

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (the “Agreement”) is entered into by and between Robert Bryant, Trinton Hatton, and Marc Meeters (“Named Plaintiffs”), individually and on behalf of Assistant Managers (“AMs”) employed by Potbelly Corporation and paid as exempt who opted into the Litigation and were employed in the United States from October 5, 2014 through January 28, 2018, and Assistant Managers employed in Illinois from October 5, 2014 to January 28, 2018 and paid as exempt, both excluding any Assistant Manager paid as exempt (“AM”) who released all claims during the Class Period as part of a settlement in the case entitled *Chiu v. Potbelly Corporation*, or AMs who participated in the *Chiu* settlement, and were not employed after the release date in *Chiu* (December 1, 2016) (collectively “Plaintiffs”), and Defendant Potbelly Sandwich Works, LLC (“Potbelly” or “Defendant”) (together with Plaintiffs, the “Parties”).

### **RECITALS**

**WHEREAS**, Bryant and Hatton filed a Complaint in Case No. 1:17-cv-07638-CM (S.D.N.Y.) asserting individual and collective action claims against Defendant under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, and individual and class action claims under New York Labor Law;

**WHEREAS**, Meeters filed a proposed Amended Complaint asserting individual and class action claims against Defendant under the Illinois Minimum Wage Law (“IMWL”), and in the proposed Amended Complaint, Named Plaintiffs withdrew class claims asserted under the New York Labor Law (the claims asserted in the proposed Amended Complaint are referred to herein as the “Litigation”);

**WHEREAS**, the purpose of this Agreement is to settle fully and finally all claims asserted in the Litigation and those claims that could have been asserted arising out of the facts pled in the Complaint, as amended;

**WHEREAS**, Defendant denies all of the allegations made by Named Plaintiffs in the Litigation and denies that it is liable or owes damages to anyone with respect to the alleged facts or causes of action asserted in the Litigation. Nonetheless, without admitting or conceding any liability or damages whatsoever, Defendant has agreed to settle the Litigation on the terms and conditions set forth in this Agreement, to avoid the burden, expense, and uncertainty of continuing the Litigation;

**WHEREAS**, the Parties agreed in 2018 to engage in negotiation discussions regarding the possibility of a voluntary resolution of the claims asserted in the Litigation;

**WHEREAS**, on in January 2019, and later in May 2019, the Parties participated in two separate mediation sessions of this matter in New York, which were conducted by two separate experienced mediators, and reached an accord resulting in this Agreement; and

**WHEREAS**, Plaintiffs’ Counsel analyzed and evaluated the merits of the claims made against Defendant in the Litigation, conducted interviews with Named Plaintiffs,

obtained and reviewed documents relating to Defendant's compensation policies and practices, the manner in which Potbelly operates its stores, and the training practices of AMs, researched law relating to the overtime and training overtime claims, potential defenses and exemptions, and the various methods for calculating damages, and analyzed voluminous payroll and time punch data, and based upon their analysis and evaluation of a number of factors, and recognizing the substantial risks of litigation, including the possibility that the Litigation, if not settled now, might not result in any recovery or might result in a recovery less favorable, and that any recovery would not occur for several years, Plaintiffs' Counsel is satisfied that the terms and conditions of this Agreement are fair, reasonable, and adequate and that this Agreement is in the best interests of the Plaintiffs,

**NOW, THEREFORE**, in consideration of the mutual covenants and promises set forth in this Agreement, as well as the good and valuable consideration provided for herein, the Parties agree to a full and complete settlement of the Litigation on the following terms and conditions.

**1. DEFINITIONS**

The defined terms set forth in this Agreement have the meanings ascribed to them below.

- 1.1 "Agreement"** means this agreement and the exhibits hereto, which the Parties understand and agree set forth all material terms and conditions of the Settlement between them, and which is subject to Court approval.
- 1.2 "Court"** means the United States District Court for the Southern District of New York.
- 1.3 "Collective Action Members"** mean Assistant Managers, however variously titled, employed by Potbelly during the Class Period, who, as of the date of this Agreement, have filed an opt-in consent form with the Court, including, for purposes of this Agreement, those who filed opt-in forms following the deadline set by the Court in the Notice to members of the collective action previously approved by the Court, and who did not file a withdrawal of their filed opt-in consents by the final mediation date. The parties have identified 148 Collective Action Members, inclusive of Pre-Mediation Settling Collective Action Members.
- 1.4 "Pre-Mediation Settling Collective Action Members"** mean Assistant Managers, however variously titled, employed by Potbelly during the Class Period, who, prior to the date of the final mediation date, accepted settlement offers made to them, subject to resolution by the Court of attorneys' fees recoverable relating to those claims. The parties have identified 26 Pre-Mediation Settling Collective Action Members.
- 1.5 "IL Class Members"** mean the 54 individuals identified by the parties prior to mediation who had not opted-in to the Lawsuit and worked as Assistant Managers, however variously titled, employed by Potbelly Corporation in Illinois during the Class Period, excluding individuals who, prior to the final mediation

date, were parties to an arbitration agreement with Potbelly, and excluding AMs who released any claims during the Class Period as part of the settlement in *Chiu v. Potbelly Corporation* or AMs who were not employed as AMs following the release effective date in *Chiu*, December 1, 2016.

