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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ARMANDO ZAVALA, individually and on behalf of all others similarly situated, Plaintiff, v. GREATBANC TRUST COMPANY, KEVIN KRUSE, THE KRUSE-WESTERN, INC. BOARD OF DIRECTORS, THE ADMINISTRATION COMMITTEE, and JOHN AND JANE DOES 1-30, Defendants.	CASE NO. 19-CV-00239-DAD-SKO **DEFENDANT KEVIN KRUSE'S AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF ARMANDO ZAVALA'S AMENDED CLASS ACTION COMPLAINT**

Kevin Kruse ("Kruse"), by and through his attorneys, Sagaser, Watkins & Wieland, PC and Holland & Knight LLP, as and for his Amended Answer and Affirmative Defenses to Count IV[1] of Plaintiff Armando Zavala's Amended Class Action Complaint ("Amended Complaint"), herein states upon information and belief as follows:

I.

INTRODUCTION

1. In response to the allegations contained in paragraph 1 of the Amended Complaint, Kruse admits that this is an action brought under ERISA but denies all remaining allegations contained in paragraph 1 of the Amended Complaint.

2. In response to the allegations contained in paragraph 2 of the Amended Complaint, Kruse admits that the Western Milling ESOP is an employee stock ownership plan subject to ERISA designed to be and is invested primarily in the stock of the Company. Kruse denies the remaining allegations contained in paragraph 2 of the Amended Complaint.

3. In response to the allegations contained in paragraph 3 of the Amended Complaint, Kruse admits that the action stems from the creation of the ESOP in 2015 and that the ESOP Trust purchased 100% of the outstanding stock of Kruse Western, Inc. for $244,130,400, but denies all remaining allegations contained in paragraph 3 of the Amended Complaint.

4. In response to the allegations contained in paragraph 4 of the Amended Complaint, Kruse denies all allegations contained in paragraph 4 of the Amended Complaint.

5. In response to the allegations contained in paragraph 5 of the Amended Complaint, Kruse denies all allegations contained in paragraph 5 of the Amended Complaint.

6. In response to the allegations contained in paragraph 6 of the Amended Complaint, Kruse denies all allegations contained in paragraph 6 of the Amended Complaint.

7. In response to the allegations contained in paragraph 7 of the Amended Complaint, Kruse denies all allegations contained in paragraph 7 of the Amended Complaint.

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[1] Kevin Kruse answers this Complaint only as to Count IV; Kruse responds to the remainder of the counts in his Motion to Dismiss, filed concurrently with this Answer.

8. In response to the allegations contained in paragraph 8 of the Amended Complaint, Paragraph 8 of the Amended Complaint contains a legal conclusion to which no response is required. To the extent a response is required, Kruse denies the allegations contained in paragraph 8 of the Amended Complaint.

9. In response to the allegations contained in paragraph 9 of the Amended Complaint, Kruse denies all allegations contained in paragraph 9 of the Amended Complaint.

10. In response to the allegations contained in paragraph 10 of the Amended Complaint, Kruse admits that the Court has personal jurisdiction over him. Kruse lacks knowledge sufficient to form a belief about the truth of the remaining allegations contained in paragraph 10 of the Amended Complaint.

11. In response to the allegations contained in paragraph 11 of the Amended Complaint, Kruse admits venue in this District is proper.

11.a. In response to the allegations contained in paragraph 11(a) of the Amended Complaint, Kruse admits that he transacts business in and/or has significant contacts with this District. Kruse lacks knowledge sufficient to form a belief as to the truth of the allegations against any other Defendants contained in paragraph 11(a) of the Amended Complaint.

11.b. In response to the allegations contained in paragraph 11(b) of the Amended Complaint, Kruse admits the allegations contained in paragraph 11(b) of the Amended Complaint.

11.c. In response to the allegations contained in paragraph 11(c) of the Amended Complaint, Kruse denies that any breaches took place.

II.

PARTIES

12. In response to the allegations contained in paragraph 12 of the Amended Complaint, Kruse denies that Plaintiff was fully vested in the ESOP at the time he left the Company. Kruse lacks knowledge sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 12 of the Amended Complaint, and therefore denies the same.

13. In response to the allegations contained in paragraph 13 of the Amended Complaint, Kruse admits that GreatBanc is the Trustee of the Western Milling ESOP but lacks knowledge

sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 13 of the Amended Complaint, and therefore denies the same.

14. In response to the allegations contained in paragraph 14 of the Amended Complaint, Kruse admits he is a member of the Kruse Western Board of Directors ("Board"), and that the ESOP Plan document provides that the Board of Directors of Kruse Western, Inc. appoints the Trustee of the ESOP and the Administrator as that term is defined in the Plan. Kruse answers that whether he is or was a fiduciary to the ESOP or a party in interest is a legal conclusion to which no answer is required, but to the extent an answer is required, Kruse denies those allegations. Kruse denies the remainder of the allegations contained in paragraph 14 of the Amended Complaint.

15. In response to the allegations contained in paragraph 15 of the Amended Complaint, Kruse admits that the ESOP Plan document provides that the Board of Directors of Kruse Western, Inc. appoints the Trustee of the ESOP and the Administrator as that term is defined in the Plan. Kruse answers that whether the Board of Directors is a fiduciary of the ESOP or a party in interest is a legal conclusion to which no answer is required, but to the extent an answer is required, Kruse denies those allegations. Kruse denies the remainder of the allegations contained in paragraph 15 of the Amended Complaint.

16. In response to the allegations contained in paragraph 16 of the Amended Complaint, Kruse lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 16 of the Amended Complaint.

17. In response to the allegations contained in paragraph 17 of the Amended Complaint, Kruse admits that Plaintiff's counsel sought the names of the Board of Directors from Defendants' counsel and that Defendants' counsel declined to provide them, but Kruse denies any suggestion that Plaintiff's counsel is entitled to that information and denies the remainder of the allegations contained in paragraph 17 of the Amended Complaint.

