11 Class Member execute this Agreement. The Notice will advise all Class Members of the binding
12 nature of the release provided herein and such shall have the same force and effect as if this
13 Agreement were executed by each Class Member.

14 94. Counterparts. This Agreement may be executed in counterparts, and when each
15 Party has signed and delivered at least one such counterpart, each counterpart shall be deemed an
16 original, and, when taken together with other signed counterparts, shall constitute one fully
17 signed Agreement, which shall be binding upon and effective as to all Parties. Electronic
18 signatures shall have the same force and effect as an original.

19
20 Dated: March 13, 2023

PLAINTIFF AND CLASS REPRESENTATIVE:

21 
22 [Nick tosta \(Mar 13, 2023 09:48 PDT\)](#)

Nicholas Tosta

23
24 Dated: March 14, 2023

DEFENDANT FORMULATION TECHNOLOGY INC

25 
26

27 By: Matt McBride (name)

28 President (title)

1 **APPROVED AS TO FORM:**

2 Dated: March 13, 2023

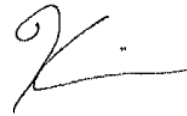
CLASS COUNSEL
LAUBY, MANKIN & LAUBY LLP

3
4 

5 _____
6 Brian J. Mankin
7 Attorneys for Plaintiff

8 Dated: March 14, 2023

DEFENSE COUNSEL
JACKSON LEWIS, P.C.

9
10 

11 _____
12 Kevin M. Erwin, Esq.
13 Attorneys for Defendant
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EXHIBIT “B”

COURT APPROVED NOTICE OF CLASS ACTION SETTLEMENT

Tosta v. Formulation Technology Incorporated

(Stanislaus County Superior Court, Case No. CV-22-00189)

***The Stanislaus County Superior Court authorized this Notice. Read it carefully!
It's not junk mail, spam, an advertisement, or solicitation by a lawyer. You are not being sued.***

You may be eligible to receive money from a class action lawsuit (“Action”) against Formulation Technology Incorporated (“Defendant” or “FTI”) for alleged unpaid wage claims. The Action was filed by a former FTI employee, and seeks payment of (1) unpaid wages, statutory damages and penalties, interest and attorneys’ fees on behalf of a class of non-exempt (*i.e.*, hourly paid) employees employed by FTI in California during the Class Period (January 14, 2018, through February 15, 2023) (the “Class Members”); and (2) penalties under the California Private Attorney General Act (“PAGA”) for all non-exempt (*i.e.*, hourly paid) employees employed by FTI in California during the PAGA Period (January 14, 2021, through February 15, 2023) (the “Aggrieved Employees”).

The proposed Settlement has two main parts: (1) a Class Settlement requiring FTI to fund Individual Class Payments to Class Members, and (2) a PAGA Settlement requiring FTI to fund Individual PAGA Payments to Aggrieved Employees and pay penalties to the California Labor and Workforce Development Agency (“LWDA”).

[CLASS MEMBER NAME] **[ID/CONTROL NUMBER]**

Two Parts	Weeks Worked During: Class Period (Class Member) and PAGA Period (Aggrieved Employee)	Your Estimated Share
Class Member	INSERT (During Class Period)	\$INSERT (Individual Class Payment)
Aggrieved Employee	INSERT (During PAGA Period)	\$INSERT (Individual PAGA Payment)

Based on Defendant’s records, and the Parties’ current assumptions, your Individual Class Payment (less withholding) and your Individual PAGA Payment are shown in the chart above, along with the Workweeks you are credited with working during the Class Period and PAGA Period, respectively, according to Defendant’s records. The actual amount you may receive likely will be different and will depend on several factors. (If no amount is stated for your Individual PAGA Payment, then according to Defendant’s records you are not eligible for an Individual PAGA Payment under the Settlement because you did not work during the PAGA Period.)

If you believe that you worked more weeks during either period than Defendant’s records show in the chart above, you can submit a challenge by **DATE**, 2023 (“**Response Deadline**”). See **Section 4** of this Notice.

The Court has already preliminarily approved the proposed Settlement and approved this Notice. The Court has not yet decided whether to grant final approval. Your legal rights are affected whether you act or not act. Read this Notice carefully. You will be deemed to have carefully read and understood it. At the Final Approval Hearing, the Court will decide whether to finally approve the Settlement and how much of the Settlement will be paid to Plaintiff and Plaintiff’s attorneys (“Class Counsel”). The Court will also decide whether to enter a judgment that requires Defendant to make payments under the Settlement and requires Class Members and Aggrieved Employees to give up their rights to assert certain claims against Defendant.

If you worked for Defendant during the Class Period and/or the PAGA Period, you have a few options as shown in the Chart below:

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT	
DO NOTHING AND RECEIVE A SETTLEMENT PAYMENT	If you want to receive your full settlement payment, then no further action is required on your part. You will automatically receive a settlement payment if the Settlement receives final approval by the Court. You will be bound by the terms of the Settlement Agreement and will give up your right to sue on the Released Class Claims described in Section 3 .
EXCLUDE YOURSELF	If you do <u>not</u> wish to participate in the settlement of the Class Claims, you may “opt-out” of the settlement of the Class Claims. If you choose to opt-out, you must submit a Request for Exclusion by [REDACTED], 2023 (see Section 6 for more details on how to opt-out). If you opt-out, you will no longer be a Class Member, and you will (1) <u>not</u> receive an Individual Class Payment, but you will preserve your right to pursue the Released Class Claims described below subject to applicable statutes of limitations, and (2) be barred from filing an objection to the settlement. You cannot opt-out of the PAGA portion of the proposed Settlement. Defendant must pay Individual PAGA Payments to all Aggrieved Employees and the Aggrieved Employees must give up their rights to pursue PAGA Released Claims. See Section 6 of this Notice.
OBJECT	If you decide to object to the settlement with respect to the Class Claims because you find it unfair or unreasonable, you must submit an Objection stating why you object to the settlement by [REDACTED], 2023 (see Section 7 for details on how to object).
DISPUTE THE NUMBER OF WEEKS WORKED	If you believe the number of workweeks that you were credited with working in the chart above is incorrect, you may submit a written dispute to the Administrator (see Section 4 for more details on how to dispute your credited Weeks Worked). Defendant’s records will be presumed correct, but you may provide evidence to the Administrator showing how many Work Weeks you believe you should be credited.

