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6 on behalf of themselves and all others similarly situated

7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES**

10 JESUS DIAZ and HECTOR GARCIA
11 on behalf of themselves and all others
similarly situated

12 Plaintiff,

13 vs.

14 CAL PLATE, Inc., a California
15 Corporation, and DOES 1 through 50,
16 inclusive

17 Defendants.

Case No. 20STCV00696

ASSIGNED FOR ALL PURPOSES TO:

JUDGE: Hon. Elihu M. Berle

DEPT: 6

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
DECLARATION OF JAMES R. HAWKINS
IN SUPPORT THEREOF; [PROPOSED]
ORDER**

Date: January 24, 2022

Time: 9:00 am

Dept.: 6

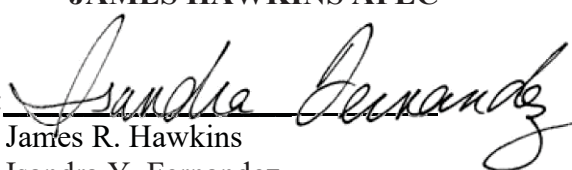
1 **PLEASE TAKE NOTICE THAT** on January 24, 2022. in Department 6 of the above-
2 entitled court located at 312 North Spring Street, Los Angeles, CA 90012, Plaintiff Jesus Diaz
3 (“Plaintiff”) will and hereby does move the Court for an Order (1) provisionally certifying the
4 Class for Settlement purposes only; (2) provisionally approving James Hawkins and Isandra
5 Fernandez from the law firm of James Hawkins, APLC, as counsel for Plaintiffs and the Class
6 Members in this matter, (3) provisionally approving Jesus Diaz and Hector Garcia as the Class
7 Representatives; (4) approving Simpluris, Inc. as the Settlement Administrator; (5) preliminarily
8 approving the class action settlement; and (6) approving and directing distribution of the Notice
9 of Proposed Class Action Settlement.

10 This Motion is made pursuant to Rule 3.769 of the California *Rules of Court*, which
11 provides for court approval of the settlement of a purported class action and allows the Court to
12 preliminarily certify a class for settlement purposes. The basis for this Motion is that the
13 proposed Settlement is fair, adequate, and reasonable and the procedures proposed by the Parties
14 are adequate to ensure the opportunity of Class Members to participate in, opt out of, or object to
15 the Settlement.

16 This Motion will be based on the Memorandum of Points and Authorities included herein,
17 the Declaration of James R. Hawkins, the Stipulation of Class and PAGA Settlement attached to
18 the Declaration of James R. Hawkins as Exhibit A, and upon the oral arguments of counsel
19 (should there be any) and upon the complete records and file herein.

20
21 **DATED: December 23, 2021**

JAMES HAWKINS APLC

22
23 By: 

James R. Hawkins
Isandra Y. Fernandez
Kacey E. Cook
Attorneys for Plaintiffs
Jesus Diaz and Hector Garcia

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27
28

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. FACTUAL BACKGROUND.....2

III. SUMMARY OF SETTLEMENT TERMS.....4

 A. Class Members.....4

 B. Allocation of Settlement Amount.....4

 C. Released Claims Summary.....9

 1. Class Release by Settlement Class Members.....9

 2. PAGA Release by Aggrieved Employees.....10

 3. Representative Plaintiff’s General Release.....11

 4. Plaintiffs’ Waiver of Section 1542 With Respect to Released
 Claims.....12

 D. Notice to Class Members.....13

IV. CALIFORNIA RULES OF COURT §3.769 APPROVAL PROCESS.....15

V. PRELIMINARY APPROVAL OF SETTLEMENT IS APPROPRIATE.....15

 A. The Terms of the Proposed Settlement are Fair.....16

 1. The Settlement Was Reached Through Extensive Arm’s Length
 Bargaining and Based on the Recommendation Proposed by the
 Mediator.....16

 2. Investigation and Discovery were Sufficient for the Parties to
 Evaluate the Risks Intelligently.....17

 3. Plaintiffs’ Counsel is Experienced in Similar
 Litigation.....17

 B. The Settlement Provides for Reasonable Compensation to Class
 Members.....17

 a. Meal Period Claim.....18

 b. Rest Period Claim.....18

1	c. Lab. Code § Claim (failure to provide accurate itemized	
2	wage statements).....	18
3	d. Failure to Pay Lawful Wages Claims.....	19
4	e. Lab. Code §203 Claim (failure to timely pay wages).....	19
5	f. Bus. & Prof. Code § 17200 Claim.....	19
6	g. Lab. Code §2699 (PAGA Claim).....	20
7	C. The Class Representative Payments and Class Counsel Fees Are Reasonable And	
8	Should be Awarded.....	22
9	VI. PROVISIONAL CLASS CERTIFICATION IS APPROPRIATE.....	22
10	A. The Proposed Class is Ascertainable.....	23
11	B. Numerosity of the Class is Sufficient.....	23
12	C. There are Common Questions of Law and Fact to the Class.....	23
13	D. The Typicality Requirement is Met.....	24
14	E. The Adequacy Requirement is Met.....	24
15	F. Common Issues Predominate and Class-wide Settlement is Superior to Other	
16	Available Methods of Resolution.....	25
17	VII. THE PROPOSED CLASS NOTICE IS APPROPRIATE.....	25
18	A. The Class Notice Satisfies Due Process.....	26
19	B. The Proposed Class Notice is Accurate and Informative.....	26
20	VIII. CONCLUSION.....	27
21		
22		
23		
24		
25		
26		
27		
28		

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Bell v Farmers Ins. Exchange*

4 (2004) 115 Cal.App.4th 715.....25

5 *Brinker Rest. Corp. v. Super. Ct.,*

6 (2012) 53 Cal. 4th 1004.....4,18

7 *Cardenas v. McLane Foodservice, Inc.,*

8 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011).....21

9 *Cartt v. Superior Court*

10 (1975) 50 Cal.App.3d 960.....26

11 *Clark v American Residential Services, LLC*

12 (2009) 175 Cal. App. 4th. 785.....16

13 *Clark v. Superior Court,*

14 (2010) 50 Cal. 4th 605.....19

15 *Class Plaintiffs v. City of Seattle*

16 (9th Cir. 1992) 955 F.2d 1268.....15

17 *Cortez v. Purolator Air Filtration Prods. Co.,*

18 (2000) 23 Cal. 4th 163.....19

19 *Dunk v. Ford Motor Company*

20 (1996) 48 Cal.App.4th 1794.....16,22,25

21 *Fleming v. Covidien,*

22 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011).....20

23 *Gomez v. Jacobo Farm Labor Contractor, Inc.,*

24 (2019) 334 FRD. 234.....20

25 *Hanlon v Chrysler Corp.*

26 (9th Cir. 1998) 150 F.3d 1011.....passim

27 *Hebberd v. Colgrove*

28 (1972) 28 Cal.App.3d 1017.....23

III

TABLE OF CONTENTS AND AUTHORITIES

1	<i>Hesse v. Sprint Corp.</i>	
2	(9th Cir. 2009) 598 F.3d 581.....	10
3	<i>In re Taco Bell Wage & Hour Actions,</i>	
4	2016 U.S. Dist. LEXIS 48557, *40 43 (E.D. Cal. Apr. 6, 2016).....	21
5	<i>Makabi v. Gedalia,</i>	
6	2016 Cal. App. Unpub. 1489, *5 7 (2nd Dist. Ct. of App. Mar. 6, 2016).....	20
7	<i>McGhee .v Bank of America</i>	
8	(1976) 60 Cal. App.3d 442.....	24
9	<i>North County Contractor’s Ass. Inc. v. Touchstone Ins. Svcs.</i>	
10	(1994) 27 Cal. App. 4th 1085.....	15
11	<i>Pineda v. Bank of Am., N.A.,</i>	
12	(2010) 50 Cal. 4th 1389.....	19
13	<i>Potter v Pacific Coast Lumber Company</i>	
14	(1951) 37 Cal. 2d. 592.....	15
15	<i>Reyn’s Pasta Bella, LLC v. Visa USA, Inc.</i>	
16	(9th Cir. 2006) 442 F.3d 741.....	10
17	<i>Richmond v. Dart Industries, Inc.</i>	
18	(1981) 29 Cal.3d 462.....	25
19	<i>Rose v. City of Hayward</i>	
20	(1981) 126 Cal. App. 3d 926.....	23
21	<i>Sav-On Drug Stores, Inc. v Superior Court</i>	
22	(2004) 34 Cal. 4th 319.....	25
23	<i>Villacres v. ABM Industries, Inc.</i>	
24	(2010) 189 Cal.App.4 th 562.....	10
25	<i>Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.</i>	
26	(2nd Cir. 2005) 396 F.3d 96.....	10
27	<i>Wershba v Apple Computer, Inc.</i>	
28	(2001) 91 Cal. App. 4th 224.....	15,16