18. In response to the allegations contained in paragraph 18 of the Amended Complaint, Kruse admits that GreatBanc was appointed as Trustee of the Western Milling Employee Stock Ownership Trust in 2015 by Kruse Western, Inc. after such appointment was approved and ratified by the Kruse Western, Inc. Board of Directors and that the Board appointed the Administrator as

that term is defined in the Plan document. Kruse answers that what obligations the Board Defendants had under ERISA is a legal conclusion to which no answer is required, but to the extent an answer is required, Kruse denies those allegations. Kruse denies the remainder of the allegations in paragraph 18 of the Amended Complaint.

19. In response to the allegations contained in paragraph 19 of the Amended Complaint, Paragraph 19 of the Amended Complaint contains a legal conclusion to which no response is required. To the extent a response is required, Kruse denies the allegations contained in paragraph 19 of the Amended Complaint.

20. In response to the allegations contained in paragraph 20 of the Amended Complaint, Kruse lacks knowledge or information sufficient to form a belief about the truth of the allegations against the Board Defendants excluding Kruse. To the extent the allegations contained in paragraph 20 of the Amended Complaint are directed at Kruse, they are denied.

21. In response to the allegations contained in paragraph 21 of the Amended Complaint, Kruse admits that under the Plan document, the Administration Committee is the Plan Administrator except for purposes of the reporting and disclosure rules of ERISA as specified in the Plan document. Kruse answers that whether the Administration Committee is a fiduciary of the ESOP is a legal conclusion to which no answer is required, but to the extent an answer is required, Kruse denies those allegations. Kruse denies the remainder of the allegations contained in paragraph 21 of the Amended Complaint.

22. In response to the allegations contained in paragraph 22 of the Amended Complaint, Kruse lacks knowledge sufficient to form a belief about the truth of the allegations contained in paragraph 22 of the Amended Complaint.

23. In response to the allegations contained in paragraph 23 of the Amended Complaint, Kruse admits that Plaintiff's counsel sought the names of the Administration Committee members from Defendants' counsel and that Defendants' counsel declined to provide them, but Kruse denies any suggestion that Plaintiff's counsel is entitled to that information and denies the remainder of the allegations contained in paragraph 23 of the Amended Complaint.

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24. In response to the allegations contained in paragraph 24 of the Amended Complaint, Kruse denies that he is a Selling Shareholder. Kruse lacks knowledge sufficient to form a belief about the truth of the allegations contained in paragraph 24 of the Amended Complaint.

25. In response to the allegations contained in paragraph 25 of the Amended Complaint, Kruse admits that Plaintiff's counsel sought the names of the Selling Shareholders from Defendants' counsel and that Defendants' counsel declined to provide them, but Kruse denies any suggestion that Plaintiff's counsel is entitled to that information and denies the remainder of the allegations contained in paragraph 25 of the Amended Complaint.

III.

FACTUAL ALLEGATIONS

26. In response to the allegations contained in paragraph 26 of the Amended Complaint, Kruse admits the allegations contained in paragraph 26 of the Amended Complaint, with the clarification that Kruse Western, Inc. is the sole manager of Western Milling, LLC, and Western Milling, LLC is the sole Manager of OHK Transport, LLC, OHK Logistics, LLC and Winema Elevators, LLC.

27. In response to the allegations contained in paragraph 27 of the Amended Complaint, Kruse admits the allegations contained in paragraph 27 of the Amended Complaint.

28. In response to the allegations contained in paragraph 28 of the Amended Complaint, Kruse admits that the Western Milling website contains the quoted language.

29. In response to the allegations contained in paragraph 29 of the Amended Complaint, Kruse admits that Western Milling manufactured Western Blend horse feed, but lack knowledge sufficient to form a belief about the truth of it being manufactured at "all relevant times," as "all relevant times" is undefined. Kruse denies the remaining allegations contained in paragraph 29 of the Amended Complaint.

30. In response to the allegations contained in paragraph 30 of the Amended Complaint, Kruse denies the allegations contained in paragraph 30 of the Amended Complaint.

31. In response to the allegations contained in paragraph 31 of the Amended Complaint, Kruse denies the allegations contained in paragraph 31 of the Amended Complaint.

32. In response to the allegations contained in paragraph 32 of the Amended Complaint, Kruse admits that Western Milling voluntarily recalled a single lot of Western Blend horse feed manufactured on September 8, 2015, after learning that the lot may contain monensin.

33. In response to the allegations contained in paragraph 33 of the Amended Complaint, Kruse denies the allegations contained in paragraph 33 of the Amended Complaint.

34. In response to the allegations contained in paragraph 34 of the Amended Complaint, Kruse admits that a lawsuit was initiated against Western Milling in Fresno Superior Court but clarify that the lawsuit that was settled in 2018 was initiated in June 2016. Kruse denies any wrongdoing in connection with the claims alleged in that lawsuit.

35. In response to the allegations contained in paragraph 35 of the Amended Complaint, Kruse admits only that Western Milling ceased production of horse feed at its Goshen, California plant in April 2017. Kruse denies the remaining allegations contained in paragraph 35 of the Amended Complaint.

36. In response to the allegations contained in paragraph 36 of the Amended Complaint, Kruse denies the allegations contained in paragraph 36 of the Amended Complaint.

37. In response to the allegations contained in paragraph 37 of the Amended Complaint, Kruse denies the allegations contained in paragraph 37 of the Amended Complaint.

38. In response to the allegations contained in paragraph 38 of the Amended Complaint, Kruse denies the allegations contained in paragraph 38 of the Amended Complaint.

39. In response to the allegations contained in paragraph 39 of the Amended Complaint, Kruse admits that Western Milling ceased production of horse feed at its Goshen, California plant in or around April 2017, and that it has built a dedicated horse feed mill separate from its cattle feed mill. Kruse denies the remaining allegations contained in paragraph 39 of the Amended Complaint.

40. In response to the allegations contained in paragraph 40 of the Amended Complaint, Kruse denies the allegations contained in paragraph 40 of the Amended Complaint.

