

Carolyn H. Cottrell (SBN 166977)
David C. Leimbach (SBN 265409)
Scott L. Gordon (SBN 319872)
SCHNEIDER WALLACE
COTTRELL KONECKY LLP
2000 Powell Street, Suite 1400
Emeryville, California 94608
Telephone: (415) 421-7100
Facsimile: (415) 421-7105
ccottrell@schneiderwallace.com
dleimbach@schneiderwallace.com
sgordon@schneiderwallace.com

[Additional Counsel Listed on Next Page]

*Attorneys for Plaintiff, the Putative Class and Collective,
the State of California, and All Aggrieved Employees*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL SCHMIDT, on behalf of
himself and the Class and Collective
members,

Plaintiff,

vs.

VISION SERVICE PLAN, VSP GLOBAL,
INC., MARCHON EYEWEAR, INC., VSP
OPTICAL GROUP, INC., and
EYEFINITY, INC.

Defendants.

Case No.: 2:20-cv-02400-KJN

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S
SECOND RENEWED
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
CLASS AND COLLECTIVE
ACTION SETTLEMENT**

Hearing Date: January 16, 2024
Hearing Time: 9:00 a.m.

Judge: Honorable Kendall J. Newman

Date action filed: December 2, 2020

1 Tamra Givens (*pro hac vice*)
2 **SHAVITZ LAW GROUP, P.A.**
3 951 Yamato Road, Suite 285
4 Boca Raton, Florida 33431
5 Telephone: (561) 447-8888
6 Facsimile: (561) 447-8831
7 gshavitz@shavitzlaw.com
8 tgivens@shavitzlaw.com

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
*Attorneys for Plaintiff, the Putative Class and Collective,
the State of California, and All Aggrieved Employees*

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND	4
III.	PROCEDURAL HISTORY	5
IV.	TERMS OF THE AMENDED SETTLEMENT	8
	A. Basic Terms of the Amended Settlement	8
	B. Class and Collective Definitions.....	9
	C. Allocation and Awards	11
	D. Scope of Releases	13
	E. Settlement Administration	14
V.	ARGUMENT	17
	A. The Court Should Grant Preliminary Approval of the Amended Settlement Agreement.....	17
	B. The Amended Settlement Provides a Sound FLSA Allocation.....	19
	C. The Court Should Approve the Proposed Schedule	22
VI.	CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Banks v. Pyramid Consulting, Inc.</i> , No. 3:18-cv-00078-H-JLB, 2019 U.S. Dist. LEXIS 13381 (S.D. Cal. Jan. 28, 2019).....	18
<i>Boyd v. Bank of Am. Corp.</i> , 2014 U.S. Dist. LEXIS 162880, 2014 WL 6473804 (C.D. Cal. Nov. 18, 2014)	21
<i>Class Plaintiffs v City of Seattle</i> , 955 F.2d 1268 (9th Cir 1992)	19
<i>Cotter v. Lyft, Inc.</i> , 2017 U.S. Dist. LEXIS 38256, 2017 WL 1033527 (N.D. Cal. Mar. 16, 2017)	20
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	17, 18
<i>In re Gulf Oil/Cities Service Tender Offer Litig.</i> , 142 F.R.D. 588 (S.D.N.Y. 1992).....	20
<i>In re Oracle Sec. Litig.</i> , 1994 U.S. Dist. LEXIS 21593, 1994 WL 502054 (N.D. Cal. June 16, 1994)	19
<i>In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.</i> , 2017 U.S. Dist. LEXIS 76092, 2017 WL 2212780 (N.D. Cal. May 17, 2017).....	20
<i>Jones, et al. v. CertifiedSafety, Inc.</i> , No. 3:17-cv-02229-EMC (N.D. Cal. Jun. 1, 2020).....	21
<i>Loeza v. JP Morgan Chase Bank, NA.</i> , Defendant, No. 13-cv-0095-L (BGS), 2015 U.S. Dist. LEXIS 196647, (S.D. Cal. Aug. 18, 2015).....	21
<i>Lynn's Food Stores, Inc. v. United States</i> , 679 F.2d 1350 (11th Cir. 1982).....	18
<i>Otey v. CrowdFlower, Inc.</i> , No. 12-cv-05524-JST, 2015 U.S. Dist. LEXIS 141338 (N.D. Cal. Oct. 15, 2015)	18
<i>re Cathode Ray Tube CRT Antitrust Litig.</i> , 2016 U.S. Dist. LEXIS 159099, 2016 WL 6778406 (N.D. Cal. Nov. 16, 2016).....	20
<i>Selk v. Pioneers Mem'l Healthcare Dist.</i> , 159 F. Supp. 3d 1164 (S.D. Cal. 2016)	18
<i>Soto, et al. v. O.C. Communications, Inc., et al.</i> , No. 3:17-cv-00251-VC (N.D. Cal. Oct. 23, 2019)	21

1	<i>Villafan v. Broadspectrum Downstream Servs.</i> , No. 18-cv-06741-LB, 2021 U.S. Dist. LEXIS	
2	249763 (N.D. Cal. Apr. 8, 2021)	20
3	<i>Vinh Nguyen v. Radiant Pharms. Corp.</i> , 2014 U.S. Dist. LEXIS 63312, 2014 WL 1802293 (C.D.	
4	Cal. May 6, 2014)	20
5	<i>Williams v. Costco Wholesale Corp.</i> , No. 02cv2003 IEG (AJB), 2010 U.S. Dist. LEXIS 19674	
6	(S.D. Cal. Mar. 4, 2010).....	21

7 Statutes

8	29 U.S.C. § 206.....	22
9	29 U.S.C. § 207.....	22
10	29 U.S.C. § 216.....	18
11	Cal. Lab. Code § 203	22
12	Cal. Lab. Code § 226.7(c).....	21
13	Cal. Lab. Code § 226	22

15 Other Authorities

16	Manual for Complex Litigation, <i>Judicial Role in Reviewing a Proposed Class Action Settlement</i>	
17	§ 21.61 (4th ed. 2004).....	17

18 Rules

19	Fed. R. Civ. Proc. 23.....	17, 18
----	----------------------------	--------

I. INTRODUCTION

Plaintiff Michael Schmidt (“Plaintiff”) and Defendants Vision Service Plan, VSP Global, Inc., Marchon Eyewear, Inc., VSP Optical Group, Inc., and Eyefinity, Inc. (collectively, “Defendants”) have executed an Amended Class Action Settlement Agreement, inclusive of a revised Notice of Settlement, which addresses all of issues raised by the Court in its Order dated August 30, 2023.¹ *See* ECF No. 56. As explained in the Order, the Court “is prepared to find that the requirements for conditional certification of the class and FLSA collective, settlement, appointment of the class representatives, appointment of class counsel, and appointment of the settlement administrator are satisfied at this preliminary stage.” *Id.*, 2:2-5. The Court, however, identified three issues that the Parties were to address.