YOU MAY ATTEND THE FINAL APPROVAL HEARING, BUT IT’S NOT REQUIRED	
DATE: INSERT DATE, 2023 TIME: 8:30 A.M.	At the Final Approval Hearing, the Court will decide whether to finally approve the Settlement. You don’t have to attend but you do have the right to appear (or hire an attorney to appear on your behalf at your own cost), in person, by telephone or by using the Court’s virtual appearance platform. Participating Class Members can verbally object to the Settlement at the Final Approval Hearing. See Section 8 of this Notice.

1. WHAT IS THE ACTION ABOUT?

Plaintiff and Class Representative, Nicholas Tosta, is a former FTI employee. The Action accuses Defendant of violating California labor laws due to the alleged: failure to pay minimum and overtime wages, failure to provide meal periods and rest breaks and failure to pay meal and rest period premiums, failure to timely pay wages each period and upon separation of employment, and failure to provide accurate itemized wage statements. Based on the same claims, Plaintiff has also asserted a claim for civil penalties under the California Private Attorneys General Act (Labor Code §§ 2698, et seq.) (“PAGA”). Plaintiff is represented by attorneys in the Action (“Class Counsel”). See Section 9 below for their contact information.

Defendant strongly denies violating any laws or failing to pay any wages and contends it complied with all applicable laws.

2. WHAT DOES IT MEAN THAT THE ACTION HAS SETTLED?

So far, the Court has made no determination whether Defendant or Plaintiff is correct on the merits. In the meantime, Plaintiff and Defendant hired an experienced, neutral mediator in an effort to resolve the Action by negotiating to end the case by agreement (settle the case) rather than continuing the expensive and time-consuming process of litigation. The negotiations were successful. By signing a lengthy written settlement agreement (“Agreement”) and agreeing to jointly ask the Court to enter a judgment ending the Action and enforcing the Agreement, Plaintiff and Defendant have negotiated a proposed Settlement that is subject to the Court’s Final Approval. Both sides agree the proposed Settlement is a compromise of disputed claims. By agreeing to settle, Defendant does not admit any violations or concede the merit of any claims.

Plaintiff and Class Counsel strongly believe the Settlement is a good deal for you because they believe that: (1) Defendant has agreed to pay a fair, reasonable and adequate amount considering the strength of the claims and the risks and uncertainties of continued litigation; and (2) Settlement is in the best interests of the Class Members and Aggrieved Employees. The Court preliminarily approved the proposed Settlement as fair, reasonable and adequate, authorized this Notice, and scheduled a hearing to determine Final Approval.

3. WHAT ARE THE IMPORTANT TERMS OF THE PROPOSED SETTLEMENT?

1. Defendant Will Pay \$300,000 as the Settlement Amount. Defendant has agreed to deposit the Settlement Amount into an account controlled by the Administrator of the Settlement. The Administrator will use the Settlement Amount to pay the Individual Class Payments, Individual PAGA Payments, Class Representative Service Payment, Class Counsel’s attorneys’ fees and expenses, the Administrator’s Costs, and PAGA Penalties to be paid to the California Labor and Workforce Development Agency (“LWDA”). Assuming the Court grants Final Approval, Defendant will fund the Settlement not more than 15 days after the Judgment entered by the Court becomes final. The Judgment will be final on the date the Court enters Judgment, or a later date if Participating Class Members object to the proposed Settlement or the Judgment is appealed.

2. Court Approved Deductions from Settlement. At the Final Approval Hearing, Plaintiff and/or Class Counsel will ask the Court to approve the following deductions from the Settlement, the amounts of which will be decided by the Court at the Final Approval Hearing:

- A. Up to one-third of the Settlement Amount to Class Counsel for attorneys’ fees and up to \$20,000 for their litigation expenses. To date, Class Counsel have worked and incurred expenses on the Action without payment.
- B. Up to \$10,000 to the Class Representative as a Service Payment for filing the Action, working with Class Counsel and representing the Class. The Class Representative’s Service Payment will be the only monies Plaintiff will receive other than Plaintiff’s Individual Class Payment and any Individual PAGA Payment.
- C. Up to \$XXXX to the Administrator for services administering the Settlement.
- D. Up to \$30,000 for PAGA Penalties, allocated 75% to the LWDA PAGA Payment and 25% to Individual PAGA Payments to all Aggrieved Employees, which will be divided based on their share of Weeks Worked during the PAGA Period.

3. Net Settlement Distributed to Class Members. After making the above deductions in amounts approved by the Court, the Administrator will distribute the rest of the remainder (the “Net Settlement”) by making Individual Class Payments to Participating Class Members based on their Weeks Worked during the Class Period.

4. Taxes Owed on Payments to Class Members. Plaintiff and Defendant are asking the Court to approve an allocation of 20% of each Individual Class Payment to taxable wages (“Wage Portion”) and 80% to penalties and interest (“Non-Wage Portion”). The Wage Portion is subject to withholdings and will be reported on IRS W-2 Forms. Defendant will separately pay employer payroll taxes it owes on the Wage Portion. The Individual PAGA Payments are counted as

penalties rather than wages for tax purposes. The Administrator will report the Individual PAGA Payments and the Non-Wage Portions of the Individual Class Payments on IRS 1099 Forms.

Although Plaintiff and Defendant have agreed to these allocations, neither side is giving you any advice on whether your Payments are taxable or how much you might owe in taxes. You are responsible for paying all taxes (including penalties and interest on back taxes) on any Payments received from the proposed Settlement. You should consult a tax advisor if you have any questions about the tax consequences of the proposed Settlement.

