

Brian J. Mankin, Esq. [CSB No. 216228]
brian@lmlfirm.com
Peter J. Carlson, Esq. [CSB No. 295611]
peter@lmlfirm.com
LAUBY, MANKIN & LAUBY, LLP
51889 Arlington Avenue, PMB 513
Riverside, CA 92504
Tel: (951) 320-1444 | Fax: (951) 320-1445

Attorneys for Plaintiff, on a representative basis and on behalf of all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF 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. Sonny S. Sandhu, Dept 23,
for all purposes]*

**NOTICE OF MOTION AND MOTION
FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT;
DECLARATIONS IN SUPPORT
THEREOF; AND [PROPOSED] FINAL
ORDER AND JUDGMENT**

Hearing:

Date: October 17, 2023

Time: 8:30 a.m.

Dept.: 24

Complaint Filed: January 14, 2022

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on October 17, 2023, at 8:30 a.m., or as soon thereafter as
3 this matter may be heard by the Honorable Sonny S. Sandhu in Department 24 of the Stanislaus
4 County Superior Court, located at 801 10th Street, 4th Floor, Modesto, CA 95354, Plaintiff
5 Nicholas Tosta, individually and on behalf of all others similarly situated, will move this Court
6 for an Order granting final approval of the class action settlement between Plaintiff and
7 Defendant Formulation Technology Incorporated, which was preliminarily approved by the
8 Court. This Motion seeks final approval and entry of judgment of a \$310,075 settlement on
9 behalf of the Class Members, and is unopposed by Formulation Technology Incorporated
10 (“Defendant” or “FTI”).

11 Specifically, Plaintiff will and hereby does move the Court to grant final approval of the
12 Class Action and PAGA Settlement Agreement and Release of Claims (“Settlement
13 Agreement”), and enter the proposed order and final judgment filed concurrently herewith:

- 14 1. Finally certifying the Class, as defined in the Settlement Agreement and the
15 Court’s Order Granting Preliminary Approval of the Settlement;
- 16 2. Finally appointing Plaintiff as the Class Representative for purposes of settlement;
- 17 3. Finally appointing Brian Mankin and Peter Carlson as Class Counsel for purposes
18 of settlement;
- 19 4. Finding that the Class Notice was properly provided to the Class in accordance
20 with the Court’s Order granting Preliminary Approval;
- 21 5. Finally approving the settlement as fair, adequate, and reasonable, based upon the
22 terms set forth in the Settlement Agreement;
- 23 6. Binding participating Class Members to the terms of the Settlement Agreement,
24 including the Release specified therein; and
- 25 7. Retaining jurisdiction to enforce the Settlement Agreement.

26 This Motion will be based upon this notice; the attached memorandum of points and
27 authorities; the Declarations of the Settlement Administrator (Lluvia Islas of Phoenix Settlement
28 Administrators), Class Counsel (Brian Mankin and Peter Carlson) and Plaintiff (Nicholas Tosta)

1 filed concurrently herewith; the records and files in this action; and any other further evidence or
2 argument that the Court may receive at or before the hearing.

3 Dated: September 21, 2023

LAUBY, MANKIN & LAUBY LLP

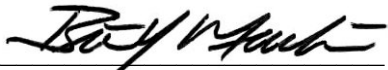
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5 BY: 
6 Brian J. Mankin, Esq.
7 Attorneys for Plaintiff and the Class
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. SUMMARY OF ARGUMENT AND ESSENTIAL POINTS**

3 Pursuant to California Rules of Court, Rule 3.769(d) and (e), Plaintiff respectfully
4 requests that this Court grant final approval of the Class Action and PAGA Settlement
5 Agreement and Release of Claims (“Settlement Agreement”) already on file in this action, and
6 enter the proposed order and final judgment in this matter. This Motion is supported and
7 unopposed by Defendant Formulation Technology Incorporated (“Defendant” or “FTI”).

8 There are several essential reasons why this settlement should be approved. First, after
9 considerable work, preparation, exchange of data and mediation, the Parties reached a \$300,000
10 settlement on behalf of the Class Members and Aggrieved Employees (the “Gross Settlement
11 Amount”), subject to an Escalator Clause that Class Counsel negotiated on behalf of the Class
12 that would increase the Gross Settlement Amount by \$25.00 per week worked if the total weeks
13 worked by the Class Members exceeded the cap of 13,200 workweeks. In fact, after Defendant
14 provided the final Class Data to the Settlement Administrator, it was determined that the
15 Escalator Clause was triggered because the final number of workweeks worked by all Class
16 exceeded the cap by 403 workweeks. This resulted in an upward adjustment of \$10,075 to the
17 Gross Settlement Amount, bringing the new Gross Settlement Amount to \$310,075 (plus
18 Defendant will separately pay its share of payroll taxes on the wage portion of the Individual
19 Class Payments). (See Declaration of Settlement Administrator, Lluvia Islas (“Islas Decl.”), ¶
20 11).

21 Second, the Class Members were deemed to participate in the Settlement, and were not
22 required to submit a Claim Form to receive funds. Plus, there is no reversion to Defendant, so all
23 funds will be distributed to the employees.