- 1.6** “**Plaintiff**” means any Collective Action Member, Pre-Mediation Settling Collective Action Member, and IL Class Member.
- 1.7** “**Class Period**” means October 5, 2014 through January 28, 2018.
- 1.8** “**Defendant**” means Potbelly Sandwich Works, LLC.
- 1.9** “**Gross Settlement Amount**” means Five Hundred Sixty One Thousand, Three Hundred Seventy Five Dollars and Ninety-Two Cents (\$561,375.92), which includes the net amounts (exclusive of fees and costs) accepted by the Pre-Mediation Settling Collective Action Members (*i.e.*, the net amount of Thirty Four Thousand Two Hundred Dollars and Ninety-Two Cents (\$34,250.92)). The Gross Settlement Amount is the maximum amount that Defendant has agreed to pay to fully resolve and settle this Litigation and the claims of Plaintiffs, including any claim for attorneys’ fees and costs approved by the Court; the employer’s share of taxes; the cost of settlement administration; and any Court-approved Service Awards. Defendant will not be required to pay any more than the gross total of Five Hundred Sixty-One Thousand, Three Hundred Seventy-Five Dollars and Ninety-Two Cents (\$561,375.92).
- 1.10** “**Net Settlement Fund**” means the remainder of the Gross Settlement Amount after deductions/payments for Court-approved: (i) Settlement Administration fees and costs; (ii) Plaintiffs’ Counsel’s attorneys’ fees and costs; (iii) Service Award to Named Plaintiffs; (iv) Employer Payroll Taxes; and (v) amounts allocated to the Pre-Mediation Settling Collective Action Members in the individual amounts accepted by each Pre-Mediation Settling Collective Action Members.
- 1.11** “**Employer Payroll Taxes**” means all taxes and withholdings an employer is required to make arising out of or based upon the payment of employment/wage compensation resulting from this settlement, including FICA, FUTA, and SUTA obligations.
- 1.12** “**Defendant’s Counsel**” means Jeffrey W. Brecher, Esq. of Jackson Lewis P.C., 58 South Service Rd, Suite 250, Melville New York, 11747.
- 1.13** “**Plaintiffs’ Counsel**” means, Fran Rudich, Esq. of Klafter Olsen and Lesser LLP, 2 International Drive, Suite 350, Rye Brook, New York, 10573, and C. Andrew Head, Esq., of Head Law Firm, LLC, 4422 Ravenswood Avenue, Chicago, IL 60640.
- 1.14** “**Effective Date**” means the date on which this Agreement becomes effective, which shall mean the later of (i) 30 days following the Court’s Order Granting

Approval of the Agreement if no appeal is taken of such Order, or (ii) the Court's entry of a final order and judgment after any appeals are resolved.

- 1.15** “**Last Known Address**” means the most recently recorded personal mailing address for a Plaintiff as shown in Defendant's records.
- 1.16** “**Order Granting Final Approval**” shall mean the final Order entered by the Court after the Fairness Hearing.
- 1.17** “**Order Granting Preliminary Approval**” shall mean the Order entered by the Court preliminarily approving, inter alia, the terms and conditions of this Agreement, the manner and timing of providing notice to the Class, and the time period for opt-outs and objections.
- 1.18** “**Qualified Settlement Fund**” or “**QSF**” means the account established by the Settlement Administrator from the Gross Settlement Amount paid by Defendant. The QSF will be controlled by the Settlement Administrator subject to the terms of this Agreement and the Court's order(s). Interest, if any, earned on any monies in the QSF will become part of the Net Settlement Fund.
- 1.19** “**Releasees**” means Defendant and its past, present, and future officers, directors, employees, agents, insurers, successors, predecessors, affiliates, parents, subsidiaries, attorneys, and other related entities or individuals, including any individual alleged to be an “employer” of Plaintiffs.
- 1.20** “**Settlement Administrator**” means the Administrator selected and retained by Plaintiffs' Counsel with Defendant's approval, which approval shall not be unreasonably withheld.
- 1.21** “**Individual Settlement Amount**” means each Plaintiff's proportionate share of the Net Settlement Fund calculated in accordance with this Agreement.
- 1.22** “**Individual Settlement Check**” means the check issued to each Class Member for his or her proportionate share of the Net Settlement Fund calculated in accordance with this Agreement.
- 1.23** “**Settlement Notice**” means the document entitled Notice of Settlement to be approved by the Court in the forms substantially similar to Exhibits A and B attached hereto.

## **2. APPROVAL AND NOTICE TO IL CLASS MEMBERS**

- 2.1** This Agreement is a binding agreement and contains all material agreed-upon terms for the Parties to seek a full and final settlement of the Litigation and the released claims set forth herein.
- 2.2** **Preliminary Approval by the Court.** Within 21 days of the execution of this Agreement by all Parties, Plaintiffs will submit to the Court a Motion for

Preliminary Approval of the Class Action Settlement (“Preliminary Approval Motion”). In connection with the Preliminary Approval Motion, Plaintiffs will submit to the Court, among other things: (a) a proposed Notice(s) of Settlement of the Class Action Lawsuit and Fairness Hearing which are appended hereto as Exhibits A and B, (b) a proposed Order Granting Preliminary Approval and certifying the Illinois Class pursuant to Fed. R. Civ. P. 23, attached hereto as Exhibit C; and (c) a Memorandum of Law in support of the Motion for Preliminary Approval. At least 14 days prior to submission Defendant will have an opportunity to review for Plaintiffs’ compliance with the terms of this Settlement Agreement and provide comments regarding same relating to the Preliminary Approval Motion. The Parties shall work together to finalize these documents in this manner. The Preliminary Approval Motion will include the findings required by Fed. R. Civ. P. 23(a) and 23(b)(3) and will seek the setting of dates for opt-outs, objections, and a Fairness Hearing. Defendant will not oppose the Preliminary Approval Motion so long as Plaintiffs have complied with the terms of this Settlement Agreement.