5. Need to Promptly Cash Payment Checks. The front of every check issued for Individual Class Payments and Individual PAGA Payments will show the date when the check expires (the void date). If you don't cash it by the void date, your check will be automatically cancelled, and the monies will be deposited with the California Controller's Unclaimed Property Fund in your name.

If the monies represented by your check are sent to the Controller's Unclaimed Property, you should consult the rules of the Fund for instructions on how to retrieve your money.

6. Requests for Exclusion from the Class Settlement (Opt-Outs). You will be treated as a Participating Class Member, participating fully in the Class Settlement, unless you opt-out of the Settlement, not later than the Response Deadline. See Section 6 of this Notice for details on how to Opt-Out.

7. The Proposed Settlement Will be Void If the Court Denies Final Approval. It is possible the Court will decline to grant Final Approval of the Settlement or decline to enter a Judgment. It is also possible the Court will enter a Judgment that is reversed on appeal. Plaintiff and Defendant have agreed that, in either case, the Settlement will be void: Defendant will not pay any money and Class Members will not release any claims against Defendant.

8. Administrator. The Court has appointed a neutral company, [NAME OF ADMIN] (the "Administrator") to send this Notice, calculate and make payments, and process Class Members' Requests for Exclusion and Objections (if any). The Administrator will also decide any Disputes over weeks worked, mail and re-mail settlement checks and tax forms, and perform other tasks necessary to administer the Settlement. The Administrator's contact information is contained in Section 9 of this Notice.

9. Participating Class Members' Release. After the Judgment is final and Defendant has fully funded the Settlement Amount and separately paid all employer payroll taxes, Participating Class Members will be legally barred from asserting any of the claims released under the Settlement. This means that unless you opted out by validly excluding yourself from the Class Settlement, you cannot sue, continue to sue, or be part of any other lawsuit against Defendant or related entities for wages based on the facts alleged in the Action for the duration of the Class Period and PAGA Period, which are resolved by this Settlement.

The Participating Class Members will be bound by the following release: All Participating Class Members, on behalf of themselves and their respective representatives, agents, heirs, and assigns, release the Released Parties from all claims stated in the operative Complaint and those based solely upon the facts in the Complaint, including: (a) failure to pay minimum wages, (b) failure to pay overtime wages, (c) failure to provide meal periods, (d) failure to provide rest breaks, (e) failure to failure to timely pay wages upon separation of employment, (h) failure to provide accurate itemized wage statements, (i) unfair and unlawful competition, and (j) all other claims for statutory penalties based on the facts or claims alleged in the operative complaint (the "Released Class Claims"). The operative release period for the Released Class Claims is the Class Period. Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period.

10. Release of Released PAGA Claims. After the Court's judgment is final, and Defendant has paid the Settlement Amount (and separately paid the employer-side payroll taxes), Plaintiff on behalf of himself, the State of California and the LWDA shall release the Released Parties from all PAGA claims that Plaintiff alleged against the Released Parties, on behalf of himself and the State of California, based on the facts stated in the operative Complaint in the Action and in the LWDA notice letter, including all PAGA claims seeking civil penalties that premised upon (a) failure to pay minimum wages, (b) failure to pay overtime wages, (c) failure to provide meal periods, (d) failure to provide rest breaks,

(e) failure to timely pay wages each pay period and upon separation of employment, (h) failure to provide accurate itemized wage statements, and (g) all other claims for civil penalties recoverable under the Private Attorneys General Act, Labor Code §§ 2698 *et seq.* based on the facts or claims alleged in the operative complaint (“Released PAGA Claims.”) The time period governing the Released PAGA Claims shall be any time during the PAGA Period.

4. WHAT ARE THE IMPORTANT TERMS OF THE PROPOSED SETTLEMENT?

1. Individual Class Payments. The Administrator will calculate Individual Class Payments by (a) dividing the Net Settlement Amount by the total number of Weeks Worked by all Participating Class Members during the Class Period, and (b) multiplying the result by the number of Weeks Worked by each individual Participating Class Member during the Class Period.

2. Individual PAGA Payments. The Administrator will calculate Individual PAGA Payments by (a) dividing \$7,500 by the total number of Weeks Worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by the number of Weeks Worked by each individual Aggrieved Employee during the PAGA Period.

3. Disputing Weeks Worked. The number of weeks you worked during the Class Period and PAGA Period, as recorded in Defendant’s records, are stated in the first page of this Notice. You have until **INSERT DATE HERE** (“Response Deadline”) to dispute the number of Workweeks credited to you by submitting evidence to the Administrator.

You need to support your dispute by sending copies of pay stubs or other records. The Administrator will accept Defendant’s calculation of weeks worked based on Defendant’s records as accurate unless you send copies of records containing contrary information. You should send copies rather than originals because the documents will not be returned to you. The Administrator will resolve Workweek challenges based on your submission and on input from Class Counsel and Defendant’s Counsel. The Administrator’s decision is final. You can’t appeal or otherwise challenge its final decision.

5. HOW WILL I GET PAID?

1. Participating Class Members and Aggrieved Employees. The Administrator will send, by U.S. mail, a single check to every Participating Class Member (*i.e.*, every Class Member who does not opt-out) and Aggrieved Employee. The single check will combine the Individual Class Payment and the Individual PAGA Payment.

2. Aggrieved Employees Only. If you opted out of the Class settlement, but qualify as an Aggrieved Employee, then the Administrator will send, by U.S. mail, a single Individual PAGA Payment check to every Aggrieved Employee, including those who opt out of the Class Settlement.

Your check will be sent to the same address as this Notice. If you change your address, be sure to notify the Administrator as soon as possible. Section 9 of this Notice has the Administrator’s contact information.