24 Third, there were no objections and no opt-outs to the Settlement, meaning 100% of the
25 Class is participating in the Settlement.

26 Finally, the release language (that was approved by the Court at Preliminary Approval) is
27 narrowly tailored to the claims alleged.
28

1 In accordance with the analysis and law set forth herein as well the preliminary approval
2 motion, the Settlement should be approved and judgment entered based on the determination that
3 the Settlement is fair, reasonable, adequate, and in the best interests of the Class. (Declaration of
4 Class Counsel, Brian J. Mankin; ¶¶ 13, 33 (“Mankin Decl.”).)

5 **II. PERTINENT BACKGROUND AND SETTLEMENT TERMS**

6 The Class Members include all current and former non-exempt (hourly paid) employees
7 employed by Defendant in California at any time during the Class Period of January 14, 2018,
8 through February 15, 2023. The claims, which Defendant disputes, involved allegations that the
9 Class Members did not receive all minimum, regular and overtime wages owed, did not receive
10 accurate itemized wage statements, were denied meal and rest breaks, as well as claims for
11 waiting time penalties and PAGA penalties.

12 The Settlement includes 159 Participating Class Members. The following is a
13 breakdown reflecting how the funds are allocated under the Settlement Agreement (Declaration
14 of Administrator, Lluvia Islas (“Islas Decl.”), ¶ 14):

<i>Gross Settlement Amount</i>	\$ 310,075.00
Attorneys’ Fees (1/3)	\$ 103,358.33
Litigation Costs	\$ 10,978.48
Administrator Costs	\$ 6,000.00
PAGA Penalties	\$ 30,000.00
Class Representative Service Award	\$ 10,000.00
<i>Net Settlement Amount</i>	\$ 149,738.19

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20 The 159 Participating Class Members were deemed to participate and did not need to
21 submit a Claim Form to receive payment. Each Participating Class Member will receive a pro
22 rata share of the Net Settlement Amount according to the number of Weeks Worked during the
23 Class Period, such that the amount actually distributed to Participating Class Members will equal
24 100% of the Net Settlement Amount. (Settlement Agreement ¶ 47).

25 Assuming all of the amounts in the Settlement are approved by the Court, the *average*
26 Individual Class Payment is estimated to be \$941.75 and the *highest* individual settlement
27 payment is approximately \$2,586.82. (Islas Decl. ¶ 13).
28

1 In addition, 117 Aggrieved Employees will each receive an Individual PAGA Payment
2 based on their share of the \$7,500 in PAGA Penalties (25% of the total \$30,000 PAGA
3 allocation), calculated pro-rata based on the number of Weeks Worked during the PAGA Period.
4 (S.A. ¶ 47(g)).

5 The Parties agree that 20% of the Individual Class Payments will be allocated as wages
6 subject to withholding of all applicable local, state and federal taxes and the remaining 80% will
7 be allocated for interest and penalties (pursuant to, *e.g.*, California Labor Code §§ 203, 210, 226,
8 2699 etc.) from which no taxes will be withheld. (S.A. ¶ 47(d)). The Individual PAGA
9 Payments will be classified entirely as civil penalties and shall be reported as required on an IRS
10 Form 1099. (S.A. ¶ 47(h)). Defendant will separately pay the share of employer payroll taxes
11 on the sum allocated to wages. (S.A. ¶ 47(a)). The Settlement Agreement provides that
12 Defendant is required to fund the Settlement Amount, plus Defendant's share of payroll taxes
13 owed on the Individual Class Payments, within 15 days of the Effective Date. (S.A. ¶ 69). Within
14 10 days after receiving the funds, the Administrator shall issue payments to cover all court-
15 approved payments. (S.A. ¶ 70).

16 Class Members will have 180 days to cash the settlement check. If a Class Member fails
17 to cash a check by the deadline, the Settlement Administrator shall issue unclaimed funds to the
18 California State Controller in the name of the Class Member. (S.A. ¶ 71).

19 **III. THE NOTICE PROCESS**

20 **A. Notice to the Class Members**

21 Pursuant to the Court's Order and the Settlement Agreement, the Parties directed the
22 Settlement Administrator to review and update the Class Members' addresses, mail the Court-
23 approved Notice Packet, and process their responses. The Administrator also posted the relevant
24 documents on its website for the Class Members to access.

25 Prior to mailing the Class Notice, the Settlement Administrator performed a National
26 Change of Address search on all Class Members to determine if any had moved and to locate
27 addresses that were not in Defendant's possession. (Islas Decl., ¶ 4). On July 5, 2023, the Class
28 Notice was sent via first-class mail to the Class Members. (Islas Decl., ¶ 5). Ultimately, all

1 Class Notices were determined to be deliverable, resulting in a 100% success rate in mailing the
2 Class Notices. (Islas Decl., ¶ 6).