First, the Parties have implemented a full FLSA opt-in process with the Amended Settlement, in which an Opt-in Form (Exhibit B to the Amended Settlement) will be distributed by the Settlement Administrator with the Notice of Settlement.² *See id.*, 5:24-6:9. To become Opt-in Plaintiffs, FLSA Collective Members will submit Opt-in Forms to the Settlement Administrator via U.S. Mail or via electronic means, as explained in the Notice of Settlement; in turn, the Administrator will provide them to Class Counsel, who will file them with the Court. *See* Amended Settlement Agreement, ¶¶ 2(r)-(s), 30, Exh. B. Only Opt-in Plaintiffs will receive an FLSA payment under the Amended Settlement, and only Opt-in Plaintiffs will release FLSA claims.³ *Id.*, ¶¶ 22, 39.a.i.

¹ Plaintiff refers to the Amended Class Action Settlement Agreement (Exhibit 1 to the Cottrell Decl.) as the “Amended Settlement Agreement” or the “Amended Settlement,” and more generally as the “Settlement,” throughout this brief. Plaintiff refers to the Court’s Order dated August 30, 2023 (ECF No. 56) as the “Order.”

² Plaintiff refers to the Fair Labor Standards Act as the “FLSA” and the California Labor Code Private Attorneys General Act as “PAGA” throughout this brief.

³ Opt-in Plaintiffs will not release any state law claims for work in states outside of California.

1 *Second*, the Parties have revamped the Notice of Settlement to address each of
 2 the issues identified by the Court. *See* Order, 6:21-27, 7:6-9; Amended Settlement
 3 Agreement, Exh. A. The Notice now provides clear, easy-to-understand explanations
 4 of, *inter alia*, the following:

- 5 • The nature of claims, including that the action is “a ‘hybrid’ lawsuit, because
 6 it asserts claims under both federal law and state law,” and that the action
 7 additionally asserts a claim for civil penalties under the PAGA (Section 2);
- 8 • FLSA Collective Members, California Class Members, and PAGA Group
 9 Members are eligible to participate in the Settlement, inclusive of the
 10 definitions for each group and that there are separate types of payments for
 11 each group (Section 3);
- 12 • FLSA Collective Members must submit timely and valid Opt-in Forms to
 13 become “Opt-in Plaintiffs” and receive their FLSA payment under the
 14 Settlement, while California Class Members will receive their California
 15 payment unless they opt out of the Settlement (Sections 3, 6);
- 16 • The estimated amount of the FLSA payment, the California payment, and
 17 the PAGA payment that the individual can expect to receive, and the
 18 applicable number of workweeks upon which each payment amount is based
 19 (Section 4);
- 20 • The nature of the releases for California Class Members (that do not opt
 21 out), Opt-in Plaintiffs, and PAGA Group Members (Section 5);
- 22 • California Class Members cannot opt out of the PAGA component of the
 23 Settlement (Section 6); and
- 24 • The options for the recipient, including the requirement to opt in to receive
 25 the FLSA payment and what will happen if the individual does not opt in,
 26 the consequences of doing nothing, the requirement for California Class
 27 Members to opt out if they do not want to participate in the Settlement and
 28

1 the consequences of doing so, that the recipient can enter an appearance
2 through an attorney if he or she desires, and the option and procedure for
3 California Class Members to object to the Settlement (Section 6).

4 *Third*, Plaintiff provides additional briefing on the FLSA allocation under the
5 Settlement. *See* Order, 7:15-25. The Amended Settlement retains the prior weighting,
6 in which each FLSA Workweek is valued as one (1) settlement share while each
7 California Workweek is weighted as two (2) settlement shares to reflect the increased
8 value of state law claims. Thus, California Class Members that are also Opt-in
9 Plaintiffs will receive three (3) settlement shares in total for workweeks that are
10 counted as both FLSA Workweeks as well as California Workweeks. This is a fair
11 and reasonable allocation that accounts for the significant additional protections
12 provided to employees under California law relative to the FLSA, as explained *infra*.
13 Numerous courts have approved such weighting in hybrid FLSA/California state law
14 actions, including several wage and hour settlements involving Plaintiff's counsel
15 here.

16 With this brief, Plaintiff provides an updated procedural history, a detailed
17 explanation of the terms of the Amended Settlement, and further briefing on the
18 allocation of the Net Settlement Amount between the California Class and FLSA
19 Collective payments. As the Court was generally satisfied with the overall Settlement
20 and that the requirements for conditional certification of the California Class and
21 FLSA Collective were met, Plaintiff does not repeat his prior briefing on those issues
22 but incorporates his Renewed Unopposed Motion for Preliminary Approval of Class
23 and Collective Action Settlement and supporting papers (ECF No. 44) by reference.
24 Plaintiff notes that the number of California Class, PAGA Group, and FLSA
25 Collective Members covered by the Amended Settlement, as well as the total number
26 of workweeks, have not increased from the original Settlement given that definitions
27 each retain the firm end date of November 12, 2021. *See* Amended Settlement
28

1 Agreement, ¶ 2(b), (n), (t).

2 The Settlement continues to provide an excellent recovery for the California
3 Class and FLSA Collective Members. The Amended Settlement Agreement and
4 revamped Notice of Settlement address the issues raised by the Court and Plaintiff
5 respectfully submits that the Settlement should be preliminarily approved.

6 II. FACTUAL BACKGROUND

7 Plaintiff, California Class Members, and FLSA Collective Members are current
8 and former non-exempt employees that worked as Customer Service Representatives
9 (CSRs) or in equivalent positions for the vision care health insurance company
10 operated by Defendants.⁴ *See id.*, ECF No. 33 (“FAC”), ¶ 32. Their primary job duties
11 include answering and responding to customer service phone calls, responding to
12 internal and customer emails, customer follow-up, documenting interactions, and
13 undergoing trainings. *See* FAC, ¶ 42.

14 Plaintiff alleges that CSRs experienced pervasive wage and hour violations
15 during their employment with Defendants. *Id.*, ¶¶ 41-48. In particular, Plaintiff alleges
16 that CSRs experienced significant amounts of off-the-clock work, including:

- 17 • Working 20 minutes before clocking in for shifts to boot up computers, load
18 programs and applications needed to perform duties and answer phone calls
19 from customers, open email programs, and review emails;
- 20 • Working from 20 minutes to up to an hour after clocking out at the end of
21 shifts, and;
- 22 • Working during meal and rest breaks.

23 *Id.* Plaintiff further alleges that Defendants, as a matter of policy and/or practice,
24 required CSRs to remain on duty during meal and rest periods and therefore failed to
25 authorize and/or permit compliant meal and rest breaks, due to a lack of break relief
26

27 ⁴ Plaintiff, California Class Members, and FLSA Collective Members are sometimes
28 referred to as “CSRs” in this brief for ease of reading.