6. HOW DO I OPT-OUT OF THE CLASS SETTLEMENT?

If you **do not** wish to take part in the release of the Class Claims in the Settlement, you may exclude yourself by sending to the Settlement Administrator a “Request for Exclusion” letter/card postmarked no later than , 2023 with your full name, address, telephone number, last four digits of your social security number or your date of birth, and signature. The Request for Exclusion should state:

“I WISH TO BE EXCLUDED FROM THE CLASS IN THE FORMULATION TECHNOLOGY LAWSUIT. I UNDERSTAND THAT IF I ASK TO BE EXCLUDED FROM THE SETTLEMENT CLASS, I WILL NOT RECEIVE MY INDIVIDUAL CLASS PAYMENT FROM THIS LAWSUIT.”

Any person who submits a timely Request for Exclusion from the Class Claims (1) will not have any rights under this Settlement, including the right to object, appeal or comment on the Settlement; (2) will not be entitled to receive an Individual Class Payment; (3) will preserve the right to pursue the Released Class Claims, and (4) will not be bound by this Settlement, or the Judgment.

You cannot opt-out of the PAGA portion of the Settlement. Class Members who exclude themselves from the Class Settlement remain eligible for Individual PAGA Payments.

If you do not want to participate in the Settlement, the Administrator will exclude you based on timely receipt of a writing communicating your request to be excluded. Be sure to personally sign your request, identify the Action as *Tosta v. Formulation Technology Incorporated*, and include your identifying information (full name, address, telephone number, approximate dates of employment, and last four digits of social security number or your date of birth for verification purposes). You must make the request yourself. If someone else makes the request for you, it will not be valid. **Send your request to be excluded to the Administrator by [REDACTED], 2023 (the “Response Deadline”), or it will be invalid.** Section 9 of the Notice has the Administrator’s contact information.

7. HOW DO I OBJECT TO THE SETTLEMENT?

Only Participating Class Members have the right to object to the Settlement. A Participating Class Member who disagrees with any aspect of the Settlement may wish to object. **The deadline for sending written objections to the Administrator is [REDACTED], 2023 (the “Response Deadline”).**

If you wish to object to the proposed Settlement, you or your own attorney must submit a written objection, and the objection must include your full name, address, telephone number, last four digits of the social security number or date of birth, signature, and dates of employment with Defendant, in addition to the case name and number (*Tosta v. Formulation Technology Incorporated*, Case No. CV-22-00189), the basis for the objection, including any legal support and each specific reason in support of the objection, as well as any documentation or evidence in support thereof. Additionally, if you are represented by an attorney, the objection must include the name and address of your attorney. This objection and all supporting information must be sent to the Administrator at the address listed in Section 9, **postmarked** on or before [REDACTED], 2023.

If you do not comply with these procedures and the deadline for objections, the Court may not consider your objection at the Final Approval Hearing, and you may lose the right to contest the approval of the Settlement. You are still eligible to receive a settlement payment should the settlement become Final even if you object to the settlement. Submitting an objection does not preserve the right to appeal a final judgment. Rather, the right to appeal is preserved by becoming a party of record by timely and properly intervening or filing a motion to vacate the judgment before entry of judgment.

Alternatively, a Participating Class Member can object (or personally retain a lawyer to object at your own cost) by attending the Final Approval Hearing. You (or your attorney) should be ready to tell the Court what you object to, why you object, and any facts that support your objection. See Section 8 of this Notice (immediately below) for specifics regarding the Final Approval Hearing.

8. WHEN IS THE FINAL APPROVAL HEARING?

On [REDACTED], 2023, the Court will hold a public hearing in Department 24 of the Superior Court for the State of California, County of Stanislaus, 801 10th Street, Modesto, CA 95354, for the purposes of determining whether the proposed Settlement is fair, adequate and reasonable and should be approved, whether to approve Class Counsel’s applications for attorneys’ fees and costs, whether to approve the payments to the LWDA, and whether to approve Plaintiff’s request for the service award. This hearing may be continued or rescheduled by the Court. Objectors to the proposed settlement will be provided notice in the event that the Final Approval Hearing is continued to a later date. Class Members who support the proposed Settlement do not need to appear at the hearing and do not need to take any other action to indicate their approval. Class Members who object to the proposed Settlement are not required to attend the Final Approval Hearing.

9. HOW CAN I GET MORE INFORMATION?

If you have questions about this Notice, the process to Opt-Out or Object, or the Settlement, or if you did not receive this Notice in the mail and you believe that you are or may be a member of the Class, you should contact the Administrator for more information or to request that a copy of this Notice be sent to you in the mail.

Settlement Administrator
Name Mailing Address Telephone Number

If you wish to communicate directly with Class Counsel, you may contact them at the contact information noted here:

Class Counsel
Brian Mankin, Esq. <i>brian@LMLfirm.com</i> Peter Carlson, Esq. <i>peter@LMLfirm.com</i> Lauby Mankin Lauby LLP 5198 Arlington Ave, PMB 513 Riverside, CA 92504 Tel: (951) 320-1444

You may also seek advice and guidance from your own private attorney at your own expense, if you so desire.

This Notice is only a summary. For more detailed information, you may review the Settlement Agreement, containing the complete terms of the proposed Settlement, which is on file with the Court and attached to the Declaration of Brian J. Mankin in Support of Motion for Preliminary Approval of Class Action Settlement filed on [REDACTED], 2023 and which is available to be inspected at any time during regular business hours at the Office of the Clerk, Stanislaus County Superior Court, at PLEASE INSERT CLERK'S OFFICE ADDRESS HERE.

**DO NOT TELEPHONE THE SUPERIOR COURT
TO OBTAIN INFORMATION ABOUT THE SETTLEMENT**

10. WHAT IF I LOSE MY SETTLEMENT CHECK?

If you lose or misplace your settlement check before cashing it, the Administrator will replace it as long as you request a replacement before the void date on the face of the original check. If your check is already void you should consult the Unclaimed Property Fund for instructions on how to retrieve the funds.

11. WHAT IF I CHANGE MY ADDRESS?

To receive your check, you should immediately notify the Administrator if you move or otherwise change your mailing address.