3 In accordance with California Rules of Court, rules 3.766 (d) and 3.769 (f), the Notice
4 provided Class Members with (1) a brief explanation of the case; (2) an explanation of each
5 Class Member's right to opt out of the settlement class; (3) an explanation of the process (and
6 relevant deadlines) through which a Class Member could opt out of the settlement class; (4)
7 notice about the binding nature of the Judgment for Class Members who do not opt out; (5) an
8 explanation of each Class Member's right to appear through counsel; (6) an explanation of each
9 Class Member's right to appear at the fairness hearing and express views on the settlement, i.e.,
10 object or otherwise respond; and (7) an explanation of each Class Member's right to participate
11 in the Settlement and receive payment accordingly. (See **Exhibit A** to the Islas Decl.)

12 **B. There are Zero Objections and Zero Opt-Outs, Resulting In An Impressive**
13 **100% of the Class Participating in the Settlement**

14 California law makes clear that the percentage of objectors and opt-outs is an important
15 factor in the Court's consideration of a proposed class action settlement. (See *Dunk v. Ford*
16 *Motor Co. (1889) 48 Cal.App.4th 1794 at 1802.*) Indeed, the Ninth Circuit and other federal
17 courts recognize that in the final fairness analysis, the number or percentage of class members
18 who object to the settlement is a significant factor. (See *Mandujano v. Basic Vegetable Prods.,*
19 *Inc.*, (9th Cir. 1976) 541 F.2d 672, 677; *In re American Bank Note Holographics, Inc.* (SDNY
20 2001) 127 F.Supp.2d 418, 425 ["[i]t is well settled that the reaction of the class to the settlement
21 is perhaps the most significant factor to be weighed in considering its adequacy."])

22 In this case, as noted above, there were zero objections and zero opt-outs, meaning that
23 100% of the Class Members are participating in the Settlement. (Islas Decl., ¶ 7-8).

24 **V. EVALUATION OF THE SETTLEMENT**

25 It is axiomatic that California law strongly favors and encourages settlements. (See
26 *Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236.) This presumption in favor of
27 settlement applies with particular force in the context of class actions. (See *Ferguson v. Lieff,*
28 *Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1177 ["[p]ublic policy favoring settlement is

1 especially weighty for class actions”]; *Bell v. Am. Title Ins. Co.* (1991) 226 Cal.App.3d 1589,
2 1607-1608 [affirming the trial court’s approval of a class settlement and implicitly endorsing its
3 citation of federal precedent for the notion that there is a “strong public policy in favor of
4 settlement of class actions”]; see also *Franklin v. Kaypro Corp.* (9th Cir. 18899) 884 F.2d 1222,
5 1229, quoting *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950 [“it hardly
6 seems necessary to point out that there is an overriding public interest in settling and quieting
7 litigation. This is particularly true in class action suits”].)

8 When entertaining a request for final approval of a class action settlement, a court’s
9 fundamental consideration is whether the settlement is fair, adequate and reasonable. (See *Dunk*,
10 *supra*, 48 Cal.App.4th at 1801, fn. 7 [noting that state courts look to federal authority concerning
11 the approval of class settlements]; California Rules of Court, rule 3.769(g).)

12 Fairness is presumed when: (1) the settlement is reached through arm’s-length
13 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
14 intelligently; (3) counsel is experienced in similar litigation; (4) the percentage of objectors and
15 opt outs is small, and (5) the range of reasonableness of the settlement fund to a possible
16 recovery in light of all attendant risks of litigation.” (*Dunk, supra*, 48 Cal.App.4th at 1802.) All
17 five of these factors are discussed in detail below.

18 **A. The Settlement Was Reached Through Informed Arms-Length Negotiation**

19 Courts presume the absence of fraud or collusion in the negotiation of a settlement,
20 unless evidence to the contrary is offered. Thus, there is a presumption here that the negotiations
21 were conducted in good faith. (See, 3 Alba Conte & Newberg, *supra*, at § 11.51.) The proposed
22 settlement here was the product of arm’s-length negotiation before a highly experienced and
23 reputable class action mediator to reach a settlement, which was finally consummated in the
24 months after mediation.

25 Here, Plaintiff and Class Counsel have diligently investigated the claims raised in this
26 litigation and, after taking into account the disputed factual and legal issues involved in this
27 action, the risks attending further prosecution, and the benefits to be received pursuant to the
28 compromise and settlement of the action as set forth in the Settlement, concluded that the

1 settlement terms are fair, reasonable, and in the best interest of the Class.

2 As the Settlement Agreement itself reveals, there is no preferential treatment for any
3 segment of the class, as the Settlement is designed to compensate all Class Members fairly and
4 adequately. And pursuant to California Rules of Court Rule 3.769(b), the parties have disclosed
5 the agreed upon and proposed attorney fee award, which is well within the range of
6 reasonableness for matters of this nature.

7 **B. Plaintiff's Investigation Was Sufficient**

8 As set forth at the time of preliminary approval, Class Counsel's investigation into the
9 facts and merits of the wage and hour claims alleged included an informal production of
10 information and documents by Defendant sufficient to assess potential damages and prepare for
11 mediation, analyzing substantial amounts of information, correspondence, documents, policies
12 and procedures, pay data and timekeeping records, and evidence relating to the class size and the
13 commonality of the claims. During this process, Plaintiff and Class Counsel conducted
14 investigations into the potential claims of the similarly situated employees, as well as researching
15 and investigating Defendant's defenses. Finally, Class Counsel synthesized and analyzed
16 information provided by Defendant as to the total Class Members, the number of current and
17 former employees, the number of employees who worked during various time periods, and
18 prepared comprehensive damages calculations regarding the claims at issue.