- 2.3 Denial of Preliminary Approval.** If the Court denies the Motion for Preliminary Approval, then the Parties jointly agree to seek reconsideration of the ruling or seek Court approval of a renegotiated settlement addressing the issues raised by the Court, including if necessary by involvement of mediator Steven Sonnenberg. Should reconsideration and/or the Parties’ attempt to secure Court approval of a renegotiated settlement be denied, the case will proceed as if no settlement had been attempted, and Defendant retains the right to contest whether this case should be maintained as a class action or collective action, and to contest the merits of the claims being asserted by Plaintiffs in this Litigation. In such a case, the Parties will negotiate and submit for Court approval a revised case management schedule.
- 2.4** The Settlement Administrator will be responsible for all aspects of properly administering this settlement in accordance with the Court’s approval Order, including but not limited to: preparing and mailing the Settlement Notice after updating last known addresses through the National Change of Address program certified by the United Postal Service and other standard skip trace methods; promptly notifying the parties of any undeliverable communication and seeking information or assistance required to assist with skip tracing; preparing and mailing Individual Settlement Checks; distributing the approved Service Award and attorneys’ fees and expenses; calculating and paying all appropriate taxes and complying with all applicable tax reporting obligations, including preparing and filing all applicable tax forms; retaining and providing a copy of the Individual Settlement Checks signed by IL Class Members to Plaintiffs’ and Defendant’s Counsel; preparing and submitting a final accounting of the Settlement attested to by an Affidavit or Declaration in support of final approval of the settlement; and such other administration duties necessary for implementation of the settlement notice process.



- 2.5** The Parties will have equal access to the Settlement Administrator. The Settlement Administrator will provide regular reports, at least bi-weekly, to counsel for the Parties regarding the status of the mailing of the Settlement Notice and Individual Settlement Checks, reports on distribution, responses, undeliverables, checks not negotiated, and updates from Plaintiffs regarding contact information.
- 2.6** With the Approval Motion, Plaintiffs' Counsel also will file Stipulation Regarding the Proposed Amended Complaint for Purposes of Settlement Only, attached hereto as Exhibit D.
- 2.7** Within ten days following preliminary approval of the settlement, Defendant will provide the names and addresses of the IL Class Members to the Settlement Administrator and Plaintiffs' counsel. Plaintiffs' Counsel is already in possession of the names and addresses of the FLSA Collective Action Members and Pre-Mediation Settling Collective Action Members.
- 2.8** Settlement Notice approved by the Court will be distributed to Plaintiffs, via First Class United States mail and email, where available, by the Settlement Administrator within twenty (20) days of from the date of the Order preliminarily approving the settlement. Before distributing the Settlement Notice to IL Class Members, the Settlement Administrator will perform a skip trace on all IL Class Members' addresses to obtain the most current address for each Class Member.
- 2.9** The Settlement Administrator shall take all reasonable steps to obtain the correct address for any Plaintiffs for whom the Settlement Notice or Settlement Checks are returned by the post office as undeliverable, including using the social security numbers to be provided by Defendant for tax reporting purposes to obtain better address information for Plaintiffs about their current addresses and shall attempt re-mailings. Any Settlement Notices or Settlement Checks returned as undeliverable shall be traced up to two times to obtain a new address and be re-mailed by First Class United States Mail.
- 2.10** The Settlement Administrator will periodically update Plaintiffs' Counsel and Defendant's Counsel regarding returned mailings for which it is unable to obtain corrected addresses.
- 2.11** In the event that the Court fails to approve this Agreement, in addition to complying with the obligations of Section 2.3 above, the Parties (a) can attempt to renegotiate the Settlement for the purpose of obtaining Court approval of a renegotiated settlement and agreement and/or (b) any or all Parties may seek reconsideration or appellate review of the decision denying approval of the Agreement.
- 2.12 Objections**
- (A) Any IL Class Member may object to this settlement, provided that such objections are made in writing filed with the Court and served on counsel

for the Parties no later than 45 days after mailing of the first notice sent by the Settlement Administrator. Such objection shall not be valid unless it includes the information required for objections as specified in the Notice. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection. No Plaintiff may be heard at the final settlement hearing who has not complied with this requirement. Any Plaintiff who fails to comply with this requirement will be deemed to have waived any right to object and any objection to the settlement.

- (B) All IL Class Members who do not timely exclude themselves from the settlement will be bound by the final approval order, the judgment, and the releases set forth in this Agreement, except that no FLSA claims are released by IL Class Members who timely comply with the requirements herein for forfeiture of their offered FLSA Payment or do not endorse their individual settlement check. The FLSA portion of their total gross net settlement amount is 50%.
- (C) Unless they have timely asserted an objection to this Agreement, all Plaintiffs shall be deemed to have waived all objections and opposition to its fairness, reasonableness and adequacy.
- (D) Upon receipt, counsel for the Parties shall promptly exchange with one another and file with the Court copies of all objections and/or challenges to the Settlement Agreement or any part thereof.