EXHIBIT “C”



January 14, 2022

Submitted Via Online Filing to the LWDA

California LWDA
Attn: PAGA Administrator
455 Golden Gate Ave., 9th Fl.
San Francisco, CA 94102

Sent Via U.S. Mail and Certified Mail

Formulation Technology Incorporated
579 Armstrong Way
Oakdale, CA 95361

Keith Hensley
579 Armstrong Way
Oakdale, CA 95361

Re: PAGA Civil Penalty Claim
Nicholas Tosta v. Formulation Technology Incorporated, et al.

To the Labor and Workforce Development Agency, Formulation Technology, and Mr. Keith Hensley:

Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Labor Code §§ 2699, *et seq.*, this letter shall serve as notification of the PAGA civil penalty claim of aggrieved employee Nicholas Tosta (“Claimant”), on behalf of the State of California and all Aggrieved Employees, against his former employer(s), Formulation Technology Incorporated and/or any affiliated entities, as well as its Mr. Keth Hensley and other owners (the “Owners”) (collectively, the “Company”), for violations of Labor Code §§ 200, 201, 202, 203, 204, 208, 210, 218.6, 226, 226.3, 226.7, 510, 512, 558, 1194, 1194.2, 1197, 1197.1, 1198, and 1199 among possibly other sections inadvertently omitted, and/or sections of the applicable Industrial Welfare Commission Wage Order(s).

FACTUAL BACKGROUND

Claimant was employed by the Company from approximately 2015 through June 2021. Claimant alleges that, at all relevant times, he and all other non-exempt employees employed by the Company in California (the “Aggrieved Employees”) were subjected to the same policies, working conditions, and corresponding wage and hour violations that Claimant was subjected during his employment.

For instance, at all relevant times, Claimant and the Aggrieved Employees were not provided proper minimum and overtime wages due to the Company’s failure to accurately record and compensate for all hours worked. As one such example, the Company required Claimant and the Aggrieved Employees to undergo mandatory temperature checks and screenings prior to clocking in for payroll purposes. However, because this time was spent under the Company’s control but before being allowed to clock in, it was uncompensated in violation of California law and led to minimum and overtime wage violations. See *Troester v. Starbucks Corporation* (2018) 5 Cal.5th 829 (California law “do[es] not allow employers to require employees to routinely work for minutes off the clock without compensation”); See also *Frlekin v.*

Apple Inc. (2020) 8 Cal.5th 1038 (tasks are compensable when employee is under company's control and where the tasks served the employer's interests).

Also, at all relevant times, Claimant was compensated on an hourly basis plus additional compensation in the form of nondiscretionary bonuses. However, on the occasions when Claimant worked in excess of 8 and/or 12 hours per day and/or 40 hours per week and received additional earned compensation during the workweek, the Company failed to properly include these amounts in the calculations for Claimant's regular rate of pay. Therefore, the Company failed to pay proper overtime wages for the hours worked in excess of 8 and/or 12 per day and/or 40 per week.

Claimant was also not provided 30-minute off-duty meal periods, as mandated by California law, during employment with the Company. As a result of the Company's policies and practices, as well as the hectic and demanding workload, Claimant was subjected to meal period violations when he was: (1) unable to take a meal period due to workload, (2) forced to take an on-duty meal period while under the control of the Company, (3) forced to take a shortened meal period, (4) forced to take a meal period after the 5th hour of work, and (5) not provided a mandated second meal period for shifts in excess of 10 hours.

The Company also failed to provide Claimant with 10 minutes of net rest break time for every 4 hours worked, or major fraction thereof, as mandated by California law. The Company did not schedule Claimant's rest breaks, Claimant was unable to leave the premises for breaks, and Claimant was often not authorized and/or permitted to take mandated rest breaks due to the lack of adequate staffing and coverage and being overwhelmed by the hectic workload. Furthermore, on occasions when Claimant worked in excess of 10 hours in a shift, the Company failed to authorize and/or permit a third mandated rest break.

The Company also failed to comply with the mandates of Labor Code §§ 204 and 210 regarding the timing of the payment of wages to its employees each period, including minimum and overtime wages, as well as meal and rest period premiums. Also, the Company failed to comply with the mandates of Labor Code §§ 201–203 regarding timing of payment of final wages and failed to pay all wages due and owing upon separation of employment including minimum, regular, and overtime wages, and all required meal and rest break premiums under Labor Code § 226.7. Finally, during his employment with the Company, Claimant received inaccurate and incomplete wage statements that failed to accurately state all necessary items required under Labor Code § 226(a).

Claimant alleges that he worked under the joint direction and control of Formulation Technology and the Owners and is informed and believes that each of them acted in all respects pertinent to this action as the agent of the others, carried out a joint scheme, business plan or policy in all respect pertinent hereto, and the acts of each are legally attributable to the others. On information and belief, a unity of interest and ownership between each exists such that Formulation Technology and the Owners acted as a single employer of Claimant and the Aggrieved Employees. Furthermore, on information and belief, Formulation Technology and the Owners are an integrated enterprise and should be treated as a single employer because Formulation Technology and the Owners share an interrelation of operations, with common human resources and personnel policies and shared common offices and facilities. Upon information and belief, Formulation Technology and the Owners share common management, a centralized control of labor operations, and common ownership or financial control.

Furthermore, Claimant alleges that the Owners are now and at all relevant times were the owners of Formulation Technology and were Claimant's and the Aggrieved Employees' actual employer or, in the



alternative, were individuals employed by the Company as managerial and/or supervisory employees and/or agents. In addition, Claimant alleges that at all relevant times the Owners had the authority, in the interest of Formulation Technology to exercise independent judgment to hire, transfer, promote, discharge, assign, discipline, or take other similar actions against Claimant and the Aggrieved Employees, and were in Claimant's chain of command at the time of and direct participants in the wrongful conduct which constitutes the basis of Claimant's complaint herein. Claimant also alleges that Formulation Technology and the Owners are the agents, servants, employees, partners, affiliates, and/or representatives of each other, and were, at all times herein mentioned, acting within the course, scope, and purpose of such relationship(s) and with the knowledge, consent and/or ratification of each other. Furthermore, in conducting themselves in the manner described herein, Formulation Technology and the Owners were acting in active concert with on another such that the acts of each were fully attributable to the other in all material respects.