19 **C. Class Counsel Are Experienced in Similar Litigation and Endorse the**
20 **Settlement**

21 Class Counsel are experienced in this type of litigation, and they have represented (and
22 hereby do represent) that this Settlement is fair and reasonable. (Mankin Decl., ¶¶ 13, 33;
23 Carlson Decl., ¶¶ 2-6; see *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
24 Cal.App.4th 1135, 1152 [Final approval of settlement affirmed where counsel were all
25 experienced litigators with class-action experience and had recommended settlement based on
26 the negotiated terms].)
27
28

1 **D. Reasonable Estimate of the Nature and Amount of Recovery**

2 Plaintiff's Motion for Preliminary Approval contained a comprehensive *Kullar* analysis
3 (which sufficiently provided the Court with "basic information about the nature and magnitude
4 of the claims in question and the basis for concluding that the consideration being paid for the
5 release of those claims represents a reasonable compromise." (*Kullar v. Foot Locker Retail,*
6 *Inc.* (2008) 168 Cal.App.4th 116, 133.) Of course, a settlement is not judged against what
7 might have been recovered had a plaintiff prevailed at trial, nor does the settlement have to
8 provide 100% of the damages sought to be fair and reasonable. (*Wershba v. Apple Computers,*
9 *Inc.* (2001) 91 Cal.App.4th 246, 250.) ("Compromise is inherent and necessary in the settlement
10 process ... even if the relief afforded by the proposed settlement is substantially narrower than it
11 would be if the suits were to be successfully litigated, this is no bar to a class settlement because
12 the public interest may indeed be served by a voluntary settlement in which each side gives
13 ground in the interest of avoiding litigation.")

14 In light of the uncertainties of protracted litigation, this negotiated settlement reflects the
15 best practicable recovery for the Class. While the total settlement amount is, of course, a
16 compromise figure, the potential risks and opportunities of both parties were effectively weighed
17 and considered by the parties, resulting in a fair and equitable settlement. Based upon detailed
18 data obtained through discovery and information exchanges, and factoring in claim certification
19 probabilities and liability probabilities, Class Counsel formulated detailed damages models to
20 evaluate the claims in preparation for mediation and in order to reach a realistic and reasonable
21 resolution.

22 Of course, Defendant denies that any damages should be assessed and denies all of the
23 value assessed by Plaintiff. Notwithstanding these arguments, the Settlement commits
24 Defendant to pay \$310,075 to settle the litigation.

25 **VI. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE**

26 For their efforts in creating a common fund for the benefit of the Class, the Settlement
27 Agreement provided that Class Counsel may seek reasonable fees of \$103,358.33 (one-third of
28 the Settlement Amount). This amount will be paid from the settlement amount, as provided by

1 the Settlement Agreement. These fees are warranted under the law and within the range of fees
2 commonly awarded in similar cases.

3 As shown herein, the requested percentage of one-third of the settlement fund as payment
4 for attorneys' fees should be granted for several reasons, including one-third is the standard
5 bench mark in California for class action settlements (see e.g., *Chavez v. Netflix, Inc.* (2008) 162
6 Cal.App.4th 43, 66 n. 11 ("Empirical studies show that, regardless whether the percentage
7 method or the lodestar method is used, fee awards in class actions average around one-third of
8 the recovery"), that the California Supreme Court recently held that the percentage of the fund
9 method survives in California class action cases (*Laffitte v. Robert Half International, Inc.*
10 (2016) 1 Cal.5th 480, and through the prism of a lodestar cross-check. Accordingly, this request
11 should receive final approval.

12 **A. Plaintiff is Entitled to Recover Reasonable Attorney's Fees Under the**
13 **Labor Code**

14 Plaintiff and the Class in this action are entitled to recover reasonable attorneys' fees,
15 expenses and costs under section 218.5 of the California Labor Code, which provides that, "[i]n
16 any action brought for the nonpayment of wages ... the Court shall award reasonable attorneys'
17 fees and costs to the prevailing party." In addition, Plaintiff and the Class are entitled to recover
18 reasonable attorneys' fees pursuant to section 1194.2 of the Labor Code, which provides that,
19 "... any employee receiving less than the legal minimum wage ... applicable to the employee is
20 entitled to recover in a civil action the unpaid balance of the full amount of this minimum
21 wage... including ... reasonable attorney's fees, and costs of suit." Plaintiff is also entitled to
22 fees and costs under section 226(e) of the Labor Code (employee who prevails on claim for
23 itemized wage statement violation "is entitled to an award of costs and reasonable attorneys'
24 fees"); under PAGA (Labor Code § 2699(g), which provides "Any employee who prevails in any
25 action shall be entitled to an award of reasonable attorney's fees and costs, including any filing
26 fee paid"); and, potentially, section 1021.5 of the California Code of Civil Procedure.