41. In response to the allegations contained in paragraph 41 of the Amended Complaint, Kruse denies the allegations contained in paragraph 41 of the Amended Complaint.

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The Western Milling ESOP

42. In response to the allegations contained in paragraph 42 of the Amended Complaint, Kruse lacks knowledge sufficient to form a belief about the truth of the allegations contained in paragraph 42 of the Amended Complaint regarding documents Plaintiff obtained, but admits that Kruse Western, Inc. was incorporated under the laws of California on September 11, 2015.

43. In response to the allegations contained in paragraph 43 of the Amended Complaint, Kruse admits the allegations contained in paragraph 43 of the Amended Complaint.

44. In response to the allegations contained in paragraph 44 of the Amended Complaint, Kruse admits that the ESOP was created on November 4, 2015, and the ESOP Trust purchased 100% of the outstanding stock of Kruse Western, Inc. Kruse denies the remaining allegations contained in paragraph 44 of the Amended Complaint.

45. In response to the allegations contained in paragraph 45 of the Amended Complaint, Kruse admits that immediately prior to the transaction in which Greatbanc caused the ESOP Trust to purchase 100% of the outstanding stock of Kruse Western, Inc., the outstanding stock of Kruse Western, Inc. was owned by the shareholders of Kruse Western, Inc., who sold their stock in Kruse Western, Inc. to the ESOP. Kruse denies the remaining allegations contained in paragraph 45 of the Amended Complaint.

46. In response to the allegations contained in paragraph 46 of the Amended Complaint, Kruse admits the allegations contained in paragraph 46 of the Amended Complaint.

47. In response to the allegations contained in paragraph 47 of the Amended Complaint, Kruse admits that the ESOP was established and is maintained pursuant to a written instrument called the Western Milling Employee Stock Ownership Plan as provided by 29 U.S.C. § 1102. Kruse denies the remaining allegations contained in paragraph 47 of the Amended Complaint.

48. In response to the allegations contained in paragraph 48 of the Amended Complaint, Kruse admits that Section 1.4 of the Plan document states the following: "The Company shall be the statutory plan administrator for purposes of the reporting and disclosure rules of ERISA. For all other purposes under the Plan, a committee appointed by the Board of Directors of the Company shall serve as Administrator (the "Administrator") as described in Section 17.1. Any notice or

document required to be given to or filed with the Administrator will be properly given or filed if delivered or mailed, by registered or certified mail, postage prepaid, to the Administrator, in care of the Company at its corporate headquarters." Kruse denies the characterization of this provision contained in paragraph 48 of the Amended Complaint and denies the remaining allegations contained in paragraph 48 of the Amended Complaint.

49. In response to the allegations contained in paragraph 49 of the Amended Complaint, Kruse denies the allegations contained in paragraph 49 of the Amended Complaint, except admits that the Plan document provides that the Trustee of the ESOP is appointed by the Company acting by its Board of Directors.

50. In response to the allegations contained in paragraph 50 of the Amended Complaint, Kruse admits that paragraph 50 purports to quote a portion of Section 13(b) of the Plan document, but Kruse denies that paragraph 50 is a complete and accurate quotation, Kruse relies on the Plan document to speak for itself, and Kruse denies the remaining allegations contained in paragraph 50 of the Amended Complaint.

51. In response to the allegations contained in paragraph 51 of the Amended Complaint, Kruse admits that paragraph 51 purports to quote a portion of Section 4.3 of the Plan document, but Kruse denies that paragraph 51 is a complete and accurate quotation, Kruse relies on the Plan document to speak for itself, and Kruse denies the remaining allegations contained in paragraph 51 of the Amended Complaint.

52. In response to the allegations contained in paragraph 52 of the Amended Complaint, Kruse denies the characterization of Section 6.1 of the Plan document contained in paragraph 52, Kruse relies on the Plan document to speak for itself, and Kruse denies the remaining allegations contained in paragraph 52 of the Amended Complaint.

53. In response to the allegations contained in paragraph 53 of the Amended Complaint, Kruse admits that paragraph 53 purports to quote a portion of Section 7.5(b) of the Plan document, but Kruse denies that paragraph 53 is a complete and accurate quotation, Kruse relies on the Plan document to speak for itself, and Kruse denies the remaining allegations contained in paragraph 53 of the Amended Complaint.

54. In response to the allegations contained in paragraph 54 of the Amended Complaint, Kruse denies the characterization of Section 17.2(h) of the Plan document, Kruse relies on the Plan document to speak for itself, and Kruse denies the remaining allegations contained in paragraph 54 of the Amended Complaint.

55. In response to the allegations contained in paragraph 55 of the Amended Complaint, Kruse denies the allegations contained in paragraph 55 of the Amended Complaint.

56. In response to the allegations contained in paragraph 56 of the Amended Complaint, Kruse denies all allegations contained in paragraph 56 of the Amended Complaint, except admits that members of the Administration Committee held management positions at Western Milling and/or Kruse Western.

57. In response to the allegations contained in paragraph 57 of the Amended Complaint, Kruse admits the allegations contained in paragraph 57, except clarifies that it was the ESOP Trust that purchased 100% of the outstanding shares of Kruse Western, Inc. and denies that Kevin Kruse was a Selling Shareholder.

58. In response to the allegations contained in paragraph 58 of the Amended Complaint, Kruse denies the allegations contained in paragraph 58 of the Amended Complaint.

59. In response to the allegations contained in paragraph 59 of the Amended Complaint, Kruse denies the allegations contained in paragraph 59 of the Amended Complaint.

60. In response to the allegations contained in paragraph 60 of the Amended Complaint, Kruse denies the allegations contained in paragraph 60 of the Amended Complaint.

61. In response to the allegations contained in paragraph 61 of the Amended Complaint, Kruse denies all allegations contained in paragraph 61 of the Amended Complaint, except relies on 26 U.S.C. § 1042 to speak for itself.

62. In response to the allegations contained in paragraph 62 of the Amended Complaint, Kruse denies all allegations contained in paragraph 62 of the Amended Complaint.