IV
TABLE OF CONTENTS AND AUTHORITIES

1	<i>Wherner v. Syntex</i>	
2	(N.D. Cal. 1987) 117 F.R.D. 641.....	24
3		
4	<u>STATE RULES AND STATUTES</u>	
5	California Business and Professions Code §17200.....	passim
6	California Business and Professions Code §17200-17208.....	2
7	California Code of Civil Procedure § 382.....	22
8	California Code of Civil Procedure § 1542.....	5,12,13
9	California Code of Regulations, Title 8, section 11010.....	2
10	California Gov’t Code § 12945.1, et seq.....	12
11	California Rules of Court 3.760.....	26
12	California Rules of Court 3.766(d).....	27
13	California Rules of Court 3.766.....	27
14	California Rules of Court 3.769.....	1,15
15	California Rules of Court 3.769(f).....	26
16	Industrial Welfare Commission (“IWC”) Wage Order No.1-2001.....	1,9,11,24
17	Labor Code § 201, 202, 204, 226.7, 510,512, 1194.....	2,11
18	Labor Code § 203.....	2,11,19
19	Labor Code § 226.....	passim
20	Labor Code § 226(e).....	18
21	Labor Code § 2698.....	11
22	Labor Code § 2699.....	6,20
23	Labor Code § 2699(i).....	6
24	Labor Code § 2699(e)(2).....	20
25	Private Attorney General Act, Lab. Code § 2698 <i>et seq.</i> (“PAGA”).....	passim
26		
27		
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SECONDARY SOURCES

MANUAL at §§21.311, 21.312.....26

MANUAL at §30.21.....27

Newberg, § 8.39.....26

Newberg, § 11.25 at 11-36-3715

Newberg, § 11.41.....15

FEDERAL RULES

29 U.S.C. § 209(4)(1).....12

29 U.S.C. § 1000, et seq.....12

42 U.S.C. § 1981.....12

42 U.S.C. § 12100 et seq.....12

Federal Rules of Civil Procedure Rule 23.....22

Federal Rules of Civil Procedure Rule 23(c)(2).....27

Wright & Miller, *Fed. Practice & Procedure* § 1797.6.....26

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On January 8, 2020, Plaintiff Jesus Diaz (“Diaz”) filed this wage and hour class action
4 (“Lawsuit” or “Action”) on behalf of himself and all employees employed by, or formerly
5 employed by Cal Plate, Inc., (hereinafter “Defendant” and/or “Cal Plate”) (Plaintiff and
6 Defendant collectively referred to as “Parties”) who occupied non-exempt hourly positions in the
7 state of California (“Class Action Complaint”). The Lawsuit seeks recovery of alleged unpaid
8 wages, premium wages and penalties pursuant to California Labor Code, California Industrial
9 Welfare Commission (“IWC”) Wage Order No.7-2001, Bus. & Prof. Code § 17200 and PAGA.
10 The action further seeks an award of attorneys’ fees, interest and costs. Cal Plate denies the
11 claims alleged and disputes any liability for the damages sought.

12 Subject to Court approval, the Parties have reached a settlement of the claims asserted on
13 behalf of the class and representative PAGA group in this Lawsuit for a total of Three Hundred
14 Fifty Thousand Dollars \$350,000 (hereinafter “Gross Settlement Amount” or “GSA”), which
15 includes the individual settlement payments to the class/PAGA group members, attorneys’ fees
16 and costs, Class Representative enhancement payment, the costs of the settlement administrator,
17 and payment to the California Labor Workforce Development Agency (“LWDA”) under PAGA
18 (the “Settlement”). **This is a cash settlement.** Every Class Member who does not opt out of the
19 Settlement will automatically be mailed an individual settlement payment. However, every Class
20 Member who is also within the PAGA group will be mailed their respective individual settlement
21 payment associated with the PAGA penalty portion of the settlement amount regardless of opt-out
22 status. There is no claims filing process, and Class Members do not have to file a claim to be
23 mailed a payment.

24 As discussed more thoroughly below, the proposed Settlement satisfies all of the criteria
25 for preliminary settlement approval under California law and falls well within the range of proper
26 approval. As such, Plaintiff moves this Court to: (i) provisionally certify the proposed Settlement
27 Class; (ii) provisionally approve James Hawkins and Isandra Fernandez from the law firm of
28 JAMES HAWKINS, APLC as class counsel for Plaintiffs and the Class in this matter; (iii)
provisionally approve named Plaintiffs Jesus Diaz and Hector Garcia as the class representatives;

(iv) appoint Simpluris, Inc. as the settlement administrator; (v) grant preliminary approval of the Stipulation of Class and PAGA Settlement (hereinafter “Settlement Agreement”); (vi) direct distribution of the Notice of Proposed Class Action Settlement on the terms and conditions set forth in the Settlement Agreement; and (vii) schedule a final approval hearing.

II. FACTUAL BACKGROUND

On January 8, 2020, Plaintiff Jesus Diaz initiated this action in the Superior Court for the County of Los Angeles on behalf of himself and all others similarly situated, styled *Jesus Diaz v. Cal Plate, Inc.* Case No. 20STCV00696 (the “Lawsuit”). The Complaint asserts causes of action for; (1) failure to pay lawful wages including overtime wages; (2) failure to provide lawful meal periods or compensation in lieu thereof; (3) failure to provide lawful rest periods or compensation in lieu thereof; (4) failure to pay wages due at termination; (5) knowing and intentional failure to comply with itemized employee wage statement provisions; and (6) violations of the unfair competition law (Bus. & Prof. Code § 17200 *et seq.*) (the “Action”). (See Declaration of James R. Hawkins “Hawkins Decl.” ¶ 2.)

On March 1, 2021, Hector Garcia (“Garcia”) provided notice to the Labor and Workforce Development Agency (“LWDA”) of his intent to pursue Defendant for all civil penalties arising from Defendant’s alleged failure to, inter alia, pay all wages earned including failure to provide proper rest periods and meal breaks and failure to provide accurate wage statements to Plaintiff and other similarly situated aggrieved employees. (Hawkins Decl. ¶ 3.)

On June 9, 2021, Diaz filed a First Amended Complaint, adding Hector Garcia as a named plaintiff and proposed class representative, and included one additional cause of action for violations of the Labor Code Private Attorney General Act. (Hawkins Decl. ¶ 4)

Plaintiffs bring this action pursuant to Labor Code 201, 202, 203, 226, 226.7, 510, 512, 558, 1194, 1198 and California Code of Regulations, Title 8, section 11010 *et seq.* seeking unpaid lawful wages, unpaid rest and meal period compensation, penalties and other equitable relief, and reasonable attorneys’ fees and costs. Pursuant to Business and Professions Code sections 17200 through 17208, Plaintiffs also seek restitution for unpaid wages and claims for civil penalties pursuant to or based on these sections can only be recovered in a PAGA action.

1 Throughout this litigation, Cal Plate has denied Plaintiffs’ allegations and raised defenses
2 to the claims, individually and on a representative basis. (Hawkins Decl. ¶ 5.) Defendant
3 maintains that its employment policies and practices meet the requirements of the Labor Code
4 and applicable Wage Orders. (*Id.*) To date, no motion for class certification has been filed, no
5 class has been certified and the Court has not made any findings that Cal Plate engaged in any
6 wrongdoing or in violation of any state law, rule or regulation, with respect to the issues
7 presented in the litigation. (Hawkins Decl. ¶ 6.)

8 Through discovery, Plaintiffs and Cal Plate have exchanged extensive documents and
9 information related to the claims asserted (Hawkins Decl. ¶ 7.). Defendant has produced
10 thousands of pages of information, including timecard records and wage reports of putative class
11 members. (*Id.*) Defendant also provided Plaintiffs with class data and random samples of time
12 records, wage statements, information regarding the number of non-exempt employees during the
13 relevant time period. (Hawkins Decl. ¶ 8.)

14 After conducting extensive discovery, exchanging relevant information and engaging in
15 numerous discussions regarding the claims alleged, on June 28, 2021, the parties participated in a
16 private mediation with Mediator Michael Young, Esq. (Hawkins Decl. ¶ 9.) During the course of
17 the mediation, the parties exchanged further information and documentation concerning
18 Plaintiffs’ claims and Cal Plate’s defenses thereto, and aggressively advocated for their respective
19 positions. (*Id.*)

20 At the conclusion of the mediation, the parties reached a settlement of this Action for a
21 maximum settlement amount of \$350,000. (Hawkins Decl. ¶ 10.) Following the mediation, the
22 parties exchanged various drafts of the Memorandum of Understanding (“MOU”) (*Id.*) The MOU
23 was executed by the Parties on or about August 19, 2021 (*Id.*). Thereafter, the Parties exchanged
24 multiple drafts of the proposed settlement agreement and class notice documents and engaged in
25 communications regarding the settlement terms (*Id.*) The final terms and provisions of the
26 settlement agreement were approved and executed by all the parties on or about November 19,
27 2021. (Hawkins Decl. ¶ 11; Exhibit A- Settlement Agreement).
28

1 Based on their own respective independent investigations and evaluations and after taking
2 into account the sharply disputed factual and legal issues involved in this matter, the risks
3 attending further prosecution in light of certification issues faced due to the *Brinker Rest. Corp. v.*
4 *Super. Ct.*, (2012) 53 Cal. 4th 1004 (“*Brinker*”) decision, the discovery and investigation
5 conducted to date, Plaintiffs and their counsel are of the opinion that settlement for the
6 consideration and on the terms set forth in the Settlement Agreement is fair, reasonable and
7 adequate and is in the best interests of the named Plaintiffs and Class Members. (Hawkins Decl. ¶
8 12.)