1 **B. Class Counsel’s Request for Fees Is Reasonable and Properly Calculated as**
2 **a Percentage of the Common Fund**

3 Under the “common fund” doctrine, the request for attorneys’ fees in the amount of 1/3
4 of the common fund is reasonable and appropriate, because (1) it is within the approved range
5 for percentages awarded as attorneys’ fees in similar cases; (2) it is supported by the high quality
6 of Class Counsel’s work on this case and the results obtained for the Class; (3) the Class had
7 sufficient notice of the fee request; (4) it is supported by the fact that this case was handled on a
8 contingency basis and was undertaken despite various risks and expenses; and (5) the lodestar
9 cross-check supports the fee request.

10 **1. *The Attorneys’ Fees Requested Here Fall Within the Reasonable***
11 ***Range Awarded in Similar Cases Under the Well-established***
12 ***Common Fund Method***

13 The California Supreme Court has approved trial courts’ usage of the common fund
14 method of awarding attorneys’ fees in wage and hour class actions, like this one, upholding a fee
15 awarded of 1/3 of the total settlement amount obtained for the class. *See Laffitte*, 1 Cal.5th at
16 506; *see also*, 4 Newberg on Class Actions, § 14:6 at 552 (“fee awards in class actions average
17 around one-third of the recovery”). Specifically, in *Laffitte*, the Court wrote: “[w]e join the
18 overwhelming majority of federal and state courts in holding that when class action litigation
19 establishes a monetary fund for the benefit of the class members, and the trial court in its
20 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
21 of a reasonable fee by choosing an appropriate percentage of the fund created”). *Id.* at 506. The
22 California Supreme Court also noted that trial courts have the discretion to award fees as a
23 percentage of the common fund, with or without the necessity to conduct a lodestar cross-check.
24 *Id.* (“...[Courts] ... retain the discretion to forgo a lodestar cross-check and use other means to
25 evaluate the reasonableness of a requested percentage fee.”)

26 The California Supreme Court’s *Laffitte* decision was consistent with its prior rulings
27 recognizing that “when a number of persons are entitled in common to a specific fund, and an
28 action brought by ... plaintiffs for the benefit of all results in the creation or preservation of that

1 fund, such ... plaintiffs may be awarded attorneys' fees out of the fund." *Serrano III v. Priest*
2 (1977) 20 Cal.3d 25, 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 ("[A] lawyer who
3 recovers a common fund . . . is entitled to reasonable attorneys' fees from the fund as a whole").
4 Notably, when fees are calculated as a percentage of the common fund, they should be calculated
5 based on the amount that was available to be claimed, rather than as a percentage of the actual
6 amount claimed. *See Id.* at 475-6, 480-1 (the SCOTUS held that attorneys for a successful class
7 may recover a fee based on the fund created for the class, even if some class members make no
8 claims against the fund, so that money remains in it that will be returned to the defendant,
9 explaining: "[t]heir [class members'] right to share the harvest of the lawsuit upon proof of their
10 identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class
11 representatives and their counsel." *See also Williams v. MGM-Pathe Communs. Co.* (9th Cir.
12 1997) 129 F.3d 1026, 1027 (trial court "abused its discretion by basing the fee on the class
13 members' claims against the fund rather than on a percentage of the entire fund or on the
14 lodestar").

15 **2. The High Quality of Work and Excellent Result Obtained Support**
16 **the Award**

17 In addition to the fact that a Class benefit was created with a \$310,075 non-reversionary
18 common fund settlement, the fairness of the requested fee award of 1/3 of the Settlement
19 Amount is supported by the high quality of work performed by Class Counsel and the positive
20 result obtained for the Class. This great result occurred because Class Counsel diligently,
21 efficiently, and creatively pursued this case and reached a successful settlement for the benefit of
22 the entire Class. In fact, some Class Member will receive \$2,586.82, which is an excellent result.
23 Moreover, the fact that the settlement was embraced and supported by the Class, as evidenced by
24 a 100% participation rate, demonstrates that Class Counsel obtained a favorable result for the
25 Class.

26 **3. Class Members Had Sufficient Notice of the Requested Fees**

27 Rule 3.769 of the California Rules of Court requires that the Class Members be given
28 notice of any agreement regarding an application for attorneys' fees. Here, the Notice

1 preliminarily approved by the Court and distributed to the Class Members apprised them of the
2 requested attorneys fees.

3 The Class Notice also advised the class members of the procedures for objecting to the
4 proposed settlement and appearing at the settlement hearing, where they could present their
5 objections to any aspect of the settlement, including the amount of attorneys' fees to be awarded
6 to class counsel. (*Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883
7 ["[p]rocedural due process requires that affected parties be provided with 'the right to be heard at
8 a meaningful time and in a meaningful manner'"].) In accordance with the foregoing, it is
9 respectfully submitted that the instant notice Complied with Rule 3.769 and, as a result, the Class
10 Members' due process rights were fulfilled.