63. In response to the allegations contained in paragraph 63 of the Amended Complaint, Kruse denies the allegations contained in paragraph 63 of the Amended Complaint.

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64. In response to the allegations contained in paragraph 64 of the Amended Complaint, Kruse denies the allegations contained in paragraph 64 of the Amended Complaint.

65. In response to the allegations contained in paragraph 65 of the Amended Complaint, Kruse denies the allegations contained in paragraph 65 of the Amended Complaint.

66. In response to the allegations contained in paragraph 66 of the Amended Complaint, Kruse denies the allegations contained in paragraph 66 of the Amended Complaint.

67. In response to the allegations contained in paragraph 67 of the Amended Complaint and its subparts, Kruse denies all allegations contained in paragraph 67 of the Amended Complaint.

68. In response to the allegations contained in paragraph 68 of the Amended Complaint, Kruse denies the allegations contained in paragraph 68 of the Amended Complaint.

69. In response to the allegations contained in paragraph 69 of the Amended Complaint, Kruse denies the allegations contained in paragraph 69 of the Amended Complaint.

70. In response to the allegations contained in paragraph 70 of the Amended Complaint, Kruse denies the allegations contained in paragraph 70 of the Amended Complaint.

71. In response to the allegations contained in paragraph 71 of the Amended Complaint, Kruse denies the allegations contained in paragraph 71 of the Amended Complaint.

72. In response to the allegations contained in paragraph 72 of the Amended Complaint, Kruse denies the allegations contained in paragraph 72 of the Amended Complaint.

73. In response to the allegations contained in paragraph 73 of the Amended Complaint, Kruse denies the allegations contained in paragraph 73 of the Amended Complaint.

74. In response to the allegations contained in paragraph 74 of the Amended Complaint, Kruse denies the allegations contained in paragraph 74 of the Amended Complaint.

75. In response to the allegations contained in paragraph 75 of the Amended Complaint, Kruse denies the allegations contained in paragraph 77 of the Amended Complaint.

76. In response to the allegations contained in paragraph 76 of the Amended Complaint, Kruse denies the allegations contained in paragraph 76 of the Amended Complaint.

77. In response to the allegations contained in paragraph 77 of the Amended Complaint, Kruse denies the allegations contained in paragraph 77 of the Amended Complaint.

78. In response to the allegations contained in paragraph 78 of the Amended Complaint, Kruse denies the allegations contained in paragraph 78 of the Amended Complaint.

79. In response to the allegations contained in paragraph 79 of the Amended Complaint, Kruse denies the allegations contained in paragraph 79 of the Amended Complaint.

80. In response to the allegations contained in paragraph 80 of the Amended Complaint, Kruse admits the allegations contained in paragraph 80 of the Amended Complaint.

81. In response to the allegations contained in paragraph 81 of the Amended Complaint, Kruse denies the allegations contained in paragraph 81 of the Amended Complaint.

82. In response to the allegations contained in paragraph 82 of the Amended Complaint, Kruse denies the allegations contained in paragraph 82 of the Amended Complaint.

IV.

CLASS ACTION ALLEGATIONS

83. In response to the allegations contained in paragraph 83 of the Amended Complaint, Kruse admits that Plaintiff purports to bring his claims as a class action but denies that Plaintiff can establish the requirements of Fed. R. Civ. P. 23 and denies the remaining allegations contained in paragraph 83 of the Amended Complaint.

84. In response to the allegations contained in paragraph 84 of the Amended Complaint, Kruse denies the allegations contained in paragraph 84 of the Amended Complaint except admits that Form 5500 for the year ending December 31, 2017 identifies the number of participants with account balances as of the end of the plan year as 393.

85. In response to the allegations contained in paragraph 85 of the Amended Complaint, Kruse denies all allegations contained in paragraph 85 of the Amended Complaint.

85.a. In response to the allegations contained in paragraph 85(a) of the Amended Complaint, Kruse denies all allegations contained in paragraph 85(a) of the Amended Complaint.

85.b. In response to the allegations contained in paragraph 85(b) of the Amended Complaint, Kruse denies all allegations contained in paragraph 85(b) of the Amended Complaint.

85.c. In response to the allegations contained in paragraph 85(c) of the Amended Complaint, Kruse denies all allegations contained in paragraph 85(c) of the Amended Complaint.

85.d. In response to the allegations contained in paragraph 85(d) of the Amended Complaint, Kruse denies all allegations contained in paragraph 85(d) of the Amended Complaint.

85.e. In response to the allegations contained in paragraph 85(e) of the Amended Complaint, Kruse denies all allegations contained in paragraph 85(e) of the Amended Complaint.

86. In response to the allegations contained in paragraph 86 of the Amended Complaint, Kruse denies all allegations contained in paragraph 86 of the Amended Complaint.

87. In response to the allegations contained in paragraph 87 of the Amended Complaint, Kruse denies all allegations contained in paragraph 87 of the Amended Complaint.

88. In response to the allegations contained in paragraph 88 of the Amended Complaint, Kruse denies all allegations contained in paragraph 88 of the Amended Complaint.

89. In response to the allegations contained in paragraph 89 of the Amended Complaint, Kruse denies all allegations contained in paragraph 89 of the Amended Complaint.

90. In response to the allegations contained in paragraph 90 of the Amended Complaint, Kruse denies all allegations contained in paragraph 90 of the Amended Complaint.

91. In response to the allegations contained in paragraph 91 of the Amended Complaint, Kruse denies all allegations contained in paragraph 91 of the Amended Complaint.

92. In response to the allegations contained in paragraph 92 of the Amended Complaint, Kruse denies all allegations contained in paragraph 92 of the Amended Complaint.

93. In response to the allegations contained in paragraph 93 of the Amended Complaint, Kruse denies all allegations contained in paragraph 93 of the Amended Complaint.

94. In response to the allegations contained in paragraph 94 of the Amended Complaint, Kruse denies all allegations contained in paragraph 94 of the Amended Complaint.

95. In response to the allegations contained in paragraph 95 of the Amended Complaint, Kruse denies all allegations contained in paragraph 95 of the Amended Complaint.