9 III. SUMMARY OF SETTLEMENT TERMS

10 A. Class Members

11 The Parties request the Court certify a class (the “Class”) as follows for the purpose of this
12 Settlement: All persons who are or were employed by Defendant as non-exempt, hourly-paid
13 employees in California from January 8, 2016 through preliminary approval (the “Class
14 Period”). All employees who are part of this Class are referred to as “Class Members”.
15 (Settlement Agreement p.1 ¶ 1.)

16 B. Allocation of Settlement Amount

17 1. In exchange for the releases set forth in this Settlement Agreement, Defendant
18 agrees to pay Three Hundred Fifty Thousand Dollars and Zero Cents (\$350,000.00) (the “Gross
19 Settlement Amount”) in full and complete settlement of this matter, as follows: (Settlement
20 Agreement, p. 5, ¶ 4)

21 2. Within thirty (30) calendar days after the Court enters the Preliminary Approval
22 Order, Defendant will transfer the entire Gross Settlement Amount into a Qualified Settlement
23 Fund (“QSF”) established by the Settlement Administrator, plus an amount sufficient to cover the
24 Employer Taxes on the payments. In the event that the Class Settlement is not granted Final
25 Approval, or the Settlement Agreement does not become Final, any funds deposited into the QSF
26 by Defendant shall be returned within fifteen (15) days of a Court Order or other decision
27 denying final approval of the Settlement Agreement. The term “Final” and “Final Effective
28 Date” means: (i) that the Final Approval Order and Judgment is entered by the Court and there

1 were no timely objections or intervener requests filed after Preliminary Approval, or that any such
2 timely objections and/or interveners have been withdrawn by the date the Court entered the Final
3 Approval Order and Judgment; or, (ii) in the event that one or more timely objections or
4 intervener request(s) has/have been filed after Preliminary Approval and not withdrawn, then
5 upon the passage of the applicable date for an objector or intervener to seek appellate review of
6 the Court's Final Approval Order and Judgment, without a timely appeal having been filed; or,
7 (iii) in the event that a timely appeal of the Court's Final Approval Order and Judgment has been
8 filed, then the Settlement Agreement shall be final when the applicable appellate court has
9 rendered a final decision or opinion affirming the Court's Final Approval Order and Judgment
10 without material modification, and the applicable date for seeking further appellate review has
11 passed, or the date that any such appeal has been either dismissed or withdrawn by the appellant.
12 (Settlement Agreement, p. 5, ¶ 4 A)

13 3. This is not a "claims-made" settlement. Class Members need not make a claim to
14 share in the settlement. This is a common fund, non-reversionary settlement. (Settlement
15 Agreement, p. 5, ¶ 4 B) The Gross Settlement Amount includes:

16 2. All payments to Settlement Class Members and their share of payroll tax
17 withholdings (Settlement Agreement, p. 6, ¶ B (1)). Subject to Court approval, all reasonable
18 costs of the Settlement Administrator associated with the administration of the Settlement
19 ("Settlement Administration Costs"), which are anticipated to be no greater than Nine Thousand
20 Dollars and Zero Cents (\$9,000.00) (Settlement Agreement p. 6, ¶ B (2))

21 3. Subject to Court approval, up to \$6,000 each shall be paid to Plaintiffs Jesus Diaz
22 and Hector Garcia for the Plaintiff's Enhancement Payment in recognition of Plaintiffs' general
23 release of claims including a Civil Code section 1542 waiver, contributions to the Lawsuit,
24 creating the Gross Settlement Amount, and service to the Class. In the event that the Court
25 reduces or does not approve the requested Enhancement Payment, the Settlement Agreement
26 remains in full force and effect, Plaintiffs shall not have the right to revoke the Settlement
27 Agreement for that reason, it shall remain binding, and any unapproved amount shall be part of
28 the Net Settlement Fund; (Settlement Agreement p. 6, ¶ B (3))

1 4. Subject to Court approval, the law firm of James Hawkins, APLC shall be paid up
2 to thirty-three and one-third (33.33) percent (i.e., \$117,000.00) of the Gross Settlement Amount
3 in attorneys' fees to Class Counsel and up to Fifteen Thousand Dollars and Zero Cents (\$15,000)
4 for reimbursement of litigation costs and expenses to Class Counsel related to the Lawsuit
5 (together, "Attorneys' Fees and Costs"), including all such fees and costs incurred in
6 documenting the Settlement, securing the Court's approval of the Settlement and the amended
7 complaint, and administering the Settlement, as supported by declaration. In the event that the
8 Court reduces or does not approve Class Counsel's requested fees and costs, the Settlement
9 Agreement remains in full force and effect, Plaintiffs shall not have the right to revoke the
10 Settlement Agreement for that reason, it shall remain binding, and any unapproved amount shall
11 be part of the Net Settlement Fund (although Plaintiffs shall retain the right to appeal any
12 reduction in attorneys' fees or costs awarded); (Settlement Agreement p. 6, ¶ B (4))

13 5. Subject to Court approval, Fifteen Thousand Dollars and Zero Cents (\$15,000.00)
14 of the Gross Settlement Amount that shall be set aside by the Parties as PAGA civil penalties
15 ("PAGA Payment"). Per California Labor Code § 2699(i), seventy-five percent (75%) of such
16 penalties, or Eleven Thousand Two Hundred Fifty Dollars and Zero Cents (\$11,250.00) will be
17 payable to the Labor & Workforce Development Agency ("LWDA Payment"), and the remaining
18 twenty-five percent (25%), or Three Thousand Seven Hundred Fifty Dollars and Zero Cents
19 (\$3,750.00) ("Employee PAGA Amount"), will be part of distributed to Aggrieved Employees on
20 a pro rata basis. (Settlement Agreement p. 6 ¶ B (5)) Plaintiffs will take all actions required by
21 California Labor Code § 2699.

22 6. Under no circumstances will Defendant be required to pay any additional monies
23 in order to receive the release of claims as set forth herein, with the exception of Defendant's
24 required FICA, FUTA, and other payroll tax payments resulting from payment of the Individual
25 Settlement Shares to Settlement Class Members ("Employer Taxes"), which shall be paid
26 separately and in addition to the Gross Settlement Amount. (Settlement Agreement pp. 6-7 ¶ B
27 (6))

28 7. This settlement shall remain confidential until the Motion for Preliminary
Approval of Class Action Settlement ("Motion for Preliminary Approval") is filed with the Court.

1 Until that time, Plaintiffs and Class Counsel expressly agree that they shall not reveal, disclose,
2 divulge, advertise, post on the Internet or social media, or discuss, directly or indirectly, with any
3 person or any entity, in public or in private, the manner in which the Lawsuit has been resolved,
4 the nature of the Lawsuit, or any terms of the Settlement Agreement whatsoever. Plaintiffs and
5 Class Counsel further expressly agree that they will not publicize this settlement or Settlement
6 Agreement in any manner, even anonymously, including, without limitation, reporting to Jury
7 Verdicts or any other reporting services. After the Motion for Preliminary Approval is filed with
8 the Court, Plaintiffs and Class Counsel expressly agree not to publicize the name of the
9 Defendant and settlement amount in any manner and shall refrain from posting Defendant's name
10 on Class Counsel's website or using Defendant's name to advertise any alleged recovery or
11 settlement agreement by Class Counsel. Nothing in this Settlement Agreement shall restrict Class
12 Counsel from disclosing and including all publicly available information regarding this case and
13 the Settlement in any documents filed with any court and/or judicial submissions (e.g., CV's,
14 declarations regarding adequacy or experience, etc.) (Settlement Agreement p.7, ¶ C)

15 8. Settlement Class Members will receive a pro rata share of the Net Settlement Fund
16 ("Individual Settlement Share") based on the pro rata number of workweeks that each of them
17 worked for Defendant as an hourly-paid or non-exempt employee during the Class Period ("Class
18 Workweeks") and Aggrieved Employees will receive a pro rata share of the Employee PAGA
19 Amount ("Individual PAGA Payment") based on the number of pay periods that each of them
20 worked for Defendant as an hourly-paid or non-exempt employee during the PAGA Period
21 ("PAGA Pay Periods"). Class Workweeks and PAGA Pay Periods will be calculated based on
22 Defendant's payroll records by determining the number of weeks during which the Class Member
23 or Aggrieved Employee worked at least one (1) day during the workweek and/or pay period.
24 Class Members and Aggrieved Employees are not required to submit a claim form to receive their
25 Individual Settlement Shares or Individual PAGA Shares for which they may be eligible.
(Settlement Agreement p.7, ¶ (5))

26 8. The Net Settlement Amount and Employee PAGA Amount will be distributed as
27 follows: (*Id*) The Settlement Administrator shall first deduct from the Gross Settlement Amount
28 the amounts approved by the Court for Settlement Administration Costs to the Settlement

1 Administrator, Enhancement Payment to Plaintiffs, Attorneys' Fees and Costs to Class Counsel,
2 and the PAGA Payment. The remaining amount shall be known as the "Net Settlement Fund."
3 From the Net Settlement Fund, the Settlement Administrator will calculate each Settlement Class
4 Member's Individual Settlement Share based on the following formula: the Net Settlement Fund
5 will be multiplied by a fraction, the numerator of which is the Settlement Class Member's number
6 of Class Workweeks, and the denominator of which is the total Class Workweeks of all
7 Settlement Class Members. (Settlement Agreement pp.7-8 ¶ A (1)(2))

8 9. For purposes of calculating applicable taxes and withholdings for the Settlement
9 Class Members, thirty-three and one-third percent (33.33%) of each Individual Settlement Share
10 shall be designated as wages subject to W-2 reporting and normal payroll withholdings; and
11 thirty-three and one-third percent (33.33%) of each Individual Settlement Share shall be
12 designated as penalties/other payments and thirty-three and one-third percent (33.33%) of each
13 Individual Settlement Share shall be designated as interest, subject to IRS Form 1099 reporting
14 with no withholdings. Notwithstanding the treatment of the payments to each Settlement Class
15 Member above, none of the payments called for by this Settlement Agreement, including the
16 wage portion, are to be treated as earnings, wages, pay or compensation for any purpose of any
17 applicable benefit or retirement plan, unless required by such plans. Defendant shall not be
18 responsible for making any employer contributions to any fringe benefit plan for any amounts
19 paid to Class Members under this Settlement Agreement. Defendant shall have no responsibility
20 for the tax treatment of the non-wage components of the settlement payments. The net payment
21 of the Individual Settlement Share to a Settlement Class Member is his or her "Individual
22 Settlement Payment.". (Settlement Agreement p.8, ¶ A (3)).