### **2.13 Opt-Out**

- (A) Any IL Class Member may request exclusion from the Class by “opting out.” Any IL Class Member who chooses to do so must mail a written, signed statement to the Claims Administrator that he or she is opting out of the Settlement (“Opt-Out Statement”). The Opt-Out Statement must contain the name, address and telephone number of the Class Member to be valid. It must also contain the words “I elect to exclude myself from the settlement in *Bryant v. Potbelly Sandwich Works, LLC*”, in order to be valid. To be effective, such Opt-Out Statement must also be sent via mail and postmarked by a date certain to be specified on the Notice of Proposed Class Action Lawsuit and Fairness Hearing, which will be 45 calendar days after the date on which the Claims Administrator mails the Notice. The 45-day period will begin to run from the first mailing, except for those IL Class Members whose first mailing was returned to the Claims Administrator as undeliverable, in which case the 45-day period for any such Class Member will begin to run from the date of the second mailing to such Class Member, unless another period is set by the Court. The Claims Administrator shall not attempt more than two skip traces and supplemental distribution of the Notice. The end of the “Opt-Out Period” shall be 45 days after the last day on which the Claims Administrator makes a mailing to a Class Member, but in any case no later than 7

calendar days before the date of the Fairness Hearing. The Claims Administrator shall, within 10 calendar days after the last day on which it makes such a mailing, notify Class Counsel and Defendants' Counsel of the precise date of the end of the Opt-Out Period.

- (B) The Claims Administrator shall stamp the postmark date on the original of each Opt-Out Statement that it receives and shall serve copies of each Statement on Class Counsel and Defendants' Counsel not later than three calendar days after receipt thereof. The Claims Administrator shall, within 24 hours of the end of the Opt-Out Period, send a final list of all Opt-Out Statements to Class Counsel and Defendants' Counsel. The Claims Administrator shall retain the stamped originals of all Opt-Out Statements and originals of all envelopes accompanying Opt-Out Statements in its files until such time as the Claims Administrator is relieved of its duties and responsibilities under this Stipulation.

#### **2.14 Requesting Forfeiture of Offered FLSA Payment**

IL Class Members who do not opt out of the settlement may accept their offered FLSA Payment (one-half of their allocated individual amount) by cashing, depositing or otherwise endorsing their individual settlement check and thereby opt-ing in and accepting the FLSA Release by the check void deadline of 90 days from the check date.

IL Class Members who do not want to accept the offered FLSA Payment that is contingent upon releasing FLSA claims must submit a request in writing to the Settlement Administrator affirmatively stating that they choose to forfeit their individual offered FLSA Payment from Bryant v. Potbelly Sandwich Works, LLC, Case No. 1:17-cv-07638-CM (S.D.N.Y.). That written request must include the IL Class Member's name, address, telephone number, and signature, as well as their employee ID number or the last four digits of your Social Security number for identity verification purposes, postmarked no later than 45 days after mailing of the first settlement notice sent by the Settlement Administrator, or received by the Settlement Administrator (if sent by e-mail) no later than [insert date], to the Settlement Administrator.

IL Class Members who do not opt-out of the settlement will receive the one-half of their individually allocated amount from the net amount of the Total Gross IL Class Member Fund for the release given for Illinois state law claims under the settlement regardless of whether the IL Class Member forfeits his or her offered FLSA Payment.

- 2.15 Final Order and Judgment from the Court.** Plaintiffs will seek to obtain from the Court, as a condition of settlement, a Final Order and Judgment in a form to be agreed upon by the Parties. The proposed Final Order and Judgment will, among other things: (a) finally certify the Class for purposes of settlement, (b) enter Judgment in accordance with this Agreement, (c) approve the settlement as fair, adequate, reasonable, and binding on all Collective Action Members and IL



Class Members who have not timely opted out, (d) dismiss the Litigation with prejudice, (e) enter an order permanently enjoining all IL Class Members who do not opt out from pursuing and/or seeking to reopen claims that have been released by this Agreement and by the FLSA consents to join filed in connection with this lawsuit both to date and as further contemplated herein, and (f) incorporate the terms of this Settlement and Release. At least 14 days prior to submission Defendant will have an opportunity to review for compliance with the terms of this Settlement Agreement and provide comments regarding same relating to the Motion for Judgment and Final Approval and the proposed Final Order and Judgment. The Parties will meet and confer in good faith to draft these submissions.

**2.16 Motion for Judgment and Final Approval.** No later than 14 calendar days before the Fairness Hearing, Plaintiffs will submit a Motion for Judgment and Final Approval. The Fairness Hearing shall be held at the Court's convenience, but in no event earlier than 90 days from the date the Preliminary Approval Order is signed in accordance with the Class Action Fairness Act

### **3. SETTLEMENT TERMS**

#### **3.1 Settlement Payments**

- i. Defendant agrees to pay into the QSF Five Hundred Sixty One Thousand, Three Hundred Seventy Five Dollars and Ninety-Two Cents (\$561,375.92), which shall fully resolve and satisfy any and all amounts to be paid to Plaintiffs, any Court-approved Service Award as more fully set forth herein, the Settlement Administrator's fees and costs, any claim for Plaintiffs' Counsels' fees and costs, and Employer Payroll Taxes. Defendant will not be required to pay more than this amount under the terms of this Agreement.
- ii. Within 10 days of the Effective Date, Defendant shall deposit the funds to satisfy the payments in Section 3.1(i) into the QSF.
- iii. Within 30 days of the Effective Date, the Settlement Administrator will distribute the money by making the following payments:
  - (a) Paying the Plaintiffs their Individual Settlement Amounts, as described in Section 3.4.
  - (b) Paying Plaintiffs' Counsel's Court-approved attorneys' fees and costs as described in Section 3.2.
  - (c) Paying the Court-approved Service Award as described in Section 3.3; and
  - (d) Paying the costs of the Settlement Administrator as described in Section 3.1.

- (e) Paying the Employer's Payroll Taxes.
- iv. Any amount from the FLSA portion allocated to the IL Class Members not claimed by any IL Class Member shall revert to Defendant, with all adjustments to tax reporting required for non-payment of those wages to be made by the Administrator.