Claimant also alleges Formulation Technology and the Owners were merely the alter-ego of the others in that there existed a unity of interest and ownership such that any separateness between them ceased to exist and each exercised undue dominance, control, influence, and management over the others. Claimant further alleges that, at all relevant times, Formulation Technology has been inadequately capitalized to conduct business, has failed to follow appropriate corporate formalities, and has simply been a shell and instrumentality through which the Owners have conducted their personal affairs. Adherence to the fiction of the separate existence of Formulation Technology would permit abuse of the corporate privilege, thereby sanctioning fraud and promoting injustice. Accordingly, the corporate veil should be pierced, and any liability attached to Formulation Technology should be imposed jointly and severally against the Owners.

Finally, in an additional separate, but not necessarily mutually exclusive, alternative theory of liability, the Owners are liable for PAGA civil penalties under Labor Code § 558 as "other person(s)" who caused the violations regarding minimum wage among other claims. See *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, 820 ("if there is evidence and a finding that a party other than the employer 'violates, or causes to be violated' the overtime laws (§ 558(a)) or 'pays or causes to be paid to any employee' less than minimum wage (§ 1197.1(a)), then that party is liable for certain civil penalties regardless of the identity or business structure of the employer"); *Moua v. IBM* (N.D. Cal. 2019) 2019 U.S.Dist.LEXIS 40851 (same)

As a result of these violations, and others described below, Claimant alleges that he and other Aggrieved Employees were denied specific rights to which they are/were entitled under California law and the rules promulgated by the IWC Wage Orders, including the following:

**PAGA ASSESSMENT FOR FAILURE TO
PAY ALL MINIMUM, REGULAR, AND OVERTIME WAGES**

(Labor Code §§ 204, 210, 221-223, 510, 558, 1194, 1194.2, 1197, 1197.1, 1198; IWC Wage Order §§ 3, 4(B))

As discussed above, the Company failed to pay all required minimum, regular, and overtime wages to Claimant and the Aggrieved Employees due to the Company's failure to accurately record and compensate for all hours worked, the failure to compensate for time spent in mandated temperature checks, and the failure to pay overtime and/or properly calculate the regular rate of pay for Claimant and other Aggrieved Employees. This resulted in earned, but unpaid, wages due and owing to Claimant and the Aggrieved Employees. Therefore, Claimants and the Aggrieved Employees performed work for the Company without receiving proper payment of the requisite minimum, overtime, and/or doubletime wages.



Accordingly, Labor Code §§ 210, 558, 1194.2, 1197.1, and 2699, among possibly others, impose various penalties upon the Company for each employee and each pay period in which it failed to pay all wages including, but not limited to, minimum, regular, and overtime wages in violation of the Labor Code and/or the IWC Wage Orders.

**PAGA ASSESSMENT FOR DENIAL OF MEAL PERIODS,
REST BREAKS, AND WAGE PREMIUMS**

(Labor Code §§ 226.7(b) & (c), 512, 558; Cal. Admin. Code, Title 8, § 11090)

Labor Code § 226.7(b) states that “[a]n employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission ...” Labor Code § 512(a) states in pertinent part: “[A]n employer may not employ an employee for a work period of more than 5 hours per day without providing the employee with an uninterrupted meal period of not less than 30 minutes [...] [a]n employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes.”

Section 12 of applicable IWC Wage Order states in pertinent part: “Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.”

Here, Claimant and other Aggrieved Employees were regularly not provided compliant mandatory meal periods and paid rest breaks due to the Company’s policies described above. Although the Company was required to pay Claimant and all Aggrieved Employees premium wages equal to an additional hour of pay at the employee’s regular rate of pay for each violation under Labor Code § 226.7(c), the Company did not pay the mandatory one-hour wage premiums and did not do so at the proper rate. Labor Code § 558 imposes a penalty for each violation, plus an amount sufficient to recover the underpaid wages. Additionally, the civil assessment set forth in Labor Code § 2699 applies to these violations.

**PAGA ASSESSMENT FOR FAILURE TO PAY ALL WAGES DUE AND OWING
EACH PAYROLL PERIOD WITHIN THE TIME REQUIRED BY LAW**

(Labor Code §§ 204, 204.1, 208, 210, 256 and 2699)

Labor Code § 204(a) states that all wages earned by a person are due and payable twice during each calendar month, and further states that wages earned during the first through fifteenth days of the month must be paid no later than the twenty-sixth day of the month, and that wages earned between the sixteenth and last day of the month must be paid by the tenth day of the following month. Labor Code § 204(d) states “[t]he requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.”

As a result of the Company’s failure to pay Claimant and the Aggrieved Employees all compensation to which they were entitled, the Company had a pattern and practice of failing to pay all wages due and owing to Claimant and the Aggrieved Employees within the time mandated by Labor Code § 204. As a result of these violations, penalties may be assessed pursuant to Labor Code §§ 203, 210, 256, and/or 2699.



PAGA ASSESSMENT FOR FAILURE TO TIMELY PAY FINAL WAGES

(Labor Code §§ 201, 202, 203, 256 and 2699)

Labor Code § 201(a) provides in pertinent part: “If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.” Labor Code § 202(a) states in pertinent part “If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours’ previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.” Labor Code § 203(a) states “If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 201.9, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.”

The Company did not pay the Aggrieved Employees all wages that were due and owing within the required time following the end of their employment in accordance with Labor Code §§ 201-202. As a result, all such Aggrieved Employees are entitled to 30 days of wages as a “waiting time penalty.” (Labor Code § 203.) Labor Code § 2699 also imposes a penalty.