23 10. From the Employee PAGA Amount, the Settlement Administrator will calculate
24 each Aggrieved Employee's Individual PAGA Payment based on the following formula: the
25 Employee PAGA Payment will be multiplied by a fraction, the numerator of which is the
26 Aggrieved Employee's number of PAGA Pay Periods, and the denominator of which is the total
27 PAGA Pay Periods of all Aggrieved Employees. Each Individual PAGA Payment shall be
28 allocated as 100% non-wage penalties and subject to IRS Form 1099 reporting. The Settlement

1 Administrator will not undertake any payroll tax deductions or withholdings in connection with
2 the Individual PAGA Payments. (Settlement Agreement p.8 ¶ B (1) (2))

3 **C. Released Claims Summary**

4 1) Class Release by Settlement Class Members

5 The “Class Settlement” means the settlement and resolution of the Class Released Claims,
6 which will be binding on all Settlement Class Members. “Settlement Class Member” means a
7 Class Member who does not validly opt out of the Class Settlement (Settlement Agreement p.2, ¶
8 3 A (1) (2)) “Released Parties” means (1) Defendant; (2) Defendant’s respective past, present and
9 future parent corporations, affiliates, affiliates’ companies, subsidiaries, divisions, d/b/a’s,
10 predecessors, insurers, successors, franchisees, franchisors, assigns, principals, heirs, their current
11 and former employees, accountants, auditors, attorneys, consultants, officers, managers,
12 members, partners, directors, shareholders, agents, both individually and in their business
13 capacities of any of the following: and (3) any individual or entity which could be jointly liable
14 with any of the foregoing (collectively the “Released Parties” and each a “Released Party”)
15 (Settlement Agreement p.2, ¶ 3 A (3)). “Class Released Claims” means any and all claims, debts,
16 liabilities, demands, obligations, guarantees, costs, expenses, attorneys’ fees, damages, or causes
17 of action contingent or accrued for, that are pleaded, or that could have been pleaded, based on
18 the facts and claims alleged in the Lawsuit, including any claims for: (1) failure to pay lawful
19 wages including overtime wages; (2) failure to provide lawful meal periods or compensation in
20 lieu thereof; (3) failure to provide rest periods or compensation in lieu thereof; (4) failure to
21 timely pay wages due at termination; (5) knowing and intentional failure to comply with itemized
22 employee wage statement provisions; (6) violation of unfair competition law; and (7) Labor Code
23 Private Attorney General Act, predicated on any of the violations of the California Labor Code
24 and applicable IWC Wage Order alleged in the Lawsuit, including but not limited to
25 compensatory damages; economic and/or special damages; premium wages; premium pay;
26 penalties; attorneys’ fees; interest; and litigation costs. (Settlement Agreement p.2, ¶ 3 A (4)).

27 As of the date on which the Gross Settlement Amount has been fully funded and the Final
28 Effective Date, in exchange for the consideration set forth in this Settlement Agreement, Plaintiffs

1 and all Settlement Class Members, on behalf of themselves, and on behalf of all those who claim
2 by and through them, or in their stead, including, but not limited to agents, attorneys,
3 representatives, predecessors, successors and assigns will forever release, acquit, and discharge,
4 and covenant not to sue Released Parties from Class Released Claims. (Settlement Agreement
5 p.3, ¶ A (5)).

6 The release here is a common type of release found in class action settlements. This type
7 of release has been approved in both state and federal courts. (*Villacres v. ABM Industries, Inc.*
8 (2010) 189 Cal.App.4th 562, 586 [“the weight of authority establishes that ... a court may release
9 not only those claims alleged in the complaint and before the court, but also claims which ‘could
10 have been alleged by reason of or in connection with any matter or fact set forth or referred to in’
11 the complaint”]; *Hesse v. Sprint Corp.* (9th Cir. 2009) 598 F.3d 581, 591 [“a state court’s
12 approval of a settlement agreement could release not only the state law fraudulent billing claims
13 before it, but also federal RICO claims arising from the same billing practices”].)

14 Likewise, it is perfectly permissible for releases to release more than simply the named
15 defendant in the class action. (See, e.g., *Villacres*, 189 Cal.App.4th at p. 573 [enforcing a class
16 action settlement that released the named defendant and “its affiliates, subsidiaries, parent,
17 successors-in-interest, and assigns, and all of their present, former and future offices, directors,
18 shareholders, employees, agents, attorneys, insurers, and representatives ...”]; *Reyn’s Pasta*
19 *Bella, LLC v. Visa USA, Inc.* (9th Cir. 2006) 442 F.3d 741, 748 [“A class settlement may also
20 release factually related claims against parties not named as defendants”].) Indeed, a class action
21 settlement would have little value to the settling defendant if, minutes after the settlement
22 agreement obtained final court approval, the plaintiff could simply turn around and sue the
23 defendant’s officers, directors, employees or agents for the same alleged wrongful acts. (*Wal-*
24 *Mart Stores, Inc. v. Visa U.S.A. Inc.* (2nd Cir. 2005) 396 F.3d 96, 106 [“Broad class action
25 settlements are common, since defendants and their cohorts would otherwise face nearly limitless
liability from related lawsuits”].)

26 2) PAGA Release by Aggrieved Employees

27 “PAGA Settlement” means the settlement and resolution of the PAGA Released Claims,
28 which will be binding on all Aggrieved Employees. “PAGA Released Claims” means any and

1 all claims for civil penalties under California Labor section 2698, et seq. (California Labor Code
2 Private Attorneys General Act of 2004) arising during the PAGA Period, for Defendant's alleged
3 failure to, inter alia, pay all wages earned including failure to provide proper rest periods and
4 meal breaks and failure to provide accurate wage statements to Plaintiff and other similarly
5 situated aggrieved employees in violation of California Labor Code sections 201, 202, 203, 226,
6 226.7, 510, and any other applicable IWC Wage Orders, that were or could have been alleged
7 based on the facts alleged in the Lawsuit and in Garcia's PAGA notice submitted to the LWDA
8 on March 1, 2021. As of the date on which the Gross Settlement Amount has been fully funded
9 and the Final Effective Date, in exchange for the consideration set forth in this Settlement
10 Agreement, Plaintiffs and all Aggrieved Employees will release the Released Parties from all
11 PAGA Released Claims. (Settlement Agreement p. 3, ¶ B (1-2))

12 3) Representative Plaintiff's General Release

13 As of the date on which the Gross Settlement Amount has been fully funded and the Final
14 Effective Date, Plaintiffs will, for themselves, and for their heirs, successors, predecessors,
15 attorneys, agents, representatives and assigns, forever release the Released Parties from any and
16 all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies,
17 damages, actions, causes of action, suits, rights, demands, costs, losses, debts, and expenses
18 (including back wages, restitution, penalties, liquidated damages, and attorneys' fees and costs
19 actually incurred) of any nature whatsoever, from the beginning of time through the date on
20 which the Gross Settlement Amount has been fully funded, known or unknown, suspected or
21 unsuspected, including but not limited to all claims arising out of, based upon, or relating to their
22 employment with Defendant or the remuneration for such employment. Without limiting the
23 generality of the foregoing, Plaintiffs expressly release all claims which were or could have been
24 raised in the Lawsuit and all claims or rights arising out of alleged violations of any contracts,
25 express or implied (including but not limited to any contract of employment); any contract or
26 covenant of good faith or fair dealing (express or implied); any tort, including negligence, fraud,
27 misrepresentation under California Labor Code 970, negligent infliction of emotional distress,
28 intentional infliction of emotional distress, and defamation; any "retaliation" claims; any claims
relating to any breach of public policy; any legal restrictions on Defendant's right to discharge

employees or refuse to hire applicants; and any federal, state, or other governmental statute, regulation, or ordinance, including, without limitation: (1) Title VII of the Civil Rights Act of 1964 (race, color, religion, sex, and national origin discrimination or harassment, including retaliation for reporting discrimination or harassment); (2) 42 U.S.C. § 1981 (discrimination); (3) sections 503 and 504 of the Rehabilitation Act of 1973 (disability discrimination); (4) Equal Pay Act, 29 U.S.C. § 209(4)(1) (equal pay); (5) Americans with Disabilities Act, 42 U.S.C. § 12100 et seq. (disability discrimination); (6) Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. (family/medical leave); (7) California Fair Employment and Housing Act, Cal. Gov't Code § 12900, et seq. (discrimination or harassment in employment and/or housing, including discrimination or harassment based on race, religious creed, color, national origin, ancestry, physical or mental disability, marital status, sex (including pregnancy), sexual orientation, genetic, or age, including retaliation for reporting discrimination or harassment); (8) California Family Rights Act, Cal. Gov't Code § 12945.1, et seq. (family/medical leave); (9) California Labor Code or any Industrial Welfare Commission Wage Order; (10) Executive Order 11246 (race, color, religion, sex, and national origin discrimination or harassment); (12) Executive Order 11141 (age discrimination); and (11) Employee Retirement Income Security Act, 29 U.S.C. § 1000, et seq. (employee benefits). (Settlement Agreement pp.3-4, ¶ C)

4) Plaintiffs' Waiver of Section 1542 With Respect to Released Claims.