### **3.2 Settlement Amounts Payable as Attorneys' Fees and Costs.**

- i. The parties agree that Plaintiffs' Counsel will seek approval of, and Defendant will not oppose, one-third of the Gross Settlement Amount as an award of attorneys' fees. In addition, Plaintiffs' Counsel shall seek, and Defendant will not oppose, reimbursement of reasonable actual case-related costs and expenses from the Gross Settlement Amount. These amounts shall constitute full satisfaction of any claim for attorneys' fees or costs for any claims released herein, and Plaintiffs agree that they shall not seek, nor be entitled to, any additional attorneys' fees or costs under any theory or from any source, incurred in relation to this case, including attorneys' fees relating to the Pre-Mediation Settling Collective Action Members.
- ii. The substance of Plaintiffs' Counsel's application for attorneys' fees and costs is not part of this Agreement and is to be considered separately from the Court's consideration of the fairness, reasonableness, adequacy, and good faith of the Settlement and this Agreement. The outcome of any proceeding related to Plaintiffs' Counsel's application for attorneys' fees and costs shall not terminate this Agreement or otherwise affect the Court's ruling on the Approval Motion. In the event that the Court (or any appellate court) awards less than the requested amounts, only the awarded amounts shall be paid and shall constitute full satisfaction of the obligations of this Section and full payment hereunder. Any money requested for attorneys' fees or costs that is not approved by the Court shall be redistributed to the Plaintiffs.

### **3.3 Service Award to Named Plaintiffs.**

- i. In their Approval Motion, Named Plaintiffs will apply to the Court to receive up to \$12,500.00 collectively (\$5,000 for Named Plaintiff Bryant, \$5,000 for Named Plaintiff Hatton, and \$2,500 for Named Plaintiff Meeters) from the Gross Settlement Amount for the services that Named Plaintiffs Bryant and Hatton rendered to the Collective Action Members and that Named Plaintiff Meeters rendered to the IL Class Members. Named Plaintiffs, in consideration for the service award, agree to a full general release.
- ii. The Service Award is separate and apart from, and in addition to, Named Plaintiffs' recovery from the Net Settlement Fund as a

Collective Action Member or IL Class Member. The substance of the Named Plaintiffs' application for a Service Award is to be considered separately from the Court's consideration of the fairness, reasonableness, adequacy and good faith of the Settlement and this Agreement. The outcome of the Court's ruling on the application for a Service Award shall not terminate this Agreement or otherwise affect the Court's ruling on the Approval Motion. Any Service Award money not approved by the Court shall be reallocated to the Plaintiffs as part of the Net Settlement Fund.

### **3.4 Distribution of Payments to Plaintiffs.**

- i. Payments to Plaintiffs will be made from the Net Settlement Fund.
- ii. The Pre-Mediation Settling Collective Action Members shall receive from the Gross Settlement Fund, the amounts offered by Defendant, and accepted by them prior to the mediation, in the total amount of \$35,250.92. The individual amounts allocated to each is set forth in Exhibit E to this Agreement.
- iii. The Total Gross IL Class Members Fund amount allocated from the Gross Settlement Fund shall be the amount of \$70,000. The IL Class Members who do not timely opt-out shall receive, from the Net Settlement Fund, a pro-rata share of the amount of the Total Gross IL Class Members Fund amount remaining after payment of \$23,333.33 for one-third attorneys' fees and deduction of an approximate pro rata amount as reasonably estimated by the Administrator for the pro rata share of costs expenses, and service payments attributable to the Total Gross IL Class Members Fund amount, determined based on the number of weeks during the Class Period worked by each IL Class Member as set forth in Defendants' payroll data as reported prior to the mediation, exclusive of weeks released by the prior *Chiu* settlement (the "eligible weeks"), which weeks the Parties agree shall be final and controlling with respect to Individual Settlement Amount calculations. The Individual Settlement Amount for each IL Class Member shall be determined as follows, except as adjusted so that no IL Class Member shall receive less than \$250.00:
  - (a) Total eligible weeks worked by each IL Class Member during the Class Period shall be identified.
  - (b) The aggregate number of eligible weeks worked recorded by all IL Class Member during the Class Period shall be identified.

- (c) The number of eligible weeks worked recorded for each individual IL Class Member as a percentage of the total aggregate eligible weeks worked shall be identified.
  - (d) Each IL Class Member will be allocated a pro-rata share of the Net Settlement Fund based on the percentage of the eligible weeks worked from the aggregate number of eligible weeks worked for the IL Class Members.
  - (e) 50% of the individual amount allocated to each IL Class Member shall be deemed consideration for release of FLSA claims and 50% for release of IL state law claims; accordingly should any IL Class Member comply with the requirements for forfeiting their FLSA Payment or fail to deposit or otherwise endorse their individual settlement check bearing endorsement language requiring opt-in acceptance of the FLSA release, and thus, fail to opt into the FLSA collective action, 50% of the individual amount allocated to that IL Class Member shall revert to Defendant.
- iv. The pro-rata share of the Net Settlement Fund for each Collective Action Member will be determined based on the number of eligible weeks worked by each Collective Action Member as set forth in Defendants' payroll data provided prior to the mediation, which the Parties agree shall be final and controlling with respect to Individual Settlement Amount calculations. The Individual Settlement Amount for each Collective Action shall be determined as follows, except as adjusted so that no Collective Action Member shall receive less than \$250.00:
  - (a) Total eligible weeks worked by each Collective Action Member during the Class Period shall be identified.
  - (b) The aggregate number of eligible weeks worked recorded by all Collective Action Members during the Class Period shall be identified.
  - (c) The number of eligible weeks worked recorded for each individual Collective Action Member as a percentage of the total aggregate eligible weeks worked shall be identified.
  - (d) Each Collective Action Member will be allocated a pro-rata share of the Net Settlement Fund remaining after the individual payments allocated under the above subsections (ii) and (iii), based on the percentage of the eligible weeks worked from the aggregate number of eligible weeks worked for the Collective Action Members.

v. Payroll Tax Responsibility and Tax Characterization of Payments.