1 and the demands of the work environment. *Id.* Defendants represent there are
 2 approximately 1,800 members of the California Class and the FLSA Collective. *See*
 3 Amended Settlement Agreement, ¶ 2.cc.

4 As a result of the alleged violations, Plaintiff alleges that Defendants
 5 systematically violated the FLSA and California state law. FAC, ¶¶ 71-168.
 6 Defendants deny all allegations asserted and deny any and all liability, including any
 7 liability for the alleged violations of law. *See* Amended Settlement Agreement, ¶ 17.

8 **III. PROCEDURAL HISTORY**

9 Plaintiff Michael Schmidt submitted a PAGA letter to the Labor and Workforce
 10 Development Agency (LWDA) setting forth the alleged violations on July 31, 2020.
 11 Cottrell Decl., ¶ 13. Following the expiration of the 65-day PAGA notice period,
 12 Plaintiff filed a PAGA action in Alameda County Superior Court (Case No.
 13 RG20077472) on October 20, 2020. *Id.*, ¶ 14. That same day, Plaintiff also filed an
 14 updated PAGA letter with the LWDA and later filed his First Amended Complaint in
 15 the PAGA case on January 28, 2021. *Id.*, ¶ 15. Defendants answered Plaintiff's First
 16 Amended Complaint in the PAGA action by asserting a general denial of all claims
 17 and nineteen affirmative defenses on March 11, 2021. *Id.*, ¶ 16.

18 Plaintiff filed this collective and class action, alleging causes of action under
 19 the FLSA, the California Labor Code, and the Unfair Competition Law, on December
 20 2, 2020. *See* ECF No. 1. Cottrell Decl., ¶ 17. Defendants filed their answer in this
 21 case, denying each allegation in Plaintiff's Complaint and asserting twenty-two
 22 affirmative defenses, on March 2, 2021. *See* ECF No. 10.

23 The Parties agreed to early mediation and attended a virtual full-day mediation
 24 with mediator Scott Markus on July 15, 2021. Cottrell Decl., ¶ 18. Prior to and during
 25 mediation, Plaintiff's counsel made an independent investigation of the facts and law
 26 relating to the allegations asserted in both actions. *Id.*, ¶ 19. Defendants provided
 27 informal discovery such as timekeeping and payroll information, as well as data
 28

1 concerning CSRs including number of workweeks, pay periods, and other
2 information. *Id.* Plaintiff's counsel extensively analyzed the potential damages that
3 might be recovered following a review of documents and information produced by
4 Defendants. *Id.* Plaintiff and Plaintiff's counsel further considered the attendant risks
5 of continued litigation, the uncertainty of the outcome of the claims alleged against
6 Defendants, and the desirability of consummating a settlement. *Id.*, ¶ 20.

7 At mediation, the Parties agreed to resolve all claims asserted in both actions
8 and executed a memorandum of understanding, which served as the basis for the
9 Settlement. *Id.*, ¶ 21. After several months of negotiating and conferring about the
10 terms of a long-form settlement agreement, the Parties executed the initial Settlement
11 Agreement on January 4, 2022. *Id.*

12 As part of the initial Settlement, the Parties agreed that Plaintiff would amend
13 the complaint to bring the PAGA claims into this action, prior to moving for approval
14 of the Settlement. *Id.*, ¶ 22. Plaintiff filed a joint stipulation seeking leave for Plaintiff
15 to file an amended complaint to consolidate the claims on February 3, 2022. *See* ECF
16 No. 31. Following the Court's order on the stipulation, Plaintiff filed a First Amended
17 Complaint (FAC) that added the PAGA allegations to this action on February 8, 2022.
18 *See* ECF No. 32-33. Plaintiff then dismissed the Alameda County Superior Court
19 action without prejudice on February 17, 2022. Cottrell Decl., ¶ 22.

20 Plaintiff filed an Unopposed Motion for Preliminary Approval of Class and
21 Collective Action Settlement on April 8, 2022. ECF No. 36. Ten days later, Chief
22 District Judge Kimberly J. Mueller issued an order reassigning the case to herself
23 pursuant to the senior status of District Judge John A. Mendez. ECF No. 37. Judge
24 Mueller issued an order resetting the hearing on the preliminary approval motion to
25 July 8, 2022. ECF No. 39.

26 Upon review of the motion and the initial Class Action Settlement Agreement,
27 Judge Mueller raised an issue with the definition of the FLSA Collective. ECF No. 41.
28

1 The Parties had originally agreed to define the FLSA Collective so that it excluded
 2 California employees as part of a framework that accounts for the relatively greater
 3 value of damages and penalties under California law (compared to the recovery
 4 available under the FLSA) for the wage and hour violations alleged.⁵ As Plaintiff only
 5 worked for Defendants in California, he did not have standing to act as the
 6 representative for an FLSA Collective that was comprised exclusively of non-
 7 California employees. *See id.*

8 Pursuant to the Court's July 5, 2022 order, Plaintiff filed a response indicating
 9 that the Parties had agreed to redefine the FLSA Collective so that it would include
 10 employees in all states including California. *See* ECF No. 42. The Parties further agreed
 11 to adjust the allocation formula to maintain the relative valuation for California
 12 workweeks.⁶ Upon review of Plaintiff's response, Judge Mueller vacated the hearing
 13 on the motion for preliminary approval so that the Parties could execute a revised
 14 settlement agreement and file a renewed motion for preliminary approval. *See* ECF No.
 15 43.

16 After execution of a revised Class Action Settlement Agreement, Plaintiff filed
 17 his Renewed Unopposed Motion for Preliminary Approval of Class and Collective
 18 Action Settlement on August 9, 2022. *See* ECF No. 44. The renewed motion was set
 19 for hearing on October 21, 2022 at 10:00 a.m. before Judge Mueller. Shortly thereafter,
 20 the case was reassigned to District Judge Dale A. Drozd on August 25, 2022. *See* ECF
 21 No. 45. Pursuant to the reassignment, the motion hearing was reset to November 1,
 22 2022 at 1:30 p.m. before Judge Drozd. *See* ECF No. 47. The Court later vacated the
 23

24 ⁵ Under the framework in the initial Class Action Settlement Agreement, California
 25 workweeks were weighted such that they were credited with three settlement shares
 26 and FLSA-only workweeks were unweighted and were credited with one settlement
 share.

27 ⁶ Again, the Parties have valued each California workweek as two settlement shares
 28 and each FLSA workweek as one settlement share, such that California Class Members
 will still receive an overall total of three settlement shares for their workweeks.

November 1 hearing in accordance with its standard approach to motion hearings in civil matters. *See* ECF No. 48.