Plaintiffs agree there is a risk that each and every injury they may have allegedly or actually suffered by reason of the Released Parties' relationship with them might not now be known, and there is further risk that said injuries, whether known or unknown at the date of this Settlement Agreement, might possibly become progressively worse, and that as a result thereof further damages may be sustained by them. Nevertheless, Plaintiffs desire to forever and fully release and discharge the Released Parties of all Class Released Claims and PAGA Released Claims, and understand that as of the date on which the Gross Settlement Amount has been fully funded and the Final Effective Date, by the execution of this Settlement Agreement no further claims for any of the Class Released Claims or PAGA Released Claims that existed at the time of the execution of this Settlement Agreement may ever be asserted by them. As of the date on which the Gross Settlement Amount has been fully funded, Plaintiffs expressly waive and

1 relinquish all rights and benefits afforded by section 1542 of the Civil Code of the State of
2 California with respect to the Class Released Claims and PAGA Released Claims, and do so
3 understanding and acknowledging the significance of such specific waiver of section 1542.
4 (Settlement Agreement p. 4, ¶ D)

5 Section 1542 of the Civil Code of the State of California states as follows: A general
6 release does not extend to claims that the creditor or releasing party does not know or suspect to
7 exist in his or her favor at the time of executing the release and that, if known by him or her,
8 would have materially affected his or her settlement with the debtor or released party. Thus,
9 subject to and in accordance with this Settlement Agreement, even if Plaintiffs may hereafter
10 discover facts in addition to or different from those they now know or believe to be true, Plaintiffs
11 shall be deemed to have fully, finally, and forever settled and released any and all Class Released
12 Claims and PAGA Released Claims against the Released Parties, whether known or unknown,
13 suspected or unsuspected, contingent or non-contingent, that now exist, upon any theory of law or
14 equity, including without limitation, conduct which is negligent, intentional, with or without
15 malice, or a breach of any duty, law, or rule, without regard to the subsequent discovery or
16 existence of such different or additional facts. (Settlement Agreement pp. 4-5, ¶ D)

17 **D. Notice to Class Members**

18 Following Preliminary Approval, the Class shall be notified as follows: Subject to Court
19 approval of the Settlement, the Class Notice shall be provided to Class Members in both English
20 and Spanish. Since individuals who are Aggrieved Employees are also included within the group
21 of individuals who are considered to be Class Members, the Class Notice will also contain
22 information about the PAGA Settlement for Aggrieved Employees. (Settlement Agreement p. 11,
23 ¶ 10 A) Within twenty-one (21) calendar days after entry of the Preliminary Approval Order,
24 Defendant will provide the Settlement Administrator with a data spreadsheet including the names,
25 last known addresses, telephone numbers (if available), and Social Security numbers (in
26 password-protected or encrypted electronic format) of Class Members, as well as the number of
27 Class Workweeks of each Class Member and the number of PAGA Pay Periods of each
28 Aggrieved Employee (“Class List”). (Settlement Agreement p. 11, ¶ 10 B) Within ten (10)
business days from receipt of the Class List, the Settlement Administrator shall: (i) run the names

1 of all Class Members through the National Change of Address (“NCOA”) database to determine
2 any updated addresses for Class Members; (ii) update the addresses of any Class Member for
3 whom an updated address was found through the NCOA search; (iii) calculate initial estimates of
4 Class Members’ Individual Settlement Shares and Aggrieved Employees’ Individual PAGA
5 Payments; and (iv) mail the Class Notice to each Class Member at his or her last known address
6 or at the updated address found through the NCOA search, and retain proof of mailing
7 (Settlement Agreement p. 11, ¶ 10 C).

8 The Settlement Administrator shall use its best professional efforts, including utilizing a
9 “skip trace,” to track any Class Member’s mailing returned as undeliverable, and will re-send the
10 Class Notice promptly upon identifying updated mailing addresses through such efforts. The
11 address identified by the Settlement Administrator as the current mailing address shall be
12 presumed to be the best mailing address for each Class Member. (Settlement Agreement p. 11, ¶
13 10 D)

14 Any Class Notices returned to the Settlement Administrator as non-delivered on or before
15 the Response Deadline (defined below) shall be re-mailed to the forwarding address affixed
16 thereto. If no forwarding address is provided, the Settlement Administrator shall make reasonable
17 efforts, including utilizing a “skip trace,” to obtain an updated mailing address within five (5)
18 business days of receiving the returned Class Notice. If an updated mailing address is identified,
19 the Settlement Administrator shall resend the Class Notice to the Class Member immediately, and
20 in any event within three (3) business days of obtaining the updated address. Class Members to
21 whom Class Notices are re-sent after having been returned as undeliverable to the Settlement
22 Administrator shall have fourteen (14) days from the postmarked date of re-mailing, or until the
23 Response Deadline, whichever is later, to submit a Request for Exclusion, objection to the Class
24 Settlement, or dispute regarding Workweeks and Pay Periods to the Settlement Administrator.
(Settlement Agreement p. 11, ¶ 10 E)

25 All Class Members will automatically participate in the Class Settlement unless they
26 affirmatively opt out by submitting a timely and valid written request to be excluded from the
27 Class Settlement (“Request for Exclusion”). Any Class Member who wishes to opt out of the
28 Class Settlement must complete and mail a valid Request for Exclusion to the Settlement

1 Administrator within forty five (45) calendar days of the date of the initial mailing of the Class
2 Notice (the “Response Deadline”) (Settlement Agreement p. 11, ¶ 10 F)

3 **IV. CALIFORNIA RULES OF COURT § 3.769 APPROVAL PROCESS**

4 A class action may not be dismissed, compromised or settled without approval of the
5 Court. (*Wershba v. Apple Computer, Inc.*, (2001) 91 Cal. App. 4th 224, 240; Cal. Rules of Court,
6 Rule 3.769.) The approval or rejection of the proposed settlement is committed to this Court’s
7 sound discretion. (*Wershba*, 91 Cal. App. 4th at 234-235.) A court’s decision to approve a class
8 action settlement may be reversed only upon a strong showing of “clear abuse of discretion.”
9 (*Class Plaintiffs v. City of Seattle*, (9th Cir. 1992) 955 F.2d 1268, 1276.) The purpose of the
10 court’s preliminary evaluation of the proposed settlement is to determine whether it is within the
11 “range of reasonableness” and thus, whether the notice to the class is appropriate. (NEWBERG,
12 §11.25 at 11-36-37.)

13 According to this procedure, Plaintiffs request this Court to provisionally certify the
14 proposed class for settlement purposes – conditional upon final approval of the settlement. The
15 practical purpose of provisional class certification is to facilitate distribution to all Class Members
16 of notice of the terms of the proposed Settlement and the date and time of the final approving
17 hearing. Additionally, Plaintiffs request this Court to preliminarily approve the Settlement as fair,
adequate and reasonable as set forth below.

18 **V. PRELIMINARY APPROVAL OF SETTLEMENT IS APPROPRIATE**

19 The law favors settlement, particularly in class actions and other complex cases in which
20 substantial resources can be conserved by avoiding the time, cost and rigors of formal litigation.
21 (*City of Seattle* 955 F.2d at 1276; *Potter v. Pacific Coast Lumber Company*, (1951) 37 Cal. 2d.
22 592, 602-603.; 4 NEWBERG § 11.41.) To grant preliminary approval of this class action
23 settlement, the Court need find only that the settlement falls within the “range of reasonableness.”
24 (*North County Contractor’s Ass. Inc. v. Touchstone Ins. Svcs.*, (1994) 27 Cal. App. 4th 1085,
25 1089-1090.) In determining whether a class settlement is fair, adequate and reasonable, courts
26 must consider the following relevant factors: the strength of the plaintiff’s case, the risk, expense,
27 complexity and likely duration of further litigation, the risk of maintaining class action status
28 through trial, the amount of offered settlement, the extent of discovery completed and the range of

1 the proceedings, and the experience and views of counsel. (*Dunk v. Ford Motor Co.*, (1996) 48
2 Cal. App. 4th 1794, 1801; *Clark v. American Residential Services, LLC*, (2009) 175 Cal. App.
3 4th. 785,799.) The list of factors is not exclusive and the court is free to engage in a balancing and
4 weighing of the factors depending on the circumstances of each case.” (*Clark*, 175 Cal. App. 4th
5 at 799; *Wershba*, 91 Cal. App. 4th at 245.)