96. In response to the allegations contained in paragraph 96 of the Amended Complaint, Kruse denies all allegations contained in paragraph 96 of the Amended Complaint.

96.a. In response to the allegations contained in paragraph 96(a) of the Amended Complaint, Kruse denies all allegations contained in paragraph 96(a) of the Amended Complaint.

96.b. In response to the allegations contained in paragraph 96(b) of the Amended Complaint, Kruse denies all allegations contained in paragraph 96(b) of the Amended Complaint.

96.c. In response to the allegations contained in paragraph 96(c) of the Amended Complaint, Kruse denies all allegations contained in paragraph 96(c) of the Amended Complaint.

97. In response to the allegations contained in paragraph 97 of the Amended Complaint, Kruse denies all allegations contained in paragraph 97 of the Amended Complaint.

COUNT I

Prohibited Transaction in Violation of ERISA § 406(a), 29 U.S.C. § 1106(a)

(Against Kevin Kruse, Does 21-30, and GreatBanc)

98–109. In response to the allegations contained in paragraphs 98 through 109 of the Amended Complaint, Kruse states that his response to Count I is contained in the Motion to Dismiss filed herewith, and he reserves the right to respond further subject to the outcome of the Motion to Dismiss.

COUNT II

Prohibited Transaction in Violation of ERISA § 406(b), 29 U.S.C. § 1106(b)

(Against All Administration Committee Members Who Sold Kruse Western Stock to the ESOP)

110–120. In response to the allegations contained in paragraphs 110 through 120 of the Amended Complaint, Kruse states that his response to Count II is contained in the Motion to Dismiss filed herewith, and he reserves the right to respond further subject to the outcome of the Motion to Dismiss.

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COUNT III

Breach of Fiduciary Duties Under ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B)

(Against GreatBanc)

121–131. In response to the allegations contained in paragraphs 121 through 131 of the Amended Complaint, no allegations are made against Kruse and thus no response is required by him. To the extent a response is required, Kruse denies all allegations contained in paragraphs 121 through 131 of the Amended Complaint.

COUNT IV

Failure to Monitor in Violation of ERISA §§ 404(a)(1)(A) and (B) 29 U.S.C. §§ 1104(a)(1)(A) and (B)

(Against Kevin Kruse, the Board of Directors, and Does 1-10)

132. In response to the allegations contained in paragraph 132 of the Amended Complaint, Kruse incorporates his answers as set forth herein as his answer to paragraph 132 of the Amended Complaint.

133. In response to the allegations contained in paragraph 133 of the Amended Complaint, Kruse denies the allegations contained in paragraph 133 of the Amended Complaint, except admits that ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan."

134. In response to the allegations contained in paragraph 134 of the Amended Complaint, Kruse denies the characterization of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) contained in paragraph 134 and denies all remaining allegations contained in paragraph 134 of the Amended Complaint.

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135. In response to the allegations contained in paragraph 135 of the Amended Complaint, Kruse denies the characterization of ERISA § 404(a)(1)(A) and (B) contained in paragraph 135 and denies all remaining allegations contained in paragraph 135 of the Amended Complaint.

136. In response to the allegations contained in paragraph 136 of the Amended Complaint, Kruse denies the allegations contained in paragraph 136 of the Amended Complaint.

137. In response to the allegations contained in paragraph 137 of the Amended Complaint, Kruse denies the allegations contained in paragraph 137 of the Amended Complaint.

138. In response to the allegations contained in paragraph 138 of the Amended Complaint, Kruse denies the allegations contained in paragraph 138 of the Amended Complaint.

COUNT V

Co-Fiduciary Liability Under ERISA §§ 405(a)(1) and (a)(3)
29 U.S.C. § 1105(a)(1) and (a)(3)

(Against Kevin Kruse, the Administration Committee, the Board of Directors, and Does 1-20)

139–157. In response to the allegations contained in paragraphs 139 through 157 of the Amended Complaint, Kruse states that his response to Count V is contained in the Motion to Dismiss filed herewith, and he reserves the right to respond further subject to the outcome of the Motion to Dismiss.

158. Kruse further answers that any allegations contained in the Amended Complaint that are not expressly admitted are denied.

159. Kruse further avers that all relief sought in the Amended Complaint should be denied and denies that Plaintiff is entitled to any relief.

V.

PRAYER FOR RELIEF

In response to the prayer for relief, including each and every subpart thereof, Kruse denies that judgment for plaintiff is proper or that plaintiff is entitled to any of the relief whatsoever; Kruse requests that judgment be entered in its favor and against plaintiff on all claims.

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AFFIRMATIVE DEFENSES

Kevin Kruse states the following as his affirmative defenses to the Amended Complaint.

First Affirmative Defense

Lack of Subject Matter Jurisdiction/Lack of Standing

1. Plaintiff was not an employee of any employer participating in the Western Milling ESOP upon its inception on November 4, 2015.

2. Plaintiff was not hired until on or about December 8, 2015.

3. Plaintiff did not become a participant in the Western Milling ESOP until January 1, 2017.

4. The Court lacks subject matter jurisdiction because Plaintiff has not personally suffered an injury in fact as a result of the conduct alleged in the Amended Complaint.

5. The Court lacks subject matter jurisdiction because absent an injury in fact to Plaintiff, he lacks standing to sue.

6. The Court lacks subject matter jurisdiction because Plaintiff has failed to identify any action by Kruse that poses a real and immediate threat of future personal injury.

Second Affirmative Defense

Waiver and Release

7. On or around May 18, 2018, Plaintiff signed a Severance Agreement containing a release ("Release"), attached hereto as **Exhibit A**.

8. In the Release, Plaintiff released the following parties: Western Milling, LLC, "its subsidiaries and affiliates, and their respective present, former, and future officers, directors, employees, stockholders, attorneys, insurers, and agents, and their respective heirs, executors, administrators, successors, and assigns."

