

1 Joshua Konecky, SBN 182897
jkonecky@schneiderwallace.com
2 Nathan B. Piller SBN 300569
npiller@schneiderwallace.com
3 Sarah McCracken, SBN 313198
smccracken@schneiderwallace.com
4 **SCHNEIDER WALLACE**
5 **COTTRELL KONECKY LLP**
2000 Powell Street, Suite 1400
Emeryville, CA 94608
6 Telephone: (415) 421-7100
7 Facsimile: (415) 421-7105

8 *Attorneys for Plaintiff and the Putative Class*

9
10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12
13 BARBARA GRADY, individually
14 and on behalf of all others similarly
15 situated,

16 Plaintiffs,

17 v.

18
19 RCM TECHNOLOGIES, INC.,

20 Defendant.
21
22
23
24
25
26
27
28

Case No. 2:19-cv-04390-JAK-AGR

**DECLARATION OF JOSHUA G.
KONECKY IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION AND PAGA
SETTLEMENT**

Date: April 28, 2023

Time: 10:30 a.m.

Location:

First Street U.S. Courthouse
350 W. 1st Street, Courtroom 8A, 8th Floor,
Los Angeles, CA 90012

Complaint Filed: February 7, 2022

1 I, Joshua G. Konecky, declare as follows:

2 1. I am an attorney duly licensed to practice law in the State of California and
3 counsel of record for Plaintiff in the above-captioned case. I am familiar with the file, the
4 documents, and the history related to this case. The following statements are based on my
5 personal knowledge and review of the files. If called on to do so, I could and would testify
6 competently thereto.

7 2. I am submitting this Declaration in support of Plaintiff's motion for preliminary
8 approval of the proposed class action and PAGA settlement and conditional certification
9 of a settlement class under Rule 23 of the Federal Rules of Civil Procedure. A true and
10 correct copy of the proposed Joint Stipulation of Class Action and PAGA Settlement and
11 Release A ("Settlement Agreement") is attached to this Declaration as **Exhibit A**. The
12 proposed Notice of Settlement, subject to court approval and formatting by the Settlement
13 Administrator, is attached as Exhibit 1 to the Settlement Agreement. For the Court's
14 convenience, the proposed Notice is also attached to this Declaration as **Exhibit B**.

15 **EXPERIENCE OF COUNSEL**

16 3. I have been counsel for Plaintiff and the proposed plaintiff class throughout this
17 case. I am a partner at Schneider Wallace Cottrell Konecky LLP, which is a leading private
18 plaintiff firm in employment and other class action cases. More details on the work,
19 experience and accomplishments of the firm can be found at www.schneiderwallace.com.

20 4. A copy of my curriculum vitae, which contains a representative list of class
21 action and multi-plaintiff cases I have handled, is attached as **Exhibit C** to this
22 Declaration.

23 5. My practice over the past twenty years has focused on the representation of
24 plaintiffs in class and representative actions involving wage and hour disputes. I have also
25 litigated class actions in the area of employment discrimination and disability rights,
26 including cases involving access to public accommodations and educational services
27 under the Americans with Disabilities Act of 1990 (ADA). I also have litigated and tried

1 business disputes.

2 6. As I mentioned above, my firm is also a leading plaintiff and employment class
3 action firm. Our partners and attorneys have litigated major wage and hour class actions,
4 have won several prestigious awards, and sit on important boards and committees in the
5 legal community. The Recorder has listed our firm as one of the “top 10 go-to plaintiffs’
6 employment firms in Northern California.”

7 7. I have been lead counsel and/or co-lead counsel in numerous class actions. In
8 this capacity, I have successfully litigated contested class certification motions in some
9 twenty or more cases and have brought several certified class actions to trial. I also have
10 negotiated numerous class action settlements, both before and after contested motions for
11 class certification. This includes class actions involving off-the-clock and meal and rest
12 periods claims asserted by nurses and other healthcare workers. I also have been named
13 by the Daily Journal as a top labor and employment attorney in California and I have been
14 on the Northern California Super Lawyers list every year since 2011.