6 Furthermore, courts must give “proper deference to the private consensual decision of the
7 parties,” since “the court’s intrusion upon what is otherwise a private consensual agreement
8 negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a
9 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
10 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and
11 adequate to all concerned.” (*Hanlon v. Chrysler Corp.*, (9th Cir. 1998), 150 F.3d 1011, 1027.)

12 **A. The Terms of the Proposed Settlement are Fair**

13 A preliminary review of the terms of the Settlement Agreement provides no reason to
14 doubt its fairness. A presumption of fairness exists where: 1) the settlement is reached through
15 arms-length negotiations; 2) investigation and discovery are sufficient to allow counsel and the
16 court to act intelligently; 3) counsel is experienced in similar litigation; and 4) the percentage of
17 objectors is small. (*Dunk v. Ford Motor Co.*, *supra*, at 1802.) The first three of these factors apply
18 at the preliminary approval stage; the percentage of objectors is determinable only at the final
19 approval stage.

20 1. The Settlement Was Reached Through Extensive Arm’s Length Bargaining and
21 Based on the Recommendation Proposed by the Mediator

22 As already discussed herein, the Parties have conducted themselves in informed, good
23 faith arm's-length negotiations after exchanging extensive information about the claims and
24 defenses of this lawsuit and engaging in pre-mediation and post mediation discussions aimed at
25 settling their dispute. In attempts to settle this lawsuit, the Parties participated in a full day
26 mediation with Mediator Michael Young, Esq. (Hawkins Decl. ¶ 9.) In sum, armed with all of the
27 relevant information and with the help of an experienced mediator, counsel for the parties
28 participated in lengthy, serious and informed negotiations which has resulted in the proposed
Settlement Agreement that is now placed before this Court.

1 2. Investigation and Discovery Were Sufficient For the Parties to Evaluate the Risks
2 Intelligently

3 Plaintiffs have conducted significant investigation of the facts and law both before and
4 after the Action was filed. Plaintiffs' counsel reviewed voluminous supporting documents
5 provided by Defendant through discovery and in exchanges of information in preparation for
6 mediation. (Hawkins Decl. ¶¶ 6-9).

7 3. Plaintiff's Counsel is Experienced in Similar Litigation

8 Moreover, counsel for Plaintiffs has represented, mediated and settled other employee
9 class actions in wage and hour litigation and have knowledge of the strengths and weaknesses of
10 the claims against Cal Plate and the benefits of the proposed Settlement under the circumstances
11 of the case. (Hawkins Decl. ¶ 13, 14).

12 **B. The Settlement Provides for Reasonable Compensation to Class Members**

13 Even without the presumption of fairness and reasonableness, the Settlement clearly is
14 within the range of reasonableness. The predominant claims in this action arise from alleged
15 violations of California law with respect to meal breaks. Specifically, Plaintiffs allege that due to
16 the work load requirements, they and class members were frequently not provided a minimum,
17 uninterrupted 30 minutes meal break before the end of the fifth hour of their work shift.
18 (Hawkins Decl. ¶ 15.) Plaintiffs also allege that they and Class Members were not provided a
19 second 30 minute meal period when they worked shifts in excess of 10 hours. (*Id.*) Similarly,
20 with respect to the rest break claim, Plaintiffs allege that due to the work load requirements, they
21 and class members were unable to take a minimum ten minute rest break for every four hours or
22 major fraction thereof worked during their shifts. (Hawkins Decl. ¶ 16.)

23 Cal Plate denies Plaintiffs' allegations and maintains that class members were provided
24 with the opportunity to take all meal and rest periods to which they were entitled. Cal Plate also
25 maintained that Plaintiffs' claims were improper for class treatment. (Hawkins Decl. ¶ 17.)

26 Based on documents and information produced by Defendant in discovery, in preparation
27 for mediation and during settlement negotiations, Plaintiffs' counsel estimated a maximum
28 potential liability between \$1,241,234 to \$423,000 that may be owed to the putative class,
assuming Plaintiffs and the Class were able to obtain an order certifying the class and were also

1 able to prove their claims. (Hawkins Decl. ¶ 18.) At the time of mediation the class consisted of
2 approximately one hundred fifteen (115) Class Members. The estimated number of workweeks at
3 issue for the class period are 19,000 and the average hourly rate of pay is approximately \$18.89.
4 (Hawkins Decl. ¶ 19.)

5 a. Meal Period Claim

6 The meal period violation claim is based primarily on Cal Plate's alleged failure to
7 provide an uninterrupted 30-minute meal break by the end of the fifth hour, and were not
8 compensated one hour of pay at their regular rate of compensation for each workday that a meal
9 period was not lawfully provided. As discussed herein, Cal Plate disputes this claim and contends
10 it provided compliant meal breaks. The maximum estimated liability for the meal break claim,
11 based on a 100% violation is \$1,120,177 (59,300 shifts x \$18.89) which assumes a meal break
12 violation during every work shift. However, this is based upon Plaintiffs' review of the
13 documents and information provided in anticipation of mediation, including a random sample of
14 time records, and taking into consideration the nature of the claim, Defendant's defenses and
15 certification issues faced due to *Brinker*, for purposes of settlement, the meal break claim was
16 valued between \$448,071 (40%) and \$224,035 (20%).

17 b. Rest Period Claim

18 The rest period violation claim is primarily based on allegations that, due to the work load
19 requirements, Plaintiffs and Class Members were not provided compliant 10 minute rest period
20 during their work shifts. Cal Plate disputes Plaintiffs' rest break claim and contends that class
21 members were allowed to take ten minute rest periods and regularly took such breaks. Taking into
22 consideration the nature of the claim, Defendant's defenses and certification issues faced due to
23 *Brinker*, for purposes of settlement, the rest break claim was valued between \$224,035 (20%)
and \$112,018 (10%).

24 c. Lab. Code § 226 Claim (failure to provide accurate itemized wage statements)

25 Under Lab. Code § 226(e), an employee suffering "injury as a result of a knowing and
26 intentional failure by an employer" to provide accurate wage statements is entitled to \$50 for the
27 initial violation and \$100 for each subsequent violation up to \$4,000. Cal Plate denies that it
28 provided inaccurate wage statements. Further, Cal Plate argues that, if any wage statements were

1 in fact inaccurate, they did not “knowingly and intentionally” fail to provide accurate statements
2 and that Plaintiffs and the class did not suffer any “injury” from such inaccurate wage statements.
3 For purposes of settlement negotiations, said claim was valued between \$160,940 (40%) and \$0.

4 d. Failure to Pay Lawful Wages Claims

5 Plaintiffs’ claim for failure to pay wages owed is based on allegations that they and Class
6 Members worked off the clock to complete certain tasks for which they did not receive
7 compensation. This claim would be difficult to certify given the predominance of the
8 individualized inquiry as to the whether and to what extent, each class member performed work
9 off the clock. As such, it was valued between \$ 112,018 (10%) and \$0 for purposes of settlement.

10 e. Lab. Code § 203 Claim (failure to timely pay wages)

11 With respect to Lab. Code §203 claim, there were an estimated 42 former class members
12 to whom this claim applied and an estimated maximum potential liability of \$402,350. However,
13 faced with the willful intent requirement of the enabling statute along with Defendant’s position
14 that Lab. Code §203 does not apply to rest and meal break claims, for settlement purposes this
15 claim was valued between \$80,470 (20%) and \$0.

16 f. Bus. & Prof. Code § 17200 Claim

17 The only remedies available under the unfair competition law (“UCL”) Business and
18 Professions Code Section 17200 et seq. are restitution and injunction, as opposed to damages
19 *Clark v. Superior Court*, (2010) 50 Cal. 4th 605, 610. The UCL provides that “[t]he court may
20 make such orders or judgments ... as may be necessary to restore to any person in interest any
21 money or property, real or personal, which may have been acquired by means of such unfair
22 competition.” (Bus. & Prof. Code, § 17203.) Restitution under the UCL includes “earned wages.”
23 *Cortez v. Purolator Air Filtration Prods. Co.*, (2000) 23 Cal. 4th 163, 177-78.

24 Restitution under the UCL is not available for all violations of the Labor Code. See
25 *Pineda v. Bank of Am., N.A.*, (2010) 50 Cal. 4th 1389, 1401-02. In *Pineda*, the California
26 Supreme Court held Labor Code § 203 is “not designed to compensate employees for work
27 performed [but] it is intended to encourage employers to pay final wages on time, and to punish
28 employers who fail to do so.” *Id.* Like Labor Code section 203, section 226 for wage statement

violations is also intended to “punish” the employer and is not an action brought to recover wages. *See. Gomez v. Jacobo Farm Labor Contractor, Inc.*, (2019) 334 FRD. 234, 267-268.