- (a) For tax purposes, 50% of the individual amounts to Plaintiffs pursuant to this Agreement shall be treated as back wages and 50% of such payment shall be treated as interest, any applicable penalties, liquidated damages and other non-wage relief.
- (b) Employer Share of Payroll Taxes shall be paid from the Gross Settlement Fund.
- (c) Payments treated as back wages shall be made net of all applicable employment taxes, including, without limitation, federal, state and local income tax withholding and the employee share of the FICA tax, and shall be reported to the Internal Revenue Service (“IRS”) and the payee under the payee’s name and social security number on an IRS Form W-2. Payments treated as a Service Award, interest, penalties, liquidated damages and other non-wage relief shall be made without withholding and shall be reported to the IRS and the payee, to the extent required by law, under the payee’s name and social security number on an IRS Form 1099. The Settlement Administrator shall be responsible for determining the appropriate number of exemptions to be used in calculating payroll tax and withholding, deciding the appropriate tax rate, issuing the Settlement Checks and Service Award and issuing IRS Forms W-2 and Form 1099. Payments of attorneys’ fees and costs pursuant to Section 3.2 shall be made without withholding and be to the IRS and to Plaintiffs’ Counsel under the payee’s name and taxpayer identification number, which Plaintiffs’ Counsel shall provide for this purpose, on an IRS Form 1099.
- (d) The employee portion of all applicable income and payroll taxes will be the sole responsibility of the individual Plaintiffs receiving an Individual Settlement Check or Service Award, except that normal withholdings will be made from the W-2 portion of the Settlement Checks. The Parties make no representations, and it is understood and agreed that the Parties have made no representations, as to the taxability of any portions of the settlement payments to any Plaintiffs, the payment of any costs or award of attorneys’ fees, or any payments to the Named Plaintiffs. The Settlement Notice will advise Plaintiffs to seek their own tax advice prior to acting in response to that Settlement Notice. Neither Plaintiffs’ Counsel nor Defendant’s Counsel intend anything contained



herein to constitute legal advice regarding the taxability of any amount paid hereunder, nor will it be relied upon as such.

None of the amounts paid to the Named Plaintiffs or Plaintiffs shall create any credit for, be included in, or otherwise affect the calculation or the accrual of any employee benefits in any plans, programs, agreements or policies sponsored, maintained or contributed to by Defendant, including for purposes of any bonus of any kind.

#### 4. RELEASE OF CLAIMS

4.1 Release by Plaintiffs: Conditioned upon the Court's entry of the Final Approval Order, and in exchange for the monetary consideration recited in this Agreement, all Collective Action Members, IL Class Members who do not opt-out, and Pre-Mediation Settling Collective Action Members, shall release Releasees from: (i) all federal and state wage claims during the Class Period including overtime pay under the FLSA or any state wage and hour law, whether known or unknown, that were or could have been asserted in the Litigation or this matter, arising out of that Class Member's weeks worked as an AM paid as exempt during that period of time; and (ii) all claims for wages, penalties, liquidated damages, interest, attorneys' fees, costs or litigation expenses based on the claims listed in (i) above during the Class Period, except that IL Class Members who do not endorse their individual settlement check will not release any FLSA claim for overtime or minimum wage. The claims being released are referred to in this Agreement as "Released Claims." The parties agree that the only claims released are the Released Claims, and a Plaintiffs' assertion and release of Released Claims shall have no collateral estoppel, claim splitting, res judicata, waiver, or other claim preclusion effect as to claims not explicitly released herein (including, for IL Class Members who do not endorse their individual settlement checks, FLSA claims).

4.2 All Settlement Checks to IL Class Members who do not timely comply with the requirements herein to request forfeiture of their offered FLSA Payment contingent on the FLSA Release shall contain, on the back of the check (which shall be filed with the Court after endorsed by IL Class Members) the following limited endorsement:

By accepting this payment, I consent to join the action, ***Bryant v. Potbelly Corporation***, and agree to waive any right to bring suit for federal and state wage claims including overtime under the Fair Labor Standards Act or state and local laws for weeks worked as Assistant Manager **from October 5, 2014 to January 28, 2018**. I agree that by accepting this payment, I have settled my claims for any unpaid wages, overtime, liquidated damages, interest, and associated fees and penalties for those weeks through **January 28, 2018**.

4.3 Release by Named Plaintiffs: Named Plaintiffs additionally waive, release and discharge Releasees from all demands, claims and actions, whether known or unknown, arising before the date the release is effective, relating to their employment or termination of employment with Defendant, including but not

limited to claims under the Americans With Disabilities Act, National Labor Relations Act, Fair Labor Standards Act (including but not limited to claims for overtime compensation) Equal Pay Act, Employee Retirement Income Security Act of 1974, Worker Adjustment and Retraining Notification Act, Title VII of the Civil Rights Act of 1964, Civil Rights Acts of 1866, 1871 and 1991, Family and Medical Leave Act, and any other federal, state or local statute, regulation, and order, and in common law, through the date the respective Named Plaintiff signs this Agreement; provided, however, that Named Plaintiffs do not waive the right to file a charge or complaint with any administrative agency. Named Plaintiffs are not waiving any rights that they may have to: (a) their own vested accrued employee benefits under Defendant's health, welfare, or retirement benefit plans as of his or her termination date; (b) benefits and the right to seek benefits under applicable workers' compensation and unemployment compensation statutes; (c) pursue claims which by law cannot be waived by signing this Agreement; (d) enforce this Agreement; and (e) challenge the validity of this Agreement. Nothing in this Agreement prohibits or prevents the Named Plaintiffs filing a charge with or participating, testifying, or assisting in any investigation, hearing, whistleblower proceeding or other proceeding before any federal, state, or local government agency (e.g. EEOC, NLRB, SEC., etc.). However, to the maximum extent permitted by law, the Named Plaintiffs agree that if such an administrative claim is made, they shall not be entitled to recover any individual monetary relief or other individual remedies.