In early-December 2022, after the Renewed Unopposed Motion for Preliminary Approval of Class and Collective Action Settlement had been pending for approximately four months, the Parties conferred and agreed to consent to having the Magistrate Judge conduct all further proceedings in this action. The Parties filed the necessary forms to consent to the jurisdiction of the Magistrate Judge on December 12 and 14, 2022. *See* ECF Nos. 49-51. The case was assigned and referred to United States Magistrate Judge Kendall J. Newman for all further proceedings and entry of final judgment on December 19, 2022. *See* ECF No. 52.

The Court then issued its Order denying preliminary approval on August 30, 2023. ECF No. 56. Counsel for the Parties conferred extensively and negotiated and executed the Amended Settlement Agreement. Cottrell Decl., ¶ 28. Plaintiff's counsel then prepared the instant second renewed motion for preliminary approval of the Settlement.

IV. TERMS OF THE AMENDED SETTLEMENT

A. Basic Terms of the Amended Settlement

Defendants have agreed to pay a non-reversionary maximum Gross Settlement Amount of \$3,450,000.00 to settle the FLSA claims and the California state law claims. Amended Settlement Agreement, ¶ 2(o); Cottrell Decl., ¶ 29. The Net Settlement Amount, estimated to be approximately \$2,133,300, is the amount available to pay settlement awards to Settlement Class Members and is defined as the Gross Settlement Amount less: (i) Plaintiff's Service Award (up to \$15,000.00); (ii) Class Counsel's Fee Awards (up to 33.33% of the Gross Settlement Amount, or \$1,150,000.00); (iii) Class Counsel's Costs (estimated to be \$25,000); (iv) Settlement

Administrator Costs (estimated to be \$26,700.00)⁷; and (v) the payment to the LWDA and members of the PAGA Group (\$100,000). Amended Settlement Agreement, ¶ 2(p); Cottrell Decl., ¶ 29.

The Settlement will result in immediate and certain payment to CSRs of meaningful amounts.⁸ Cottrell Decl., ¶ 30. The average overall gross recovery is approximately \$1,917 per CSR, and the average overall net recovery is approximately \$1,185 per CSR.⁹ *Id.* This amount provides significant compensation to Settlement Class Members, and the Settlement provides an excellent recovery in the face of highly uncertain litigation. *Id.*

If more than five percent (5%) of the total number of California Class Members submit timely and valid Requests for Exclusion / Opt-Out Requests, then Defendants will have the option to void the Settlement in their sole discretion. Amended Settlement Agreement, ¶ 53; Cottrell Decl., ¶ 33.

B. Class and Collective Definitions

The following individuals are Settlement Class Members, eligible to share in the Net Settlement Amount under the Amended Settlement:

- Plaintiff.

⁷ Plaintiff reported estimated Settlement Administrator Costs of \$20,880.00 in Plaintiffs' prior Renewed Unopposed Motion for Preliminary Approval of Class and Collective Action Settlement. The increase to \$26,700.00 reflects the inclusion of the FLSA opt-in process in the Settlement Administrator's duties.

⁸ As reported in Plaintiffs' prior Renewed Unopposed Motion for Preliminary Approval of Class and Collective Action Settlement, Plaintiff's counsel calculated the total potential exposure if Plaintiff and Settlement Class Members fully prevailed on all of their claims—inclusive of derivative and penalties claims—at approximately \$39.1 million. Cottrell Decl., ¶ 31.

⁹ These amounts divide the Gross Settlement Amount and Net Settlement Amount, respectively, by the estimated 1,800 California Class Members and FLSA Collective Members. The actual per-CSR award will depend on the number of Opt-in Plaintiffs and will factor in workweek weighting, as discussed *infra*.

- California Class Members that do not opt out of the Settlement. The California Class is defined as “all current and former employees of Defendants who were employed as CSRs or equivalent positions in California at any time between December 2, 2016 and November 12, 2021.”
- Opt-in Plaintiffs. Opt-in Plaintiffs are FLSA Collective Members that timely sign and return Opt-in Forms. The FLSA Collective is defined as “all current and former employees of Defendants who were employed as CSRs or equivalent positions in the United States at any time between December 2, 2017 and November 12, 2021.”

Amended Settlement Agreement, ¶ 2(b), (n), (s), (cc); Cottrell Decl., ¶ 34.

California Class Members can exclude themselves from the California Class by following the opt-out procedure set forth in the Notice of Settlement. Amended Settlement Agreement, ¶ 29; Cottrell Decl., ¶ 35. Any California Class Member who fails to submit a timely and valid opt-out request will be deemed a Settlement Class Member. Amended Settlement Agreement, ¶ 38; Cottrell Decl., ¶ 35. As to the FLSA component of the Settlement, FLSA Collective Members can choose to participate or not participate via the Opt-in Form process. Amended Settlement Agreement, ¶ 30; Cottrell Decl., ¶ 35.

Additionally, the employee share of the PAGA allocation (i.e., \$25,000) will be distributed to the PAGA Group Members, who are defined as “all current and former employees of Defendants who were employed as CSRs or equivalent positions in California at any time between July 31, 2019 and November 12, 2021.” Amended Settlement Agreement, ¶¶ 2(t), 40; Cottrell Decl., ¶ 36. If a PAGA Group Member validly opts out of the Settlement as California Class Member, he or she will still receive a payment from the PAGA component of the Settlement and will still be subject to the release of PAGA claims. Amended Settlement Agreement, ¶ 29; Cottrell Decl., ¶ 36.

C. Allocation and Awards

All Settlement Class Members will be paid a Settlement Award from the Net Settlement Amount. Settlement Agreement, ¶ 37; Cottrell Decl., ¶ 37. The Settlement Administrator will be responsible for determining the amount of the Settlement Award to be paid to each Settlement Class Member. Each Settlement Class Member will be assigned a number of settlement shares based on their respective number of workweeks covered by the Settlement. The following workweeks are covered by the Settlement:

(1) workweeks during which an Opt-in Plaintiff was employed by Defendants as a CSR or equivalent position in any state in the United States (including California) at any time between December 2, 2017 and November 12, 2021 (“FLSA Workweeks”); and

(2) workweeks during which a participating California Class Member was employed by Defendants as a CSR or equivalent position in California at any time between December 2, 2016 and November 12, 2021 (“California Workweeks”).

Each FLSA Workweek will be equal to one (1) settlement share. To reflect the increased value of state law claims, California Workweeks will be equal to two (2) settlement shares. To the extent that Settlement Class Members are both Opt-in Plaintiffs and California Class Members, they will be credited with three (3) settlement shares for California Workweeks that were worked during the Collective Period (i.e., between December 2, 2017 and November 12, 2021). Amended Settlement Agreement, ¶ 39; Cottrell Decl., ¶ 38.