Here, Plaintiffs’ UCL claim is solely premised on the failure to pay lawful wages and premium wages claims discussed above. Class Counsel assigned a zero dollar value to the UCL claim because it does not provide any additional value in this Action other than to increase the statute of limitations to four years for the underlying claims. Those claims are valued and analyzed above based on the four year statute of limitations provided by the UCL. However, the UCL claim in and of itself does not provide any additional damages. Therefore, there is no additional or separate monetary value that this statute provides based on the facts of this Action.

g. Lab. Code § 2699 (PAGA Claim)

Plaintiffs’ claims under PAGA are primarily predicated on or derivative of the rest and meal break claims. The estimate maximum PAGA penalty was calculated as \$215,700. This figure attributes a \$100 penalty to each of the estimated 2,157 pay periods in scope during the PAGA period. The figure also assumes that there is a 100% violation rate during the PAGA period, such that every single pay period in question involved at least one Labor Code violation, despite disputes regarding Defendant’s liability. However, PAGA claims under the facts and circumstance of this case may result in no award or at best a very minimal award by the trial court. See specifically §2699(e)(2) which states in its pertinent part:

“... a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”

For instance, in *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no civil penalties, even when Labor Code violations are established. See *Makabi v. Gedalia*, 2016 Cal. App. Unpub. 1489, *5 7 (2nd Dist. Ct. of App. Mar. 6, 2016) (no PAGA penalties were awarded by the Los Angeles County

1 Superior Court) (unpublished decision); In re Taco Bell Wage & Hour Actions, 2016 U.S. Dist.
2 LEXIS 48557, *40 43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

3 In order to recover any PAGA penalties, Plaintiffs would be required at trial to prove each
4 of the underlying Labor Code violations. See Cardenas v. McLane Foodservice, Inc., 2011 U.S.
5 Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff
6 cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of
7 the Labor Code by the defendant."). Here, Plaintiff would need to prove that each PAGA
8 Aggrieved Employee suffered all violations for each pay period the employee worked. As
9 discussed herein, the nature of the PAGA based claims (i.e. rest break, meal period, wage
10 statement, failure to pay all wages owed and to timely pay wages) and Defendant's asserted
11 defenses thereto present a risk that some or all of the PAGA penalties sought may not be
12 awarded. Given the nature of these claims, as analyzed above, Class Counsel believes it to be
13 likely that if there would be any award it would be a minimal amount. Therefore, the amount of
14 \$15,000 (which has been reserved for the PAGA claim) is both fair and reasonable.

15 Through their counsel, Plaintiffs took into consideration the significant risks that class
16 certification could be denied on the central claim, or that a merits decision on the central claim
17 would not favor the Class. Plaintiffs have considered the expense and length of continued
18 proceedings necessary to continue the Action against Cal Plate through trial and any possible
19 appeals. Plaintiffs are also aware of the burdens of proof necessary to establish liability for the
20 claims asserted in the Action, Cal Plate's defenses thereto, and the difficulties in establishing
21 Plaintiff's damages. (Hawkins Decl. ¶ 20.)

22 The proposed Settlement requires Defendant to pay each Class Member who does not opt
23 out a portion of the Net Settlement Amount as specifically set forth in the Settlement Agreement.
24 (Hawkins Decl. ¶ 21.) The amount to be paid to the Class is undoubtedly fair, adequate and
25 reasonable especially in light of the significant risk to Plaintiffs and Class Members in continuing
26 with the litigation and not prevailing on class certification or at trial. (*Id.*)

27 For all the foregoing reasons, the proposed Settlement Agreement is fair, adequate and
28 reasonable, and is in the best interests of the Class Members.

1 **C. The Class Representative Payment and Class Counsel Fees Are Reasonable**
2 **and Should be Awarded**

3 The Settlement Agreement provides for an award to be paid to the Class Representatives.
4 The primary purpose is to provide Plaintiffs Jesus Diaz and Hector Garcia an enhancement
5 payment, taking into consideration the risks, time, effort and expenses incurred by them in
6 coming forward to provide invaluable information and negotiate and litigate this matter on behalf
7 of all Class Members. (Hawkins Decl. ¶ 22.) Plaintiffs have actively participated in this litigation
8 by providing significant supporting documents and information and assisting counsel in
9 developing information necessary to litigate and settle this case which has resulted in a favorable
10 settlement for the putative Class Members. (*Id.*) Thus, the payment of \$6,000.00 to the each of the
11 Class Representative represents a small portion of the aggregate settlement amount and should be
12 awarded.

13 Further, as will be discussed in more detail in Plaintiffs' motion for final approval of the
14 Settlement, class counsel fees in the amount of \$117,000 is reasonable within California's
15 standard benchmark and well within the range customarily approved by the California courts in
16 comparable class actions.

17 **VI. PROVISIONAL CLASS CERTIFICATION IS APPROPRIATE**

18 In addition to such terms as class definition, settlement amounts and payment procedures,
19 the Settlement Agreement reached between the Parties contains a provision to which the Parties
20 stipulate to the Court's provisional certification of the Class, but do so for the purposes of this
21 settlement only. Plaintiffs now request this Court to provisionally certify the Class.

22 It is well established that trial courts should use a lower standard for determining the
23 propriety of certifying a settlement class, as opposed to a litigation class. (*Dunk v. Ford Motor*
24 *Co.*, (1996) 48 Cal.App.4th at 1794, 1807, fn. 19.) Under California law, a class action is
25 appropriate when the Class is ascertainable and there is a "well defined community of interest in
26 the questions of law and fact affecting the parties to be represented." (Code Civ. Proc., §382;
27 *Dunk*, 48 Cal. App. 4th at 1806.) State law requirements under *California Code of Civil*
28 *Procedure* section 382 for class certification largely mirrors *Federal Rules of Civil Procedure*
 Rule 23 – namely, numerosity and typicality of the class representative's claims, adequacy of

1 representation, predominance of common issues and superiority. As discussed below, although
2 Defendant adamantly disputed and continues to dispute Plaintiff's ability to certify a litigation
3 class, all of the requirements of certification for settlement purposes are met for the proposed
4 settlement Class.

5 **A. The Proposed Class is Ascertainable**

6 Here, the proposed class is ascertainable because all of the Class Members are/were
7 employed directly by Cal Plate and received their compensation directly from Cal Plate. The
8 Class Members have been identified through Defendant's employee and personnel files. (See
9 *Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932 ["Class Members are 'ascertainable'
10 where they may be readily identified without unreasonable expense or time by reference to
11 official records"].)

12 **B. Numerosity of the Class is Sufficient**

13 If the class is sufficiently large that joinder of all members is impractical or that individual
14 joinder is impractical, the numerosity requirement is met. (*Hebberd v. Colgrove* (1972) 28
15 Cal.App.3d 1017, 1030.) Here, the proposed class consists of approximately one hundred fifteen
16 members, consisting of current and former employees of Defendant. Therefore, joinder of
17 individual claims would be impractical and the numerosity requirement is met.

18 **C. There are Common Questions of Law and Fact to the Class**

19 Commonality is met if there are common questions of fact and law to the class. (*Hanlon v.*
20 *Chrysler Corp.* 150 F.3d at 1019 ["The existence of shared legal issues with divergent legal
21 factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal
22 remedies within the class"].) Here, Plaintiffs allege that the proposed Class Members' claims all
23 stem from the same alleged conduct. Specifically, Plaintiffs allege that Cal Plate violated
24 California wage and hour law by (1) failure to pay lawful wages including overtime wages; (2)
25 failure to provide lawful meal periods or compensation in lieu thereof; (3) failure to provide rest
26 periods or compensation in lieu thereof; (4) failure to timely pay wages due at termination; (5)
27 knowing and intentional failure to comply with itemized employee wage statement provisions;
28 and (6) violations of the unfair competition law. Plaintiffs seek recovery of all alleged wages,
premium wages, penalties and interest pursuant to the California Labor Code, the California

1 Industrial Welfare Commission (“IWC”) Wage Orders, Bus. & Prof. Code § 17200 *et seq.*, and
2 PAGA. Although Defendant disagrees with Plaintiffs’ contentions for purposes of certifying a
3 litigation class, for purposes of a settlement class, these circumstances create questions of law and
4 fact common to all proposed Class Members.

5 **D. The Typicality Requirement is Met**

6 The typicality requirement is met if the claims of the named Class Representatives are
7 typical of those of the class, though “they need not be substantially identical.” (*Hanlon* 150 F.3d
8 at 1020.) Factual differences may exist between the Class and the Class Representative(s) so long
9 as the claims arise from the same events or course of conduct and are based on the same legal
10 theories. (*Id.*) Here, the claims of the Class Representatives are typical of the other Class
11 Members because they arise from the same factual basis and are based on the same legal theories
12 as those applicable to all Class Members. (*Wherner v. Syntex* (N.D. Cal. 1987) 117 F.R.D. 641,
13 644.) Thus, for purposes of a settlement class, the typicality requirement is met.

14 **E. The Adequacy Requirement is Met**

15 If the named representative and his or her counsel have no interests adverse to the interest
16 of the proposed Class Members and are committed to vigorously prosecuting the case on behalf
17 of the class, then the adequacy requirement is met. (*McGhee .v Bank of America*, (1976) 60 Cal.
18 App. 3d 442,450.) Here, under the proposed settlement, the Class Representatives will receive a
19 reasonable award for their time and efforts assisting counsel with factual issues surrounding the
20 case and risk incurred in bringing this action on behalf of the Class Members. Other than this
21 specific payment, all Class Members will receive a percentage of the Net Settlement Amount
22 based on his or her respective number of covered work weeks. Therefore, no “settlement
23 allocation” questions are raised. (*Hanlon* 150 F.3d at 1020.)