9. Kruse is included among the released parties in the Release.

10. The scope of the Release extends to the claims raised in this lawsuit.

11. Plaintiff's lawsuit is barred by the Release.

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Third Affirmative Defense

Statute of Limitations

12. Plaintiff's claims are barred by ERISA's statute of limitations set forth in ERISA § 413(2), which provides: "No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part . . . three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation."

13. At or around the date of Plaintiff's hire around December 8, 2015, Plaintiff received information about the ESOP from the Company.

14. Plaintiff had actual knowledge of the claims he now brings as early as 2015.

Fourth Affirmative Defense

Exemption from Prohibited Transaction

15. Plaintiff's claims that GreatBanc caused the ESOP to engage in a prohibited transaction in violation of ERISA § 406, 29 U.S.C. § 1106 do not apply to the November 4, 2015 stock purchase transaction in which the ESOP purchased 100% of the outstanding shares of Kruse Western, Inc. stock (the "Purchase Transaction").

16. The Purchase Transaction satisfies the exemption set forth in ERISA § 408(e), 29 U.S.C. § 1108(e).

17. Section 408(e) provides in pertinent part: "Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) . . . (1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation . . . (2) if no commission is charged with respect thereto, and (3) if—(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title)."

18. As used in Section 408(e), "adequate consideration" means "in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary." *See also* Proposed Regulation

Relating to the Definition of Adequate Consideration, 53 Fed. Reg. 17632-01 (May 17, 1988) (to be codified at 29 C.F.R. pt. 2510).

19. The ESOP Trust paid no more than adequate consideration for its purchase of the Company stock.

Fifth Affirmative Defense

Lack of Intent under ERISA § 406(a)(1)(D)

20. ERISA § 406(a)(1)(D) prohibits transactions between a plan and a party in interest that constitute a direct or indirect "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan."

21. Courts have held that a prohibited use of plan assets for the benefit of a party in interest as described in ERISA § 406(a)(1)(D) requires a subjective intent to benefit a party in interest.

22. Plaintiff cannot establish that there was any subjective intent to benefit any party in interest.

Sixth Affirmative Defense

Failure to Exhaust Administrative Remedies

23. Plaintiff's claims are barred, in whole or in part, by the failure to exhaust administrative remedies.

WHEREFORE, Kruse respectfully requests that this Court enter judgment in his favor and against Plaintiff on all claims, award their reasonable attorneys' fees and costs, and grant such further relief as the Court deems just.

Dated: September 20, 2019

SAGASER, WATKINS & WIELAND PC

By: /s/ Ian B. Wieland
Howard A. Sagaser
Ian B. Wieland
David G. Litman
Attorneys for Defendants, Kruse Western, Inc., GreatBanc Trust Company, and Kevin Kruse

Exhibit A

SEVERANCE AGREEMENT

This Severance Agreement ("Agreement"), dated May 18, 2018, is entered into by and between Western Milling, LLC, a California Limited Liability Company ("Employer"), and Armando Zavala ("Employee"). Employer and Employee are sometimes referred to herein as "the Parties."

RECITALS

A. Employee is employed by and/or performs services for Employer as Truck Loading & Transfer I;

B. Employees employment with Employer will end effective May 18, 2018; and

C. In consideration for the Severance Payment described below, Employer and Employee desire to resolve any and all claims Employee may have against Employer relating to Employee's employment by Employer.

NOW, THEREFORE, in consideration of the covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties to this Agreement agree as follows:

5/23/18
Block State/Fed
A.2

1. Consideration.

a. Severance Payment. Employer shall, subject to Employee's execution of this Agreement in accordance with its terms, pay Employee a gross sum in the amount of Two Thousand Five Hundred Dollars and No Cents ($2,500.00), less any federal, state or local taxes or other amounts required to be withheld by law. Finally, Employer agrees to not contest unemployment, should Employee choose to submit a claim for unemployment insurance.

2 checks
original
check w/
tax difference
A.2.

Employee agrees to pay federal or state taxes, if any, which are required by law to be paid with respect to this severance and the amounts paid or to be paid pursuant to it. Employee further agrees to indemnify and hold Employer harmless from any claims, demands, deficiencies, levies, assessments, executions, judgments or recoveries by any governmental entity against Employer for any amounts claimed due on account of this Agreement or pursuant to claims made under any federal or state tax laws, and any costs, expenses or damages sustained by Employer by reason of any such claims, including any amounts paid by Employer as taxes, attorneys' fees, deficiencies, and levies, assessments, fines, penalties, interest or otherwise.

2. General Release.

a. In consideration of Employee's agreement hereunder, including, but not limited to, the Severance Payment offered by Employer to Employee hereunder, Employee for himself, his heirs, spouse, executors, administrators, personal and legal representatives and assigns, hereby releases and forever discharges Employer, its subsidiaries and affiliates, and their respective present, former, and future officers, directors, employees, stockholders, attorneys,

A.Z Employee
Employer

insurers, and agents, and their respective heirs, executors, administrators, successors and assigns (collectively, "the Releasees") from any and all claims, demands, causes of action, obligations and liabilities whatsoever, whether or not presently known or unknown, or fixed or contingent, including, without limitation, any claims related to or arising out of Employee's employment relationship with Employer or the termination of that employment, including, without limitation, any claims for unpaid salary, severance, accrued vacation or sick pay, bonuses or any other type of compensation, other than as contemplated by the terms of this Agreement, and including, but not limited to, claims, demands or causes of action under Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1991, the Age Discrimination in Employment Act (ADEA), the Older Workers Benefit Protection Act, the Americans with Disabilities Act, the Americans with Disabilities Act Amendments Act, the Family Medical Leave Act and related regulations, the California Family Rights Act and related regulations, the National Labor Relations Act, the Labor Management Relations Act, the Fair Labor Standards Act, the Equal Pay Act, the Occupational Safety and Health Act, Employee Retirement Income Security Act, the California Fair Employment and Housing Act, and any claims within any division of the California Department of Industrial Relations or Employment Development Department, common law claims for wrongful discharge or termination, constructive discharge, retaliatory discharge, breach of contract (employment or otherwise), conspiracy, fraud, breach of fiduciary duty, negligent misrepresentation, intentional or negligent infliction of emotional distress, defamation, libel, slander, conversion, invasion of privacy rights, tortious interference with contract, tortious interference with business relations, disparagement of business reputation and any other claim, demand or cause of action arising under any provision of the California Labor and Government Codes, except as any such waiver or release is prohibited by law, case law, or statute.