The total number of settlement shares for all Settlement Class Members will be added together and the resulting sum will be divided into the Net Settlement Amount to reach a per share dollar figure. Amended Settlement Agreement, ¶ 39(a)(ii); Cottrell Decl., ¶ 39. That figure will then be multiplied by each Settlement Class Member’s number of settlement shares to determine the Settlement Class Member’s Settlement Award. *Id.*

1 Members of the PAGA Group will receive a *pro rata* portion of 25% (\$25,000)
2 of the PAGA allocation based on the number of pay periods they worked for
3 Defendants during the PAGA Period. Amended Settlement Agreement, ¶ 40; Cottrell
4 Decl., ¶ 40.

5 The Notice of Settlement will state the estimated minimum payment the class
6 member is expected to receive assuming full participation of all Settlement Class
7 Members—that all FLSA Collective Members opt in, and that no California Class
8 Members opt out. Amended Settlement Agreement, ¶ 35; Cottrell Decl., ¶ 40. The
9 Notice of Settlement with the Amended Settlement Agreement now separately reports
10 the estimated FLSA payment, California payment, and PAGA payment, and the
11 associated number of workweeks and PAGA pay periods. *See* Amended Settlement
12 Agreement, Exh. B (Section 4).

13 All Settlement Award determinations will be based on Defendants' timekeeping,
14 payroll, and/or HRIS records. Amended Settlement Agreement, ¶ 42; Cottrell Decl., ¶
15 42. If the Parties determine, based upon further review of available data, that a person
16 previously identified as being a Settlement Class Member is not a Settlement Class
17 Member, or an individual who was not previously identified as a Settlement Class
18 Member is in fact a Settlement Class Member but was not so included, the Settlement
19 Administrator will promptly make such addition or deletion as appropriate. *Id.*

20 The tax treatment in the Amended Settlement is unchanged: Twenty percent
21 (20%) of each Settlement Award to Settlement Class Members will be treated as back
22 wages, and accordingly, subject to federal and applicable state income and employment
23 tax withholding as required by law; Defendants will pay the employer's share of all
24 required FICA and FUTA taxes on such amounts. Amended Settlement Agreement, ¶
25 43; Cottrell Decl., ¶ 43. Forty percent (40%) of each Settlement Award will be treated
26 as non-wage penalties and liquidated damages, to be reported on an IRS Form 1099-
27 MISC, and will not be subject to FICA and FUTA withholding taxes. *Id.* The remaining
28

forty percent (40%) will be treated as interest and will be reported on IRS Form 1099-INT. *Id.* PAGA payments will be reported on IRS Form 1099-MISC. Amended Settlement Agreement, ¶ 40; Cottrell Decl., ¶ 43.

To the extent that any CSR disputes the number of workweeks shown in his or her Notice of Settlement, he or she may produce evidence to the Settlement Administrator establishing the dates they contend to have worked. Amended Settlement Agreement, ¶ 27; Cottrell Decl., ¶ 44. Unless the CSR presents convincing evidence proving he or she worked more workweeks than shown by Defendants' records, his or her Settlement Award will be determined based on Defendants' records. *Id.*

D. Scope of Releases

Broadly, the release provisions in the Amended Settlement provide that California Class Members that do not opt out will release California law wage and hour claims, while Opt-in Plaintiffs will release FLSA claims. PAGA Group Members will separately release PAGA claims, regardless of whether they might opt out as California Class Members. Amended Settlement Agreement, ¶¶ 22-23; Cottrell Decl., ¶ 45.

The California Class release encompasses “any and all claims, obligations, demands, actions, rights, causes of action and liabilities, whether known or unknown, against Releasees that were or could have been asserted in the operative Complaint based on the facts alleged concerning violations of the California Labor Code, the California Unfair Competition Law, and the Industrial Welfare Commission’s Wage Orders through November 12, 2021, including all claims based upon the following categories of information: failure to pay minimum wages, failure to properly calculate and pay overtime wages, failure to provide meal periods or meal period premiums, failure to provide rest periods or rest period premiums, failure to provide accurate itemized wage statements, failure to timely pay wages during employment, and failure to pay all wages due upon termination of employment.” Amended Settlement

1 Agreement, ¶ 22; Cottrell Decl., ¶ 46. To provide a separate PAGA release for PAGA
 2 Group Members, the California Class release does not encompass claims under the
 3 PAGA. Amended Settlement Agreement, ¶¶ 22-23; Cottrell Decl., ¶ 47. In addition,
 4 upon Final Approval, Opt-in Plaintiffs shall be deemed to have released their claims
 5 under the FLSA against all Releasees through November 12, 2021. *Id.*, ¶ 48.

6 The releases are exclusive of each other. PAGA Group Members that opt out as
 7 California Class Members will still release PAGA claims. California Class Members
 8 that do not opt in as Opt-in Plaintiffs will not release FLSA claims. Opt-in Plaintiffs
 9 will not release state law claims for work outside of California. *Id.* Lastly, Plaintiff
 10 agrees to a general release. Amended Settlement Agreement, ¶ 24; Cottrell Decl., ¶ 49.

11 **E. Settlement Administration**

12 The Parties have agreed to use ILYM Group, Inc. to administer the Settlement
 13 for total fees and costs currently estimated at \$26,700. Amended Settlement
 14 Agreement, ¶ 2(z), (aa); Cottrell Decl., ¶ 50. The Settlement Administrator will be
 15 responsible for preparing, printing and mailing the Notice of Settlement (with Opt-in
 16 Form, where applicable) to all California Class Members and FLSA Collective
 17 Members. Amended Settlement Agreement, ¶ 26(b); Cottrell Decl., ¶ 51. The
 18 Settlement Administrator will also create a website for the Settlement and a toll-free
 19 call center to field telephone inquiries from CSRs during the notice and settlement
 20 administration periods. *Id.*

21 Within twenty (20) business days after the Court's Preliminary Approval of the
 22 Settlement (but no sooner than January 15, 2024), Defendants will provide class list
 23 information to the Settlement Administrator. Amended Settlement Agreement, ¶ 26(c);
 24 Cottrell Decl., ¶ 52. Prior to mailing the Notice of Settlement, the Settlement
 25 Administrator will take reasonable efforts to identify current addresses via public and
 26 proprietary systems. Amended Settlement Agreement, ¶ 26(d); Cottrell Decl., ¶ 52.
 27 Within ten (10) business days after receiving the class list information, the Settlement
 28

1 Administrator will mail and email (if email addresses are available) the agreed upon
2 and Court approved Notice of Settlement. Amended Settlement Agreement, ¶ 26(e);
3 Cottrell Decl., ¶ 52.