## **5. PUBLICITY**

- 5.1** The Parties and their respective counsel will not issue any press release or other publication to any media outlet or otherwise publicize the settlement in any way. If contacted by the media a party or party's counsel may respond to the media, if necessary, only by stating that "the matter was resolved amicably" or substantially similar words to that effect.

## **6. PARTIES' AUTHORITY**

- 6.1** The signatories hereto hereby represent that they are fully authorized to enter into this Agreement and to bind the Parties hereto to the terms and conditions hereof.
- 6.2** It is agreed that because the Plaintiffs are so numerous, it is impossible or impractical and not required to have each Plaintiff execute this Settlement Agreement. The Notice will advise all Plaintiffs of the binding nature of any release(s) as applicable under this Settlement Agreement and such shall have the same force and effect as if this Settlement Agreement were executed by each Plaintiff. Each person executing this Settlement Agreement on behalf of any corporate Defendant warrants and represents that such person has the authority to do so.

**7. MUTUAL COOPERATION**

- 7.1** The Parties agree to reasonably cooperate with each other and to take all steps necessary and appropriate to obtain the Court's approval of this Agreement and all of its terms and to effectuate the terms of this Agreement, including but not limited to, execution of such documents and to take such other action as may reasonably be necessary to implement the terms of this Agreement. The Parties to this Agreement shall use their commercially reasonable efforts, including all efforts contemplated by this Agreement and any other efforts that may become necessary by order of the Court, or otherwise, to effectuate this Agreement and the terms set forth herein. As soon as practicable after execution of this Agreement, and in accordance with its terms, Plaintiffs' Counsel shall, with the assistance and cooperation of Defendant and its counsel, take all necessary steps to secure the Court's approval of this Agreement.

**8. NOTICES**

- 8.1** 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 as follows:

To Plaintiff and/or Plaintiffs:

Fran L. Rudich  
KLAFTER OLSEN & LESSER, LLP  
Two International Drive, Suite 350  
Rye Brook, NY 10573  
Tel: (914) 934-9200  
Fax: (914) 934-9220  
[Email: fran@klafterolsen.com](mailto:fran@klafterolsen.com)

C. Andrew Head (admitted *pro hac vice*)  
HEAD LAW FIRM, LLC  
4422 N. Ravenswood Ave.  
Chicago, IL 60640  
Tel: (404) 924-4151  
Fax: (404) 796-7338  
[Email: ahead@headlawfirm.com](mailto:ahead@headlawfirm.com)

To Defendant:

Jeffrey W. Brecher  
Jackson Lewis P.C.  
58 S. Service Road, Suite 250  
Melville, NY 11747  
(631) 247-4652  
[brecherj@jacksonlewis.com](mailto:brecherj@jacksonlewis.com)

**9. NO ADMISSION OF LIABILITY**

**9.1** Defendant denies all of the allegations made by Named Plaintiffs in the litigation and denies that it is liable or owes damages to anyone with respect to the alleged facts or causes of action asserted in the Litigation. Nothing herein will be deemed or used as an admission that a collective action should be finally certified or a class action certified under Fed. R. Civ. P. 23. Nonetheless, without admitting or conceding any liability or damages whatsoever, Defendant has agreed to settle the litigation on the terms and conditions set forth in this Agreement, to avoid the burden, expense, and uncertainty of continuing the Litigation.

**10. INTERPRETATION AND ENFORCEMENT/MISCELLANEOUS TERMS**

**10.1** Further Acts. Each party, upon the request of any other party, agrees to perform such further acts and to execute and deliver such other documents as are reasonably necessary to carry out the provisions of this Agreement.

**10.2** No Assignment. Named Plaintiffs represent and warrant that they have not assigned or transferred, or purported to assign or transfer, to any person or entity, any claim or any portion thereof or interest therein, including, but not limited to, any interest in the litigation, or any related action, and any attempt to do so shall be of no force or effect.

**10.3** Entire Agreement. This Agreement constitutes the entire agreement between the Parties with regard to the subject matter contained herein, and all prior and contemporaneous negotiations and understandings between the Parties shall be deemed merged into this Agreement.

**10.4** Binding Effect. This Agreement shall be binding upon the Parties and, with respect to Defendant, its affiliates, parents, subsidiaries, predecessors, successors, employees and agents; and, with respect to Plaintiffs, their spouses, children, representatives, heirs, administrators, executors, beneficiaries, conservators, attorneys and assigns.

**10.5** Arms' Length Transaction; Materiality of Terms. The Parties have negotiated all the terms and conditions of this Agreement at arms' length. All terms and conditions of this Agreement in the exact form set forth in this Agreement are material to this Agreement and have been relied upon by the Parties in entering into this Agreement, unless otherwise expressly stated.

**10.6** Captions. The captions or headings of the sections and paragraphs of this Agreement have been inserted for convenience of reference only and shall have no effect upon the construction or interpretation of any part of this Agreement.