b. Employee acknowledges and agrees that:

i. The foregoing release is a general release of claims, demands, causes of action, obligation, damages, and liabilities of any nature whatsoever, and is intended to encompass all known and unknown, foreseen and unforeseen claims which he may have against the Releasees, or any of them, as of the moment he signs this Agreement, except for those claims which may arise out of the terms of this Agreement.

ii. Employee may hereafter discover facts different from or in addition to those which he now knows or believes to be true with respect to the claims, demands, causes of action, obligations, damages, and liabilities of any nature whatsoever that are the subject of this Agreement, and he expressly agrees to assume the risk of the possible discovery of additional or different facts, and further agrees that this Agreement shall be and remain effective in all respects regardless of such additional or different facts.

iii. Employee expressly waives and relinquishes all rights and benefits that he may have against the released Parties under California Civil Code Section 1542, which states as follows:

AZ Employee

WG Employer

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Employee represents that he has read, understands, and has been fully advised as to the contents and legal effect of the foregoing Section 1542 and the waiver of all rights and benefits thereunder.

3. **Confidentiality and Liquidated Damages.** Employee agrees that neither he nor any of his agents shall, in any manner whatsoever, disclose, directly or indirectly, any information concerning the monetary terms and conditions of this Agreement, the fact that this Agreement was entered into, or the monetary proposals made during the negotiations that resulted in this Agreement to anyone unless compelled by a process of law or by other necessity, such as tax reporting, business necessity, or loan applications, provided that Employee advises any such person to whom disclosure is made as a matter of necessity that the matter(s) disclosed are to be held in the strictest confidence and may not be disclosed to or discussed with any other person, unless compelled by process of law or other necessity.

The provisions of this paragraph are effective as of the date of this Agreement. To the extent that Employee has discussed any aspect or term of this Agreement with any person prior to the date of this Agreement, Employee must inform them in writing no later than within twenty-four (24) hours of the date of this Agreement that anything he has previously discussed with them concerning the Agreement or the negotiations that resulted in the Agreement must be held in strictest confidence and may not be discussed with anyone for any purpose, except as may be required by law or other necessity.

If Employee or his agents breach any portion in this paragraph, Employee acknowledges that it will be extremely difficult to determine the damages suffered by Employer. It is, therefore, agreed that in the event of such a breach by Employee, then the breaching party shall pay Employer the sum of One Thousand Dollars ($1,000.00) as liquidated damages, in addition to any and all other rights or remedies available to Employer under applicable law.

Disclosure by Employer or its counsel of the terms or conditions of this Agreement to anyone, at any time, shall not in any way be construed as a waiver or modification of this provision or the obligations of Employee arising by virtue of this provision.

4. **Protection of Employer's Confidential Information.** Employee understands that, by virtue of his employment with Employer, Employee has acquired and was exposed to proprietary and other confidential information of Employer ("Confidential Information"). Confidential Information includes, but is not limited to, all ideas, information and materials, tangible or intangible, that is not generally known to Employer's competitors and/or the public, and that has or could have commercial value to Employer's business or that relates, in any manner, to the business of Employer, its personnel (including its shareholders, partners, principals, employees, representatives, and contractors), and its clients and all others with whom it does business that Employee learns or acquires during his employment with Employer. Confidential Information includes not only information disclosed by Employer (or its

AZ Employee

Employer

customers, clients, affiliates, or vendors) to Employee during the course of his employment with Employer, but also information developed or learned by Employee himself during the course of his employment with Employer.

Confidential Information includes, but is not limited to the following categories of information: research, product plans, customer lists, client lists, member lists, (including, but not limited to, customers of Employer on whom Employee called or with whom Employee became acquainted during the term of Employee's employment with Employer), potential customer lists (or "leads"), dealer agreements, pricing criteria, pricing lists, programs offered or existing programs, marketing programs, customer/client contracts, products, any formulas/mixtures of any type of product, markets, formulas, software, developments, inventions, processes, formula, technology, designs, drawings, engineering, hardware configuration information, marketing, finances, manuals, documents, computer programs, source code, users' manuals, algorithms, compilations of technical, financial, legal or other data, names of suppliers and vendors, specifications, designs, business or marketing plans, forecasts, financial information, works in progress, and other technical or other business information disclosed to Employee by Employer either directly or indirectly in writing, orally or by drawings or observation of parts or equipment. Confidential Information does not include basic information that is generally known and used within Employer's industry. Confidential Information includes, but is not limited to, "trade secrets," as that term is defined by California Civil Code section 3246.1.

Employee acknowledges and agrees that such Confidential Information is secret, valuable, and owned by Employer, and that Employer has exercised substantial efforts to preserve the information's secrecy.

Employee agrees to hold in trust and in confidence all Confidential Information after the period of Employee's employment with Employer. Employee shall not disclose any Confidential Information to anyone outside of Employer without the prior written approval of an authorized officer of Employer and may not use any Confidential Information for any purpose. Employee shall immediately deliver to Employer any Confidential Information in a tangible form that Employee may hold or control, as well as all other property, equipment, documents or things that Employee was issued or otherwise received or obtained during his employment. The term "tangible form" includes ideas, information or materials in a written or graphic form, on a computer disk, or otherwise stored in or available through an electronic, a magnetic or any other form or medium.