4 The Settlement Administrator will receive Opt-in Forms via U.S Mail, email,
5 and/or electronic submission via the Settlement website, due by the Notice Deadline
6 (forty-five (45) days after the Settlement Notice is initially mailed). Amended
7 Settlement Agreement, ¶ 30; Cottrell Decl., ¶ 53. The Settlement Administrator will
8 provide the completed Opt-in Forms to Plaintiff’s counsel, who will promptly file them
9 with the Court on a rolling basis. *Id.*

10 Objections and opt-outs are also due by the Notice Deadline. Amended
11 Settlement Agreement, ¶ 30; Cottrell Decl., ¶ 54. For undeliverable notices sent via
12 U.S. Mail, the Settlement Administrator will undertake reasonable efforts to search for
13 the correct address and will promptly re-mail the Settlement Notice to any newly found
14 addresses. *Id.* In no circumstance will such re-mailing extend the Notice Deadline.
15 Amended Settlement Agreement, ¶ 26(f); Cottrell Decl., ¶ 54.

16 The “Effective Date” of the Settlement means (i) if there is an objection(s) to the
17 settlement that is not subsequently withdrawn, then the date upon the expiration of time
18 for appeal of the Court’s Final Approval Order; or (ii) if there is a timely objection(s)
19 and appeal by an objector(s), then after such appeal(s) is dismissed or the Court’s Final
20 Approval Order is affirmed on appeal; or (iii) if there are no timely objections to the
21 settlement, or if any objections which were filed are withdrawn before the date of final
22 approval, then the first business day after the Court’s order granting Final Approval of
23 the Settlement. Amended Settlement Agreement, ¶ 2(i); Cottrell Decl., ¶ 55.

24 Within ten (10) business days after the Effective Date, Defendants will pay the
25 Gross Settlement Amount into the Qualified Settlement Fund. Amended Settlement
26 Agreement, ¶ 34(a); Cottrell Decl., ¶ 56. The Gross Settlement Fund is fully non-
27 reversionary. *Id.* The payments from the Qualified Settlement Fund will be made
28

1 within thirty (30) days after the Effective Date. Amended Settlement Agreement, ¶¶
2 35, 46; Cottrell Decl., ¶ 56.

3 All Settlement Award checks will remain valid and negotiable for one hundred
4 eighty (180) days from the date of their issuance and may thereafter automatically be
5 canceled if not cashed within that time, at which time the right to recover any
6 Settlement Award will be deemed void and of no further force and effect. Amended
7 Settlement Agreement, ¶ 47; Cottrell Decl., ¶ 57. With ninety (90) days remaining, a
8 reminder letter will be sent via U.S. mail and email to those who have not yet cashed
9 their settlement check, and during the last sixty (60) days of the check cashing period,
10 a call will be placed to those that have still not cashed their check to remind them to do
11 so. *Id.* At the conclusion of the 180-day check cashing deadline, any Settlement Class
12 Members who have not cashed their Settlement Award checks will nevertheless be
13 deemed to have released applicable claims. *Id.*

14 If at the conclusion of the 180-day check void period, there are any uncashed
15 checks, those monies will be paid to the Parties' agreed upon *cy pres* recipient, the
16 Monarch School, subject to the Court's approval in the Final Approval Order, if the
17 total residual amount is less than \$25,000. Amended Settlement Agreement, ¶ 48;
18 Cottrell Decl., ¶ 58. If the total residual amount is \$25,000 or greater, a second
19 distribution will occur to those Settlement Class Members who cashed their check on
20 a *pro rata* basis. *Id.*

21 To the best of my knowledge, neither Class Counsel, Defendants' Counsel,
22 Plaintiff, nor Defendants have any financial or business interest in, or personal
23 relationships with, the Monarch School, the proposed *cy pres*. Nor does Class Counsel,
24 Defendants' Counsel, Plaintiff, or Defendants hold any officer, director, or executive
25 position with the Monarch School. Cottrell Decl., ¶ 59.

26 Within twenty-one (21) days after the distribution of any remaining monies to
27 Settlement Class Members who cashed their Settlement Award check or to the *cy pres*
28

recipient, Plaintiff will file a Post-Distribution Accounting. Amended Settlement Agreement, ¶ 48(d); Cottrell Decl., ¶ 60. The Post-Distribution Accounting will set forth the total settlement fund, the total number of Settlement Class Members, the total number of Settlement Class Members to whom notice was sent and not returned as undeliverable, the number and percentage of opt-outs, the number and percentage of objections, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to the *cy pres* recipient (if applicable), the administrative costs, the attorneys' fees and costs, the attorneys' fees in terms of percentage of the settlement fund, and the multiplier, if any. *Id.*

V. ARGUMENT

A. The Court Should Grant Preliminary Approval of the Amended Settlement Agreement

A certified class action may not be settled without Court approval. *See* Fed.R.Civ.P. 23(e) Approval of a class action settlement requires three steps: (1) preliminary approval of the proposed settlement upon a written motion; (2) dissemination of notice of the settlement to all class members; and (3) a final settlement approval hearing at which objecting class members may be heard, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement is presented. Manual for Complex Litigation, *Judicial Role in Reviewing a Proposed Class Action Settlement*, § 21.61 (4th ed. 2004). The decision to approve or reject a proposed settlement is committed to the sound discretion of the court. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Rule 23 requires that all class action settlements satisfy two primary prerequisites before a court may grant certification for purposes of preliminary approval: (1) that the settlement class meets the requirements for class certification if it has not yet been certified; and (2) that the settlement is fair, reasonable, and adequate. Fed.R.Civ.P. 23(a), (e)(2); *Hanlon*, 150

1 F.3d at 1020.

2 In the FLSA context, court approval is required for FLSA collective settlements,
 3 but the Ninth Circuit has not established the criteria that a district court must consider
 4 in determining whether an FLSA settlement warrants approval. *See, e.g., Selk v.*
 5 *Pioneers Mem'l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1172 (S.D. Cal. 2016); *Banks*
 6 *v. Pyramid Consulting, Inc.*, No. 3:18-cv-00078-H-JLB, 2019 U.S. Dist. LEXIS 13381,
 7 at *6 (S.D. Cal. Jan. 28, 2019). Most courts in this Circuit, however, first consider
 8 whether the named plaintiffs are “similarly situated” to the putative class members
 9 within the meaning of 29 U.S.C. § 216(b), and then evaluate the settlement under the
 10 standard established by the Eleventh Circuit in *Lynn’s Food Stores, Inc. v. United*
 11 *States*, 679 F.2d 1350, 1355 (11th Cir. 1982), which requires the settlement to
 12 constitute “a fair and reasonable resolution of a bona fide dispute over FLSA
 13 provisions.” *Otey v. CrowdFlower, Inc.*, No. 12-cv-05524-JST, 2015 U.S. Dist. LEXIS
 14 141338, at *12 (N.D. Cal. Oct. 15, 2015) “If a settlement in an employee FLSA suit
 15 does reflect a reasonable compromise over issues...that are actually in dispute,” the
 16 district court may “approve the settlement in order to promote the policy of
 17 encouraging settlement of litigation.” *Lynn’s Food Stores*, 679 F.2d at 1354; *Otey*, 2015
 18 U.S. Dist. LEXIS 141338, at *12.