**10.7** Construction. The determination of the terms and conditions of this Agreement has been by mutual agreement of the Parties. Each party participated jointly in the drafting of this Agreement, and therefore the terms and conditions of this

Agreement are not intended to be, and shall not be, construed against any party by virtue of draftsmanship.

- 10.8** Governing Law. This Agreement shall in all respects be interpreted, enforced and governed by and under the laws of the State of New York, without regard to choice of law principles, except to the extent that the law of the United States governs any matter set forth herein, in which case such federal law shall govern.
- 10.9** Continuing Jurisdiction. The Court shall retain jurisdiction over the interpretation and implementation of this Agreement as well as any and all matters arising out of, or related to, the interpretation or implementation of this Agreement and of the Settlement contemplated thereby.
- 10.10** Waivers, etc. to Be in Writing. No waiver, modification or amendment of the terms of this Agreement, whether purportedly made before or after the Court's approval of this Agreement, shall be valid or binding unless in writing, signed by or on behalf of all Parties, and then only to the extent set forth in such written waiver, modification or amendment, with any required Court approval. Any failure by any party to insist upon the strict performance by the other party of any of the provisions of this Agreement shall not be deemed a waiver of future performance of the same provisions or of any of the other provisions of this Agreement, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement
- 10.11** Counterparts. The Parties may execute this Agreement in counterparts, and execution in counterparts shall have the same force and effect as if all Parties had signed the same original instrument.
- 10.12** Facsimile and E-mail Signatures. Any party may execute this Agreement by signing, including by electronic means, or by causing its counsel to sign on the designated signature block below and transmitting that signature page via facsimile or e-mail to counsel for the other party. Any signature made and transmitted by facsimile or e-mail for the purpose of executing this Agreement shall be deemed an original signature for purposes of this Agreement and shall be binding upon the party whose counsel transmits the signature page by facsimile or e-mail.

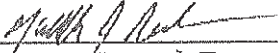


**WE AGREE TO THESE TERMS.**

DATED:

9/23/19

**POTBELLY CORPORATION**

  
By: Matt Revord, Esq.  
Senior Vice President, Chief People Officer, Chief  
Legal Officer & Secretary

DATED:

\_\_\_\_\_

**ROBERT BRYANT**

DATED:

\_\_\_\_\_

**TRINTON HATTON**

DATED:

\_\_\_\_\_

**MARC MEETERS**

**APPROVED BY COUNSEL AS TO FORM ONLY BY:**

DATED:

\_\_\_\_\_

**COUNSEL FOR PLAINTIFFS**

**FRAN RUDICH, ESQ.**

DATED:

10/10/19

**COUNSEL FOR DEFENDANT**

  
**JEFFREY BRECHER, ESQ.**

**WE AGREE TO THESE TERMS.**

DATED:

**POTBELLY CORPORATION**

\_\_\_\_\_

\_\_\_\_\_  
By: Matt Revord, Esq.  
*Senior Vice President, Chief People Officer, Chief  
Legal Officer & Secretary*

DATED:

Sep 18, 2019

\_\_\_\_\_

*Robert Bryant*

Robert Bryant (Sep 18, 2019)

\_\_\_\_\_  
**ROBERT BRYANT**

DATED:

\_\_\_\_\_

\_\_\_\_\_  
**TRINTON HATTON**

DATED:

\_\_\_\_\_

\_\_\_\_\_  
**MARC MEETERS**

\_\_\_\_\_

***APPROVED BY COUNSEL AS TO FORM ONLY BY:***

DATED:

**COUNSEL FOR PLAINTIFFS**

\_\_\_\_\_

\_\_\_\_\_  
**FRAN RUDICH, ESQ.**

DATED:

**COUNSEL FOR DEFENDANT**

\_\_\_\_\_

\_\_\_\_\_  
**JEFFREY BRECHER, ESQ.**

**WE AGREE TO THESE TERMS.**

DATED:

**POTBELLY CORPORATION**

\_\_\_\_\_

\_\_\_\_\_  
By: Matt Revord, Esq.  
*Senior Vice President, Chief People Officer, Chief  
Legal Officer & Secretary*

DATED:

\_\_\_\_\_  
**ROBERT BRYANT**

DATED:

Sep 25, 2019

  
Trinton Hatton (Sep 25, 2019)

\_\_\_\_\_  
**TRINTON HATTON**

DATED:

\_\_\_\_\_  
**MARC MEETERS**

***APPROVED BY COUNSEL AS TO FORM ONLY BY:***

DATED:

**COUNSEL FOR PLAINTIFFS**

\_\_\_\_\_

\_\_\_\_\_  
**FRAN RUDICH, ESQ.**

DATED:

**COUNSEL FOR DEFENDANT**

\_\_\_\_\_

\_\_\_\_\_  
**JEFFREY BRECHER, ESQ.**

**WE AGREE TO THESE TERMS.**

DATED: **POTBELLY CORPORATION**

\_\_\_\_\_

By: Matt Revord, Esq.  
*Senior Vice President, Chief People Officer, Chief  
Legal Officer & Secretary*

DATED:

\_\_\_\_\_

**ROBERT BRYANT**

DATED:

\_\_\_\_\_

**TRINTON HATTON**

DATED:  
09/16/2019

\_\_\_\_\_



**MARC MEETERS**

\_\_\_\_\_

**APPROVED BY COUNSEL AS TO FORM ONLY BY:**

DATED:  
9/30/19

\_\_\_\_\_

**COUNSEL FOR PLAINTIFFS**



**FRAN RUDICH, ESQ.**

DATED:

\_\_\_\_\_

**COUNSEL FOR DEFENDANT**

**JEFFREY BRECHER, ESQ.**