5. **Employee Covenants.**

a. Employee represents and warrants that, since Employee's employment with Employer ended, Employee has not performed any services or incurred any liabilities on behalf of Employer. Employee further represents and warrants that Employee's separation from Employer is not in any way related to any work-related injury and that Employee has not experienced a work-related injury while employed by Employer. Employee further represents and warrants that Employee has not erased, written over, removed, copied, or destroyed any Company information and/or Confidential Information contained on any computer storage media or other electronic media. Employee also represents and warrants that during the course of Employee's employment with Employer, Employee did not defraud Employer or any of its

Employee

Employer

officers, directors, shareholders, members, managers, employees, customers, suppliers, or vendors. Employee further represents and warrants that he has received all compensation due and owing him, including all wages, accrued vacation, and business expenses.

b. Employee agrees and covenants that he shall, to the extent reasonably requested in writing, cooperate with Employer in any pending or future litigation in which Employer is a party, and regarding which Employee, by virtue of his employment with Employer has knowledge or information relevant to said litigation. Employee further agrees and covenants that, in any such litigation, he shall, without the necessity for subpoena, provide, in any jurisdiction in which Employer requests, truthful testimony relevant to said litigation. Employer agrees to pay for reasonable time and expenses incurred on the part of Employee for cooperation in such litigation.

c. Employee agrees to return all equipment issued to Employee by Employer to Employer. Employee agrees to return all property of Employer, including but not limited to lap top computers, electronic data, cell phones, Employer credit cards, chargers, printers, cameras, projectors, dollies, and projection screens. Employee agrees to return all keys to Employer's offices and company cars, as well as any security/parking cards for accessing Employer's offices.

6. **No Admission of Liability.** This Agreement is a compromise settlement of all potential claims by Employee, and does not constitute an admission of liability on the part of Employer or an admission directly or by implication that Employer has violated any law, regulation, contractual right, or other obligation owed to Employee. Employer may raise this Agreement as a complete defense to any claims brought by Employee regarding the matters covered by this Agreement.

7. **Neutral Reference.** Employer agrees to respond to all inquiries from prospective employers of Employee with a neutral reference consisting of: (1) Employee's dates of employment; and (2) Employee's job title. All requests for references shall be directed to the Human Resources Department.

8. **No Re-employment.** Employee knowingly, voluntarily, and irrevocably, waives his right to seek reinstatement, employment, or reemployment, with Employer and affirmatively agrees that he will not apply for such reinstatement, employment, or reemployment. Employee further agrees and acknowledges that any application for reinstatement, employment, or reemployment that Employee may submit shall not be processed and that the failure to process his application shall not under any circumstances be considered an act of retaliation under any statute or other public policy. This applies not only to Employer, but also to any business entity owned, managed or licensed in whole or in part, by Employer. Employee agrees that if Employee knowingly or unknowingly applies for a position with an entity of the status described herein and is offered or accepts a position, the offer may be withdrawn, or Employee may be terminated immediately without notice or cause. Employee further agrees that in the event of such an offer and withdrawal, or hiring and termination as described herein, Employee waives any right to seek legal or administrative redress of any kind for events relating to the withdrawal of the offer, or termination of employment, as described in this paragraph.

Employee

Employer

9. **Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions will nevertheless continue in full force and effect without being impaired or invalidated in any way.

10. **Entire Agreement.** This Agreement contains the entire agreement between the Parties and may not be altered, amended or modified in any respect, except by a writing duly executed by the party to be charged. All prior agreements, understandings, oral agreements and writings are expressly superseded hereby and are of no further force or effect except for any arbitration agreement signed by the Parties.

11. **Attorneys' Fees.** If any dispute shall arise concerning the execution, interpretation, breach, enforcement, or modification of this Agreement and/or if either party commences an arbitration to resolve that dispute, the Court shall award to the prevailing party, in addition to such other relief as may be appropriate, reasonable attorneys' fees and costs incurred in resolving that dispute.

12. **Headings and Captions.** The headings and captions used in this Agreement are for convenience of reference only, and shall in no way define, limit, expand or otherwise affect the meaning or construction of any provision of this Agreement.

13. **Arbitration Agreement.** Any dispute between or among Employee and Employer arising out of or related to this Agreement, shall be resolved by arbitration pursuant to the Mutual Arbitration of Disputes Agreement attached hereto as Exhibit "A."

14. **Counterparts.** This Agreement may be executed in counterparts, and all copies so executed shall be binding upon the Parties. The signatures of the Parties may be communicated by facsimile or email and such signatures shall have the same binding effect as original signatures.

15. **Additional Documents.** To the extent the parties are required to execute additional documents to effectuate this Agreement, the parties agree to execute and deliver such other and further documents as may be required to carry out the terms of this Agreement.

16. **Governing Law.** The validity, performance, construction and effect of this Agreement shall be governed by the substantive laws of the State of California, without regard to any provisions for choice of law. In any action arising from the enforcement and/or interpretation of this Agreement, venue shall be in the County of Tulare, State of California.

17. **Successor.** This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and their respective heirs, personal representatives, successors and assigns.

18. **Notice.** Any notice required or permitted under this Agreement shall be given in writing by certified mail to the following addresses:

Employee

Employer

Employer: Notices shall be mailed to:

Aubrey Michael
EVP of HR
Western Milling, LLC
31120 West Street
P.O. Box 1029
Goshen, California 93227

Employee: Notices shall be mailed to:

Armando Zavala
1520 Pioneer Ave
Porterville, CA 93257

For the purpose of determining compliance with any time limit in this Agreement, a notice shall be deemed to have been duly given on the date postmarked.

19. Voluntary Execution of Agreement. Employee understands and agrees that he executed this Agreement voluntarily, without any duress or undue influence on the part or behalf of Employer or any third party, with the full intent of releasing all of his claims against Employer and any of the other Releasees. Employee acknowledges that: (a) he has read this Severance Agreement; (b) he has been represented in the preparation, negotiation, and execution of this Severance Agreement by legal counsel of his own choice or has voluntarily elected not to retain legal counsel; (c) he understands the terms and consequences of this Severance Agreement and of the releases it contains; and (d) he is fully aware of the legal and binding effect of this Severance Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first set forth above.

A Z
Employee

5-18-18
Date

Western Milling, LLC

By Nikki Bautista

Title Generalist, People Operations

5/23/18
Date

A.Z Employee
Employer