11 **4. The Contingent Nature of Class Counsel's Representation of**
12 ***Plaintiff and the Class Further Supports the Fee Award at 1/3 of the***
13 ***Common Fund***

14 An additional factor militating in favor of the granting of the requested fee award is the
15 fact that this case was both legally and financially risky for Class Counsel. (*See Vizcaino v.*
16 *Microsoft Corp* (9th Cir. 2002) 290 F.3d 1043, 1048-49.) Class Counsel have been representing
17 the Class in this matter on a strictly contingency basis, and as such, incurred the risk of non-
18 recovery after a substantial investment of time, money, and resources, and have done so since the
19 inception of this case without any payment or compensation. Specifically, there was the prospect
20 of enormous cost inherent in class action litigation, as well as a battle with a corporation who
21 was represented by an experienced law firm; the risk that Defendant could prevail on its
22 argument that the class should not be certified; and the risk that Defendant could prevail on the
23 merits of some or all of the claims.

24 If Plaintiff had lost this case, Class Counsel would have recovered nothing, and would
25 have lost its out-of-pocket costs. This is not an easy burden for Plaintiff's Counsel, which is a
26 small firm. (Mankin Decl. ¶ 20). If, despite these hardships and risks, the best Plaintiff's
27 Counsel could hope for is merely to be paid its customary hourly rate multiplied by the number
28 of hours worked on all cases (including cases like this where the lodestar is far greater than the

1 potential fee award), then Class Counsel would not be compensated for the hardships and serious
2 risks they faced litigating this contingency case, and would not be incentivized to take on similar
3 cases in the future. (*Id.*)

4 The court in *Horsford v. Board of Trustees of California State University*, 132
5 Cal.App.4th 359 (2005) analyzed this issue and held that, when determining the market-level
6 compensation to award to contingent fee attorneys, the analysis must take into account the large
7 risk inherent in such situations:

8 The market value of the services provided by plaintiffs' counsel in
9 a case of this magnitude must take into consideration that any
10 compensation has been deferred for up to four years from the time
11 an hourly fee attorney would begin collecting fees from his or her
12 client; that the demands of the present case substantially precluded
13 other work during that extended period, which makes the ultimate
14 risk of not obtaining fees all the greater (since the attorneys must
15 use savings or incur debt to keep their offices afloat and their
16 families fed during the years-long litigation); and that a failure to
17 fully compensate for the enormous risk in bringing even a wholly
18 meritorious case would effectively immunize large or politically
19 powerful defendants from being held to answer for constitutional
20 deprivations, resulting in harm to the public."

21 *Id.* at 399-400.

22 Indeed, as Class Counsel can attest, not all class/PAGA cases are successful. Many cases
23 end with no fees or a greatly reduced fee that is far less than lodestar, often due to no fault of
24 counsel (i.e., bankruptcy, change in the law, consolidation/coordination/preemption, being top
25 filed, etc.). According to Mayer Brown LLP's study entitled, An Empirical Analysis of Class
26 Actions, cited in *Laguna v. Coverall North America, Inc.*, No. 12-55479 (9th Circuit 2014), found
27 that only one-third of class actions are successful, compared to two-thirds that are defeated and
28 result in no payment to the class members.¹

Thus, the contingent nature of this case supports a fee of one-third of the common fund.

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¹ www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf

5. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award

Despite recognized limitations of the so-called lodestar method, some California and federal courts acknowledge the utility of a lodestar “cross-check.”² (*Lealao, supra*, 82 Cal.App.4th at 46-47.) Under the “lodestar multiplier” method of cross-checking the reasonableness of attorneys’ fees in class actions, the court ascertains Class counsel’s total “lodestar” amount by multiplying the number of hours reasonably expended by each attorney or legal staff member by their hourly rates, and then enhances or reduces this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty or difficulty of the case, its contingent nature, and the degree of success achieved. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-96; *Press v. Lucky Stores, Inc.* (18893) 34 Cal.3d 311, 322; *Lealao, supra*, 82 Cal.App.4th at 43 [court has discretion to use a multiplier to ensure that the “fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation”].)

The actual aggregated lodestar between the Plaintiff’s attorneys that worked on this case is approximately \$124,305. This results in a ***negative multiplier***, as summarized in the following table, and in the submitted declaration of Plaintiffs’ counsel:

Attorney/Timekeeper	Role	Yrs Experience	Rate	Hours	Fee
Brian J. Mankin (Partner – LML)	Trial Counsel	22	\$775	77³	\$59,675
Peter Carlson (Senior Associate – LML)	Handling Attorney	8	\$575	112.4	\$64,630
Grand Total for All Attorneys					\$124,305

(See Mankin Decl., ¶ 25; Carlson Decl. ¶ 7).

² In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours have been expended. Herr, David F., *Manual for Complex Litigation*, § 14.121 (1988); See also *In re Activision* (N.D. Cal 1989) 723 F.Supp 1373.

³ Includes an estimated 30 hours that will be expended in finalizing the motion, attending the hearing, working with the parties and administrator regarding the notice and payment process, and filing any post judgment paperwork.