19 The Settlement provides a strong overall recovery, and the Court has already
 20 ruled in the Order that the majority of the requirements for preliminary approval are
 21 met.¹⁰ *See* Order, 2:2-5. Plaintiff has addressed the FLSA opt-in requirement with the
 22 Amended Settlement and revised the Notice of Settlement as specified by the Court, as
 23 explained *supra*. Plaintiff provides further briefing on the FLSA allocation, *infra*. With
 24

25 ¹⁰ Plaintiff again notes that the number of California Class, PAGA Group, and FLSA
 26 Collective Members covered by the Amended Settlement, as well as the total number
 27 of workweeks, have not increased from the original Settlement given that definitions
 28 each retain the firm end date of November 12, 2021. *See* Amended Settlement
 Agreement, ¶ 2(b), (n), (t).

1 this information, Plaintiff respectfully submits that the Court should grant preliminary
2 approval.

3 **B. The Amended Settlement Provides a Sound FLSA Allocation**

4 The Amended Settlement provides a sound workweek weighting device that
5 allocates the Net Settlement Amount between the claims of the California Class
6 Members and Opt-in Plaintiffs. Plaintiff alleges that the general fact pattern of alleged
7 violations – off-the-clock work, inclusive of work during unpaid meal periods, and
8 other break violations – is the same for all CSRs, regardless of where they worked. *See*
9 FAC, ¶¶ 32-48. What differs is that California state law protections apply for members
10 of the California Class, who release relatively valuable California state law wage and
11 hour claims under the Settlement. *See* Amended Settlement Agreement, ¶ 22. In
12 contrast, Opt-in Plaintiffs only release FLSA claims, a statute that provides less
13 protections, and do not release any further state law claims. *Id.* The workweek
14 weighting of two (2) shares per California Workweek and one (1) share per FLSA
15 Workweek (for a potential total of three (3) shares) appropriately recognizes the
16 relative value of the California law claims.

17 “Approval of a plan of allocation of settlement proceeds in a class action under
18 FRCP 23 is governed by the same standards of review applicable to approval of the
19 settlement as a whole: the plan must be fair, reasonable and adequate.” *In re Oracle*
20 *Sec. Litig.*, 1994 U.S. Dist. LEXIS 21593, 1994 WL 502054, at *3-4 (N.D. Cal. June
21 16, 1994) (citing *Class Plaintiffs v City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir.
22 1992)). “A plan of allocation that reimburses class members based on the extent of
23 their injuries is generally reasonable.” *Id.*, (citing *In re Gulf Oil/Cities Service Tender*
24 *Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992). “It is also reasonable to allocate
25 more of the settlement to class members with stronger claims on the merits.” *Id.*; *see*
26 *also Cotter v. Lyft, Inc.*, 2017 U.S. Dist. LEXIS 38256, 2017 WL 1033527, at *18
27 (N.D. Cal. Mar. 16, 2017) (approving settlement allocation plan as “fair, reasonable,
28

1 and adequate”).

2 In applying this standard, courts have observed that “the standard of review
3 requires only an allocation plan that has a reasonable, rational basis; it does not require
4 the best possible plan of allocation.” *In re Cathode Ray Tube CRT Antitrust Litig.*, 2016
5 U.S. Dist. LEXIS 159099, 2016 WL 6778406, at *80-81 (N.D. Cal. Nov. 16, 2016)
6 (citation and internal quotation marks omitted) (approving settlement allocation plan,
7 observing that “although it is possible that a more precise allocation plan could be
8 fashioned, undertaking such an effort would be time-consuming and costly”); *see*
9 *also In re Volkswagen “Clean Diesel” Mktg., Sales Practices & Prods. Liab. Litig.*,
10 2017 U.S. Dist. LEXIS 76092, 2017 WL 2212780, at *748 (N.D. Cal. May 17, 2017);
11 *Vinh Nguyen v. Radient Pharms. Corp.*, 2014 U.S. Dist. LEXIS 63312, 2014 WL
12 1802293, at *5 (C.D. Cal. May 6, 2014).

13 In hybrid Rule 23 / FLSA actions – such as the instant matter – courts regularly
14 approve settlement allocation plans that allocate settlement shares based on the relative
15 strength of applicable state wage claims or remedies. For example, in *Villafan v.*
16 *Broadspectrum Downstream Servs.*, the court granted final approval of a hybrid
17 settlement in which “a workweek in California is weighted more heavily: a California
18 workweek is equal to three settlement shares, and a workweek for an opt-in plaintiff in
19 any other state than California is equal to one settlement share.” No. 18-cv-06741-LB,
20 2021 U.S. Dist. LEXIS 249763, at *6 (N.D. Cal. Apr. 8, 2021). In *Jones, et al. v.*
21 *CertifiedSafety, Inc.*, the court granted final approval of a hybrid settlement that
22 weighted California workweeks by a factor of three compared to FLSA-only
23 workweeks where the California class members released California and FLSA claims
24 and opt-in plaintiffs released only FLSA claims. No. 3:17-cv-02229-EMC (N.D. Cal.
25 Jun. 1, 2020), ECF Nos. 221 at 15:15-16:15, 17:15-18, 232. In *Soto, et al. v. O.C.*
26 *Communications, Inc., et al.*, the court similarly granted final approval of a hybrid
27 settlement that incorporated a workweek weighting of three for California state law
28

1 claims and a workweek weighting of two for Washington state law claims, relative to
2 FLSA-only Workweeks, with a similar release structure. No. 3:17-cv-00251-VC (N.D.
3 Cal. Oct. 23, 2019), ECF Nos. 299 at 10:11-14, 305. Plaintiff’s counsel represented the
4 class and collective members in those three actions and relied on its experience in those
5 approved settlements in developing the weighting device here.

6 Numerous other courts have approved similarly structured hybrid settlements.
7 *See, e.g., Boyd v. Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 162880, 2014 WL
8 6473804, at *7 (C.D. Cal. Nov. 18, 2014) (granting final approval of settlement in
9 hybrid Rule 23 / FLSA action that apportioned a greater pro rata share per workweek
10 to California class members); *Williams v. Costco Wholesale Corp.*, No. 02cv2003 IEG
11 (AJB), 2010 U.S. Dist. LEXIS 19674, at *9 (S.D. Cal. Mar. 4, 2010) (granting
12 preliminary approval in hybrid Rule 23 / FLSA action where “the allocation is
13 reasonable because the distribution to the class is based on the class members’
14 Weighted Workweek Value”); *see also Loeza v. JP Morgan Chase Bank, NA.*,
15 Defendant, No. 13-cv-0095-L (BGS), 2015 U.S. Dist. LEXIS 196647, at *14 (S.D. Cal.
16 Aug. 18, 2015) (granting approval in preliminary approval in a wage and hour
17 settlement that weighted workweeks by whether class members had signed arbitration
18 agreements and/or releases).