**PAGA ASSESSMENT FOR FAILURE TO PROVIDE ACCURATE,
ITEMIZED WAGE STATEMENTS**

(Labor Code §§ 226, 226.3, and 1174)

Labor Code § 226(a) requires an employer to provide its employees with itemized wage statements accurately stating gross wages earned, total hours worked, all deductions, net wages earned, the inclusive dates of the pay period, the employee’s name and the last four digits of his or her Social Security number (or employee identification number), the name and address of the legal entity that is the employer, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At all times pertinent hereto, the Company failed to provide accurate itemized wage statements to Claimants and all Aggrieved Employees due to violations including: failure to accurately state total hours worked (for example, the wage statements failed to accurately reflect the compensable hours spent in temperature checks); failure to accurately state gross wages earned; failure to accurately state all deductions; failure to accurately state net wages earned; failure to state the applicable hourly rates (including the accurate overtime rate of pay); failure to state the inclusive dates of the pay period; and failure to accurately state the corresponding number of hours worked at each hourly rate. Accordingly, Labor Code §§ 226.3 and 2699 impose civil penalties for these violations.

PAGA ASSESSMENT FOR VIOLATIONS OF LABOR CODE § 1199

(Labor Code § 1199)

An employer violates Labor Code § 1199 if said employer: (a) requires or causes an employee to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission; (b) pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission; or, (c) violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission. Labor Code § 2699.5 specifically enumerates Labor Code § 1199 as a



section to which the civil penalties under the PAGA apply. Therefore, as a result of the Company's violations described herein, the Company is subject to the civil penalties in accordance with Labor Code § 2699.

ATTORNEYS' FEES, INTEREST, AND PENALTIES

(Labor Code §§ 2699(f)(2), 2699(g)(1), 2699.5)

Labor Code § 2699(g)(1), give employees the right to recover in a civil action the unpaid balance of the full amount of wages, including interest thereon, penalties and other damages, as applicable, reasonable attorneys' fees, and costs of suit. Additionally, Claimants seek the assessment of penalties, including civil penalties, under Labor Code §§ 203, 210, 225.5, 226.3, 1174.5, 1197.1, 2699, and/or § 20 of the IWC Wage Orders, among possibly other provisions inadvertently omitted herein. Furthermore, Claimants is entitled to bring a wage/hour claim on behalf of all current and former similarly situated employees of the Company. Thus, the Company is exposed to these same penalties for violations involving all Aggrieved Employees.

Additionally, Claimant seeks attorney's fees pursuant to C.C.P. § 1021.5. Please construe this correspondence as Claimants' notification of alleged wrongdoing and attempted resolution in accordance with C.C.P. § 1021.5 and *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553.

CONCLUSION

Based on the foregoing, the Company may be liable for civil penalties related to the foregoing claims and remedies. If Claimant becomes aware of any additional claims for Labor Code violations related to his employment and/or other employees of the Company, he reserves the right to add new claims by supplementing this notice letter. Should you have any questions, please feel free to give me a call. In the meantime, I look forward to your response.

Very Truly Yours,



By: Peter J. Carlson, Esq.

E-mail: peter@lmlfirm.com
www.LMLfirm.com



EXHIBIT “D”



February 27, 2023

CASE ASSUMPTIONS

Class Members	150
Opt Out Rate	1%
Opt Outs Received	2
Total Class Claimants	148
Subtotal Admin Only	\$6,745.24

Flat Fee Total \$6,000.00

For 150 Class Members

Pricing Good for Scope of Estimate Only

All Aspects of Escheating to the State of CA Included

Case: Tosta v. Formulation, Opt-Out Administration

Phoenix Contact: Michael E. Moore

Contact Number: 949.331.0131

Email: mike@phoenixclassaction.com

Requesting Attorney: Brian J. Mankin

Firm: Lauby, Mankin & Lauby, LLP

Contact Number: (951) 320-1444

Email: brian@lmlfirm.com

Assumptions and Estimate are based on information provided by counsel. If class size changes, PSA will need to adjust this Estimate accordingly. Estimate is based on 150 Class Members. PSA assumes class data will be sent in Microsoft Excel or other usable format with no or reasonable additional formatting needed. A rate of \$150 per hour will be charged for any additional analysis or programming.

Case & Database Setup / Toll Free Setup & Call Center / NCOA (USPS)

Administrative Tasks:	Rate	Hours/Units	Line Item	Estimate
Programming Manager	\$100.00	2		\$200.00
Programming Database & Setup	\$100.00	2		\$200.00
Toll Free Setup*	\$150.00	1		\$150.00
Call Center & Long Distance	\$2.00	20		\$40.00
NCOA (USPS)	\$37.50	1		\$37.50
Total				\$627.50

* Up to 120 days after disbursement

Data Merger & Scrub / Notice Packet, Opt-Out Form & Postage / Reminder Postcard

Project Action	Rate	Hours/Units	Line Item	Estimate
Notice Packet Formatting	\$100.00	1		\$100.00
Data Merge & Duplication Scrub	\$0.10	150		\$15.00
Notice Packet & Opt-Out Form	\$1.30	150		\$195.00
Estimated Postage (up to 2 oz.)*	\$0.61	150		\$91.50
Check Cashing Reminder Postcard	\$0.60	31		\$18.65
Postage Included				
Total				\$420.15

* Prices good for 90 days. Subject to change with the USPS Rate or change in Notice pages or Translation, if any.