1 Class Counsel's requested rates are reasonable under the Laffey Matrix
2 (www.laffeymatrix.com) which indicates that the benchmark rate for an attorney with 20+ years
3 of experience (such as Mr. Mankin) is \$914, while the rate for attorneys with 8-10 years of
4 experience (such as Mr. Carlson) is \$733. Moreover, the Wolters Kluwer 2017 Real Rate Report
5 ("Real Rate Report") provides directly applicable information in this regard. The Real Rate
6 Report is based on an enormous and statistically significant compilation of data: 25.8 million
7 billing entries and 23.9 million hours billed by over 112,100 individual timekeepers from 4,620
8 law firms, totaling \$9.02 billion in fees billed. (See Wolters Kluwer's ELM Solutions, Inc., 2017
9 Real Rate Report). The Real Rate Report then compiles and analyzes this data to provide the
10 hourly rates for partners and associates in major metropolitan areas. For the southern California
11 area, which is based on billing entries for 1,125 partners and 1,566 associates, the Real Rate
12 Report states that: (a) the rates for partners in Los Angeles is between \$640 and \$869.75 per hour
13 for the middle and upper quartiles, and (b) the rates for associates in Los Angeles is between
14 \$478.74 and \$638.97 for the median and upper quartiles. And, perhaps most importantly, the
15 information provided in the Real Rate Report is not based on self-reported numbers, surveys,
16 sampling, or reviews or other publications – instead, the Real Rate Report is based on the actual
17 hours and fees billed by law firms. These numbers are not surprising given that a 4-year-old
18 article in the National Law Journal stated that in **2014** partners in Los Angeles charge an average
19 of \$665, while the average associate rate is \$401. (Sloan, \$1,000 Per Hour Isn't Rare Anymore;
20 Nominal Billing Levels Rise, But Discounts Ease Blow (2014) Nat. Law Journal.)⁴. (Mankin
21 Decl., ¶ 24.)

22 Class Counsel are also highly experienced in Class/PAGA litigation, including having
23 been named by the LA Times as one "Southern California Leading Lawyers" in the May 2023
24 issue of Consumer Attorney's of Southern California (a recognition given to 17
25 employment/labor law attorneys in 2023), having been selected as "Super Lawyer" in
26 employment litigation over the last 5 consecutive years, having achieved large settlements,

27 ⁴ The article notes that at Irell & Manella, the average partner rate is \$890/hr; Mannatt, Phelps & Phillips is \$740/hr;
28 O'Melveny & Meyers is \$715/hr; and Jeffer Mangels Butler & Mitchell is \$690/hr. *Id.*

1 having prevailed at trial in PAGA-only actions and Class Action jury trials. (Mankin Decl. ¶¶ 2-
2 6). Indeed, Class Counsel's rates are typical of the rates charged by defense counsel with similar
3 experience doing similar employment law work in this region.

4 Thus, Plaintiff's Counsel's rates reasonable and typical, and the attorneys' fees requested
5 confirm that the fee request is fair and reasonable under the lodestar multiplier cross-check.

6 **VII. THE REQUESTED COSTS AND SERVICE AWARDS ARE REASONABLE**

7 **A. The Requested Costs Are Reasonable and Merit Approval**

8 The Settlement Agreement authorized a Litigation Expenses Payment of not more than
9 \$20,000. (Settlement Agreement ¶ 47(f)). However, Class Counsel's actual costs through the
10 final approval hearing are estimated to be \$10,978.48. (Mankin Decl. ¶ 26.) Since Class
11 Counsel's actual costs were less than the amount allocated, the saving will be placed in the Net
12 Settlement Amount and distributed to the Participating Class Members. These costs include
13 mediation fees, filing fees, CourtCall charges, and court filing fees, and process server fees.

14 **B. The Requested Service Award is Reasonable and Merits Approval**

15 A named plaintiff is an essential ingredient of any class action and an incentive award
16 is appropriate to induce individuals to step forward and assume the burdens and obligations of
17 representing the Class. Courts regularly approve service payments to compensate named
18 Plaintiffs for their service to the class and the risks they incurred during the course of the
19 litigation. (*See, e.g. Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726
20 (upholding "service payments" to named Plaintiff for their efforts in bringing class action);
21 *Rodriguez v. West Publishing* (9th Cir. 2009) 563 F.3d 948, 959 (stating that incentive awards
22 are "intended to compensate class representatives for work done on behalf of the class, to make
23 up for financial or reputational risk undertaken in bringing the action, and, sometimes, to
24 recognize their willingness to act as a private attorney general.")).

25 Under the Settlement, Defendant agreed to pay a Service Award in the amount of
26 \$10,000 to Mr. Tosta in recognition of his contribution as the Class Representative. He
27 undertook significant risks, including the risk of being blackballed in the industry and the risk
28 that he could have been liable for Defendant's costs if he lost. (See Plaintiff's Declaration ¶

1 8.) This factor is a significant one for a wage earner, and the potential risk is very real. (*See*
2 *Whiteway v. FedEx Kinkos Office & Print Svcs., Inc.* (N.D. Cal. Dec. 17, 2007) No. C 05-2320
3 SBA, 2007 WL 4531783, at *3 (“the few courts to consider this ‘class representatives’
4 dilemma’ have not found it inequitable to assess costs upon the lead or named plaintiff in a
5 class action.”).)