19 These weightings reflect that California labor law affords greater applicable
20 protections to workers than the FLSA. For example, California law requires that
21 employers compensate employees for one full hour of pay for each noncompliant meal
22 break and rest break. Cal. Lab. Code § 226.7(c) (“If an employer fails to provide an
23 employee a meal or rest or recovery period ... the employer shall pay the employee
24 one additional hour of pay at the employee’s regular rate of compensation for each
25 workday that the meal or rest or recovery period is not provided.”). Additionally, if
26 wages are owing to an employee at the time of termination of employment, California
27 law provides for penalties under which employers must pay the employee’s wages or
28

1 compensation for up to 30 days from the due date. *See, e.g.*, Cal. Lab. Code § 203.
 2 California also imposes penalties for inaccurate wage statements. *See* Cal. Lab. Code
 3 § 226. In contrast, the FLSA provides only federal minimum wage and overtime pay
 4 at at least 1.5 times the normal rate for work in excess of forty hours weekly. 29 U.S.C.
 5 §§ 206-207. However, the FLSA permits averaging such that there is only a minimum
 6 wage violation if the effective hourly rate dips below the federal minimum. *See, e.g.*,
 7 *Maravilla v. Rosas Bros. Constr.*, 401 F.Supp.3d 886, 895 (N.D. Cal. 2019) (“Unlike
 8 the FLSA, California's minimum wage law does not permit averaging”).

9 Given the heightened protections under California state law, participating
 10 California Class Members must be compensated for their release of more valuable
 11 claims (e.g., premium pay for meal and rest break violations, derivative penalties for
 12 wage statement violations, etc.). Here, the Parties have agreed to allocate the
 13 Settlement proceeds amongst CSRs in a manner that (1) recognizes the amount of time
 14 that the particular CSR worked for Defendants in the applicable limitations period, and
 15 (2) accounts for the increased value of relevant state law claims. Such a weighting
 16 device is particularly appropriate with the opt-in nature of the Amended Settlement –
 17 as the number of Opt-in Plaintiffs will be uncertain until the completion of notice
 18 administration, the weighting device provides fluidity for the California Class
 19 payments and FLSA payments to remain in parity with each other irrespective of the
 20 final number of Opt-in Plaintiffs. A fixed allocation would not provide such parity. The
 21 weighting device here provides a fair and reasonable allocation of a greater amount of
 22 Net Settlement Amount to California Class Members and has been approved by
 23 numerous courts in California in hybrid settlements as discussed *supra*. For these
 24 reasons, the plan of allocation should be approved.

25 **C. The Court Should Approve the Proposed Schedule**

26 The Amended Settlement Agreement contains the following proposed schedule,
 27 which Plaintiff respectfully requests this Court approve:
 28

Deadline for Defendants to provide ILYM Group, Inc with the Class Data	Within 20 business days after the Court enters an order granting preliminary approval of the Settlement, but no sooner than January 15, 2024
Deadline for Defendants to provide to Plaintiff's counsel a list with the names of CSRs and the total number of workweeks that each CSR worked	Within 20 business days after the Court enters an order granting preliminary approval of the Settlement
Deadline for ILYM Group, Inc to mail (and email if possible) the Notice of Settlement to CSRs	Within 10 business days after ILYM Group, Inc receives the Class Data
Deadline for CSRs to postmark Opt-in Forms and requests to opt out	45 calendar days after Notice of Settlement mailed ("Notice Deadline")
Deadline for CSRs to file objections to the Settlement	45 calendar days after Notice of Settlement mailed ("Notice Deadline")
Deadline for filing of Final Approval Motion	Per Local Rule (at least 35 days before Final Approval Hearing)
Deadline for Class Counsel to File a Motion for Approval of the Fee and Cost Award and of the Service Award to the Plaintiff	Per Local Rule (at least 35 days before Final Approval Hearing)
Final Approval Hearing	No earlier than 30 calendar days after the Notice Deadline
Effective Date	The "Effective Date" of the Settlement means (i) if there is an objection(s) to the settlement that is not subsequently withdrawn, then the date upon the expiration of time for appeal of the Court's Final Approval Order; or (ii) if there is a timely objection(s) and appeal by an objector(s), then after such appeal(s) is dismissed or the Court's Final Approval Order is affirmed on appeal; or (iii) if there are no timely objections to the settlement, or if any objections which were filed are withdrawn before the date of final approval, then the first business day after the Court's order granting Final Approval of the Settlement.
Deadline for ILYM Group, Inc to calculate the employer share of taxes and provide Defendants with the total employer tax contributions	Within 5 calendar days after the final Settlement Award calculations are approved
Deadline for Defendants to deposit the	Within 7 calendar days after ILYM

calculated employer tax contributions into the Qualified Settlement Fund	Group, Inc provides Defendants with the amount of the total employer tax contributions due
Deadline for Defendants to pay the Gross Settlement Amount into the Qualified Settlement Fund	Within 10 business days after Effective Date
Deadline for ILYM Group, Inc to provide Class Counsel and Defendants' Counsel with a final report of all Settlement Awards	At least 10 business days before mailing the Settlement Awards to Settlement Class Members
Deadline for ILYM Group, Inc to mail all Settlement Awards to Settlement Class Members	Within 30 calendar days after Effective Date
Check-cashing deadline	180 days after issuance
Deadline for ILYM Group, Inc to redistribute uncashed check funds or transfer uncashed check funds to <i>cy pres</i> recipient	As soon as practicable after check-cashing deadline
Deadline for Plaintiff to file a Post-Distribution Accounting	Within 21 days after redistribution and/or <i>cy pres</i> payment

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement in accordance with the schedule set forth herein.

Date: December 11, 2023

Respectfully submitted,

/s/ Carolyn Hunt Cottrell

Carolyn Hunt Cottrell

David C. Leimbach

Scott L. Gordon

SCHNEIDER WALLACE

COTTRELL KONECKY LLP

/s/ Tamra C. Givens

Tamra C. Givens (*pro hac vice*)

SHAVITZ LAW GROUP, P.A.

Attorneys for Plaintiff, the Putative Class and Collective, the State of California, and All Aggrieved Employees

SIGNATURE ATTESTATION

I hereby attest that all signatories listed, on whose behalf this motion is submitted, concur in the motion's content and have authorized the filing.

Dated: December 11, 2023

/s/ Carolyn Hunt Cottrell
Carolyn Hunt Cottrell

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing and attached documents with the Clerk of the Court for the United States District Court, Eastern District of California, by using the Court's CM/ECF system on December 11, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

Dated: December 11, 2023

/s/ Carolyn Hunt Cottrell
Carolyn Hunt Cottrell