PHOENIX

CLASS ACTION ADMINISTRATION SOLUTIONS

Skip Tracing & Remailing Notice Packets / Tracking & Programming Undeliverables				
Project Action:	Rate	Hours/Units	Line Item	Estimate
Case Associate	\$55.00	3		\$165.00
Skip Tracing Undeliverables	\$0.85	38		\$31.88
Remail Notice Packets	\$0.75	35		\$25.88
Estimated Postage	\$0.61	35		\$21.05
Programming Undeliverables	\$50.00	1		\$50.00
		Total		\$293.80

Database Programming / Processing Opt-Outs, Deficiencies or Disputes				
Project Action:	Rate	Hours/Units	Line Item	Estimate
Programming Claims Database	\$150.00	2		\$300.00
Non Opt-Out Processing	\$200.00	1		\$200.00
Case Associate	\$55.00	3		\$165.00
Opt-Outs/Deficiency/Dispute Letters	\$10.00	8		\$80.00
Case Manager	\$85.00	3		\$255.00
		Total		\$1,000.00

Calculation & Disbursement Programming/ Create & Manage QSF/ Mail Checks				
Project Action:	Rate	Hours/Units	Line Item	Estimate
Programming Calculations	\$135.00	2		\$270.00
Disbursement Review	\$135.00	1		\$135.00
Programming Manager	\$95.00	1		\$95.00
QSF Bank Account & EIN	\$135.00	1		\$135.00
Check Run Setup & Printing	\$135.00	3		\$405.00
Mail Class Checks *	\$0.90	148		\$133.20
Estimated Postage	\$0.61	148		\$90.28
		Total		\$1,263.48

* Checks are printed on 8.5 x 11 in. sheets with W2/1099 Tax Filing



PHOENIX

CLASS ACTION ADMINISTRATION SOLUTIONS

Tax Reporting & Reconciliation / Re-Issuance of Checks / Conclusion Reports and Declarations			
Project Action:	Rate	Hours/Units	Line Item Estimate
Case Supervisor	\$115.00	2	\$230.00
Remail Checks & Tax Forms (Postage Included)	\$1.70	30	\$50.32
Case Associate	\$55.00	4	\$220.00
Reconcile Uncashed Checks	\$85.00	5	\$425.00
Conclusion Reports	\$115.00	2	\$230.00
Case Manager Conclusion	\$85.00	4	\$340.00
Final Reporting & Declarations	\$115.00	3	\$345.00
IRS & QSF Annual Tax Reporting * (1 State Tax Reporting Included)	\$1,000.00	1	\$1,000.00
Check to Cy-Pres	\$150.00	1	Included
Uncashed Checks to the State of California Controllers Office	\$300.00	1	\$300.00
Estimated <u>21</u> Total Class Members			
Total			\$3,140.32

* All applicable California State & Federal taxes, which include SUI, ETT, and SDI, and FUTA filings. Additional taxes are Defendant's responsibility.

Estimate Total: \$6,745.24



CLASS ACTION ADMINISTRATION SOLUTIONS

TERMS AND CONDITIONS

Provisions: The case estimate is in good faith and does not cover any applicable taxes and fees. The estimate does not make any provision for any services or class size not delineated in the request for proposal or stipulations. Proposal rates and amounts are subject to change upon further review, with Counsel/Client, of the Settlement Agreement. Only pre-approved changes will be charged when applicable. No modifications may be made to this estimate without the approval of PSA (Phoenix Settlement Administrators). All notifications are mailed in English language only unless otherwise specified. Additional costs will apply if translation into other language(s) is required. Rates to prepare and file taxes are for Federal and California State taxes only. Additional charges will apply if multiple state tax filing(s) is required. **Pricing is good for ninety (90) days.**

Data Conversion and Mailing: The proposal assumes that data provided will be in ready-to-use condition and that all data is provided in a single, comprehensive Excel spreadsheet. PSA cannot be liable for any errors or omissions arising due to additional work required for analyzing and processing the original database. A minimum of two (2) business days is required for processing prior to the anticipated mailing date with an additional two (2) business days for a National Change of Address (NCOA) update. Additional time may be required depending on the class size, necessary translation of the documents, or other factors. PSA will keep counsel apprised of the estimated mailing date.

Claims: PSA's general policy is to not accept claims via facsimile. However, in the event that facsimile filing of claims must be accepted, PSA will not be held responsible for any issues and/or errors arising out of said filing. Furthermore, PSA will require disclaimer language regarding facsimile transmissions. PSA will not be responsible for any acts or omissions caused by the USPS. PSA shall not make payments to any claimants without verified, valid Social Security Numbers. All responses and class member information are held in strict confidentiality. Additional class members are \$10.00 per opt-out.

Payment Terms: All postage charges and 50% of the final administration charges are due at the commencement of the case and will be billed immediately upon receipt of the data and/or notice documents. PSA bills are due upon receipt unless otherwise negotiated and agreed to with PSA by Counsel/Client. In the event the settlement terms provide that PSA is to be paid out of the settlement fund, PSA will request that Counsel/Client endeavor to make alternate payment arrangements for PSA charges that are due at the onset of the case. The entire remaining balance is due and payable at the time the settlement account is funded by Defendant, or no later than the time of disbursement. Amounts not paid within thirty (30) days are subject to a service charge of 1.5% per month or the highest rate permitted by law.

Tax Reporting Requirements

PSA will file the necessary tax returns under the EIN of the QSF, including federal and state returns. Payroll tax returns will be filed if necessary. Under the California Employment Development Department, all taxes are to be reported under the EIN of the QSF with the exception of the following taxes: Unemployment Insurance (UI) and Employment Training Tax (ETT), employer-side taxes, and State Disability Insurance (SDI), an employee-side tax. These are reported under Defendant's EIN. Therefore, to comply with the EDD payroll tax filing requirements we will need the following information:

1. Defendant's California State ID and Federal EIN.
2. Defendant's current State Unemployment Insurance (UI) rate and Employment Training Tax (ETT) rate. This information can be found in the current year DE 2088, Notice of Contribution Rates, issued by the EDD.
3. Termination dates of the class members, or identification of current employee class members, so we can account for the periods that the wages relate to for each class member.
4. An executed Power of Attorney (Form DE 48) from Defendant. This form is needed so that we may report the UI, SDI, and ETT taxes under Defendant's EIN on their behalf. If this form is not provided we will work with the EDD auditors to transfer the tax payments to Defendant's EIN.
5. Defendant is responsible for reporting the SDI portion of the settlement payments on the class member's W-2. PSA will file these forms on Defendant's behalf for an additional fee and will issue an additional W-2 for each class member under Defendant's EIN, as SDI is reported under Defendant's EIN rather than the EIN of the QSF. The Power of Attorney (Form DE 48) will be needed in order for PSA to report SDI payments.

EXHIBIT “E”