24 All Class Members will automatically participate in the Class Settlement unless they
25 affirmatively opt out by submitting a timely and valid written request to be excluded from the
26 Class Settlement (“Request for Exclusion”). (Settlement Agreement p. 12 ¶ F). Any Class
27 Member who validly and timely requests to be excluded from the Class Settlement will not be
28 entitled to any recovery under this Settlement Agreement and will not be bound by the terms of
the Class Settlement or have any right to object, appeal or comment thereon. (Settlement
Agreement p. 12 ¶ F (3)). As a result, there is no conflict of interest between the Class

1 Representative and the Class Members. Additionally, the Class Representatives and their counsel
2 have been committed to prosecuting this action on behalf of the Class.

3 **F. Common Issues Predominate and Class-wide Settlement is Superior to Other**
4 **Available Methods of Resolution**

5 Class certification is authorized where common questions of law and fact predominate
6 over individual questions and where class-wide treatment of a dispute is superior to individual
7 litigation. (*Richmond v. Dart Industries, Inc.*, (1981) 29 Cal.3d 462, 469.) The test is whether the
8 proposed class is sufficiently cohesive to warrant adjudication by representation. (*Hanlon, supra*,
9 at p. 1022.) Plaintiffs contend that the proposed Class in this case is sufficiently cohesive, since
10 all Class Members share a “common nucleus of facts and potential legal remedies.” Specifically,
11 all of the Class Members and the Class Representatives seek compensation for alleged unpaid
12 wages, premium wages for failure to provide compliant meal and rest breaks, as well as penalties
13 and interest for the allegations described herein; common questions about compensation or lack
14 thereof for worked performed by Class Members predominate over individual questions, and the
15 Class Members’ potential legal remedies are identical. (*Id.*) Although Defendant disagrees with
16 Plaintiffs’ contentions, it has agreed the Class may be certified for settlement purposes only.

17 Additionally, particularly in the settlement context, class resolution is superior to other
18 methods for the fair and efficient adjudication of the controversy. (*Hanlon*, 150 F. 3d at p. 1023;
19 *Dunk, supra*, 45 Cal. App. 4th at p. 1087.) The superiority requirement involves a “comparative
20 evaluation of alternative mechanisms of dispute resolution.” (*Hanlon, supra*, at p. 1023.) Here,
21 the alternative methods of resolution are a plethora of individual claims from potentially over
22 115 plaintiffs. The class action device can thus conserve judicial resources by avoiding the waste
23 and delay of repetitive proceedings and prevent inconsistent adjudication of similar issues and
24 claims. (*Sav-On Drug Stores, Inc. v Superior Court* (2004) 34 Cal. 4th 319, 340; *Bell v Farmers*
25 *Ins. Exchange* (2004) 115 Cal.App.4th 715, 741.) Therefore, settlement on a class-wide basis is
26 superior.

27 **VII. THE PROPOSED CLASS NOTICE IS APPROPRIATE**

28 The Class Notice is attached as Exhibit A to the Settlement Agreement. The Class Notice
provides the requisite, pertinent information to Class Members and the options available to them.

1 Should a Class Member wish to exclude themselves from the Settlement, they can send a request
2 for exclusion to the settlement administrator. Should a Class Member wish to object to the
3 Settlement, they can object as described in the Class Notice. If a Class Member does nothing in
4 response to the Class Notice, the Class Member will be mailed an individual settlement payment.

5 **A. The Class Notice Satisfies Due Process**

6 California statutory and case law vests the Court with broad authority to fashion an
7 appropriate notice process. (Cal. Rules of Court 3.760 *et seq.*) A proposed method of notice of a
8 proposed settlement is fair, adequate and reasonable if it has “a reasonable chance of reaching a
9 substantial percentage of the Class Members. (*Cartt v. Superior Court*, (1975) 50 Cal. App. 3d
10 960, 974.) The Class Notice plan described herein entails mailing the Class Notice to all known
11 and reasonably ascertainable Class Members based on Defendant’s payroll records and provides
12 for a reasonable chance of reaching a significant percentage of Class Members. (See section III
13 (D) herein.) Further, such individual notice by first class mail is routinely approved as consistent
14 with due process. (See, *e.g.*, MANUAL at §§21.311, 21.312; Wright & Miller, Fed. Practice &
15 Procedure §1797.6 [“Of course, notice by mail to all of the identified Class Members . . . will
16 suffice.”] (citing cases).) The Notice is consistent with the class certification notices approved by
17 numerous state and federal courts and is the best notice practicable under circumstances of this
18 case.

19 **B. The Proposed Class Notice is Accurate and Informative**

20 Not only is the manner of the proposed Class Notice proper, so too is the content of the
21 said notice. The proposed Class Notice provides information on the meaning and the nature of the
22 proposed settlement, the terms and provisions of the settlement, the relief the settlement will
23 provide the Class Members, the application of Plaintiffs’ counsel for reimbursement of costs and
24 attorneys’ fees from the settlement amount, the date, the time and place of the Final Fairness and
25 Approval Hearing, and the procedure and deadlines for opting out of the Settlement or for
26 submitting comments and objections. (Cal. Rule of Court 3.769(f).)

27 The Class Notice also fulfills the requirement of neutrality in class notices. (2 NEWBERG
28 §8.39.) It summarizes the proceedings to date and the terms and conditions of the settlement in an
informative and coherent manner, in compliance with the MANUAL’S statement, “the notice

1 should be accurate, objective, and understandable to class members.....” (MANUAL at §30.21.)
2 The Class Notice clearly states the settlement does not constitute an admission of liability by Cal
3 Plate and recognizes the Court has not ruled on the merits. It also states the final settlement
4 approval decision has yet to be made. Accordingly, the Class Notice complies with the standards
5 of fairness, completeness and neutrality required of a settlement class notice disseminated under
6 the authority of the Court. (F.R.C.P. 23(c)(2).)

7 Moreover, the class notice comports with CA Rules of Court, Rule 3.766(d). As per Rule
8 3.766, the contents of the class notice providing for an opt out procedure for the class members
9 must include the following:

- 10 (1) A brief explanation of the case, including the basic contentions or denials of
11 the parties;
- 12 (2) A statement that the Court will exclude the member from the class if the
13 member so requests by a specified date;
- 14 (3) A procedure for the member to follow in requesting exclusion from the class;
- 15 (4) A statement that the judgment, whether favorable or not, will bind all members
16 who do not request exclusion; and
- 17 (5) A statement that any member who does not request exclusion may, if the
18 member so desires, enter an appearance through counsel.

19 The class notice contains the information required under Rule 3.766(d). (See Ex. A
20 attached to Settlement Agreement.)

21 **VIII. CONCLUSION**

22 Based on the foregoing, Plaintiffs respectfully request that the Court enter the Proposed
23 Order Granting Preliminary Approval submitted concurrently herewith, and thus:

- 24 1. Grant preliminary approval of the Settlement Agreement, and certify the
25 Settlement Class for the purposes of settlement only;
- 26 2. Confirm named Plaintiffs Jesus Diaz and Hector Garcia as the Class
27 Representatives and James R. Hawkins and Isandra Fernandez of the law firm of JAMES
28 HAWKINS, APLC as Class Counsel;
3. Approve and appoint Simpluris, Inc. as Settlement Administrator;

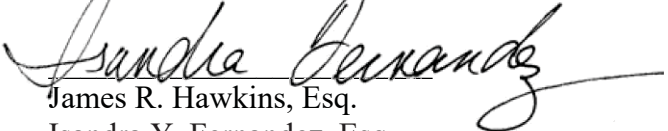
1 4. Enter an Order preliminarily approving the proposed settlement and approving the
2 Class Notice; and

3 5. Schedule the Final Approval Hearing Date on _____, 2022; (to be
4 determined by the Court at the hearing for preliminary approval of settlement.

5 Respectfully submitted,

6 Dated: December 23, 2021

7 **JAMES HAWKINS, APLC**

8 
9 James R. Hawkins, Esq.

10 Isandra Y. Fernandez, Esq.

11 Kacey E. Cook, Esq.

12 Attorneys for Plaintiffs

13 Jesus Diaz and Hector Garcia
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On December 23, 2021, I served on the interested parties in this action the following document(s) entitled:

- XX] BY ELECTRONIC SERVICE: Via electronic filing service provider- electronically transmitting the documents listed above to CaseAnywhere, an electronic filing service provider, at www.caseanywhere.com pursuant to the Court's Order Authorizing Electronic Service. The transmission(s) was reported as complete and without error to the addresses as stated on the service list below.

Scott K. Dauscher, Esq. Jon M. Setoguchi, Esq. ATKINSON, ANDELSON, LOYA, RUUD & ROMO A PROFESSIONAL LAW CORPORATION 12800 Center Court Drive South, Suite 300 Cerritos, CA 90703-9364 SDauscher@aalrr.com JSetoguchi@aalrr.com Attorneys for Defendant, CAL PLATE, INC.	Labor and Workforce Development Agency Attn: PAGA Administrator 1515 Clay Street, Ste 801 Oakland, CA 94612 http://www.dir.ca.gov/Private-Attorneys- General-Act (via LWDA Website Only)
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Executed on December 23, 2021, at Irvine, California

PROOF OF SERVICE