6 Mr. Tosta also committed a significant number of hours to assist with the
7 litigation/settlement processes of this case. Finally, he entered into a general release of all
8 claims against Defendant, whereas the Class Members only released the claims alleged. The
9 requested Service Payment is reasonable, particularly in light of the substantial benefits
10 Plaintiff generated for the Class Members, the risks he undertook, and in exchange for
11 executing a general release against Defendant while giving up the right to pursue separate
12 individual claims. (See Plaintiff’s Declaration ¶¶ 5-9.)

13 The Notice sent to each Class Member detailed the proposed service award. No Class
14 Member has objected to the proposed payment to Plaintiff. Thus, Plaintiff requests that the
15 Court approve the award because it is both reasonable and appropriate.

16 **VIII. OTHERS MATTERS RE: FINAL APPROVAL**

17 **A. Settlement Administration Costs**

18 The parties agreed that the Administrator, Phoenix Settlement Administrators, would be
19 compensated for services performed. The Administrator’s flat fee is \$6,000.00, which
20 included considerable work performed by the administrator in resolving the data issues. (Isas
21 Decl., ¶ 16; Exhibit B thereto.)

22 **B. Notice of Final Judgment to the Class**

23 The Proposed Final Approval Order directs the Settlement Administrator to give notice
24 of entry of judgment by including a postcard to the Class Members at the same time the checks
25 are mailed.

26 **C. Uncashed Checks**

27 The Settlement Agreement provides that unclaimed funds will be submitted to the
28 California State Controller’s Unclaimed Property Fund in the name of the Class Member

1 thereby leaving no “unpaid residue” subject to the requirements of California Code of Civil
2 Procedure Section 384, subd. (b). (S.A. ¶ 71.)

3 **D. Final Report**

4 Defendant’s payment is due 30 days after the Effective Date, which will be the date that
5 the final order is entered. The Administrator then has 10 days thereafter process the funds and
6 issue checks to the Class Members, who will then have 180 days to cash their checks.

7 Accordingly, the Parties project that the check cashing deadline will occur on approximately
8 May 24, 2023.

9 The Parties propose submitting a final report in the form of a declaration from the
10 Administrator setting forth the disbursements and status of any uncashed checks by
11 approximately June 24, 2024.

12 **E. Submission to the LWDA**

13 As set forth in the Mankin Declaration at ¶ 28, the Settlement Agreement and this
14 motion are concurrently being submitted to the LWDA in accordance with Labor Code §
15 2699(1)(2). The LWDA has not commented on the Settlement to date.

16 **IX. CONCLUSION**

17 Plaintiff respectfully submits that the Settlement is fair, adequate, and reasonable, and
18 merits final approval.

19 Dated: September 21, 2023

LAUBY, MANKIN & LAUBY LLP

20
21 BY: 
22 Brian L. Mankin, Esq.
23 Attorneys for Plaintiff and the Class
24
25
26
27
28

PROOF OF SERVICE
(Pursuant to CCP §§ 1013(a)(1) and 2015.5)

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

I am employed in the County of Riverside, State of California. I am over the age of 18 and not a party to the within action; my business address is 5198 Arlington Avenue, PMB 513, Riverside, California 92504.

On September 21, 2023, I caused to be served the foregoing document(s) described as follows:

**NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; DECLARATIONS IN SUPPORT THEREOF; AND [PROPOSED] FINAL
ORDER AND JUDGMENT**

I declare that I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **By Mail** I deposited such envelope in the mail at Riverside, California. The envelope was mailed with postage thereon fully prepaid.

☐ **By Facsimile** I sent this document via fax to all parties as listed on attached service list, on

☐ **By Overnight Service** I deposited such envelope in a facility regularly maintained by the United Parcel Service for receipt of items for overnight delivery, with overnight delivery expenses prepaid, addressed to the person to be served.

☒ **By Email or Electronic Transmission:** Pursuant to CCP § 1010.6 or an agreement of the parties to accept service by email or electronic transmission, I caused the document(s) to be sent from email address tracie@lmlfirm.com to the persons at the electronic notification address listed in the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

☐ **By Certified Mail-Return Receipt Requested** I caused such envelope with postage fully prepaid thereon, to be placed in the United States mail at Riverside, California

☐ **By Personal Service** I caused said document(s) to be personally served by hand on the parties listed on the attached service list.

☒ **State** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 21, 2023, Riverside, California.

☐ **Federal** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


Tracie Chiarito, Declarant

SERVICE LIST

Kevin M. Erwin, Esq.
Sumer Forrest, Esq.
JACKSON LEWIS P.C.
200 Spectrum Center Drive, #500
Irvine, CA 92618
949-885-1360
949-885-1380-fax
Kevin.Erwin@jacksonlewis.com
Sumer.Forrest@jacksonlewis.com
Attorneys for FORMULATION TECHNOLOGY, INC.