15 8. Through the many employment class action cases that I have litigated, I have
16 gained substantial experience in class action law and practice over the years, including
17 cases in the nursing and healthcare industry. I believe that my experience in these cases
18 has allowed me to develop, not just the skills to litigate and try such cases successfully,
19 but also to have good judgment in terms of understanding the strength, value and risks of
20 them when it comes time to making decisions regarding settlement.

21 **CASE BACKGROUND AND PROCEDURAL HISTORY**

22 9. Defendant RCM Technologies (USA), Inc. (“Defendant” or “RCM”) is a
23 specialty healthcare staffing company that employs numerous traveling nurses in
24 California at various healthcare sites with which it contracts. Compl. (ECF 1-1) at ¶ 1.

25 10. In approximately June 2021, my firm was contacted by Barbara Grady, who
26 worked for RCM as a traveling nurse from approximately August 30, 2020 through
27 approximately October 17, 2020. Ms. Grady contacted us regarding concerns over unpaid,
28

1 off-the-clock work and missed meal and rest periods at her placement sites. RCM had
2 placed Ms. Grady in both skilled nursing facility settings and at COVID testing sites. Ms.
3 Grady's time was tracked using timesheets. Ms. Grady reported that in both placement
4 settings, she was required to perform work before and after her official start time, but also
5 was required to write her official shift start and end times on her timesheets.

6 11. On July 22, 2021, we submitted a notice to the California Labor and Workforce
7 Development Agency (LWDA) regarding the portion of Ms. Grady's claims that might be
8 brought under the Private Attorneys General Act ("PAGA").

9 12. After Defendant received and evaluated the PAGA notice, we had some
10 discussions with Defendant through their counsel and entered into a tolling agreement
11 under which Defendant agreed to toll the statute of limitations effective October 8, 2021,
12 on all Plaintiff's claims for the purposes of creating space for settlement discussions,
13 before a case was filed in court. However, the parties did not resolve the claims at that
14 time. We therefore provided notice to Defense counsel that Ms. Grady would file a class
15 action and PAGA complaint.

16 13. On February 7, 2022, we filed Ms. Grady's class action and PAGA enforcement
17 complaint in the San Bernardino County Superior Court. The complaint alleged that
18 Defendant routinely suffered and permitted Plaintiff and other similarly situated nurses
19 and employees working in like hourly positions to work off-the-clock at their placements.
20 The off-the-clock work included activities such as setting up and/or breaking down
21 equipment, and conducting patient hand-offs between shifts. The complaint further
22 alleged, among other things, that Defendant maintained insufficient staffing levels to
23 provide nurses with off-duty meal and rest periods at the frequency and duration required
24 by California law. *See, e.g.*, Compl. (ECF 1-1) at ¶¶ 1-4, 20-28. The complaint sought
25 back wages, penalties, and declaratory relief. *See id.* at p. 25:11-27:11. It alleged claims
26 under California Labor Code §§ 201-204, 221-223, 226, 226.7, 510, 512, 1174, 1174.5,
27 1194, and 1198 *et seq.*; IWC Wage Order No. 5; the California Code of Regulations, Title

1 8 § 11040 and ¶¶ 7, 11, & 12; the Private Attorneys General Act of 2004 (“PAGA”); and
2 the California Business and Professions Code. *Id.* at ¶¶ 36-109.

3 14. On May 19, 2022, Defendant removed the action to this Court. ECF 1. Defendant
4 filed its Answer and Affirmative Defenses on the same day, denying the allegations. ECF
5 1-2. Defendant also has maintained that putative class members have worked at different
6 sites, for different clients, and under different conditions of employment (including under
7 arbitration agreements), than Plaintiff, rendering class certification unsuitable.

8 15. On June 28, 2022, the parties conducted their initial Rule 26(f) conference. On
9 July 12, 2022, the parties exchanged initial disclosures.

10 16. On August 2, 2022, we served Plaintiff’s first sets of interrogatories and requests
11 for production of documents on Defense counsel. In the months that followed, we engaged
12 in ongoing meet and confer with Defense counsel (by videoconference and in writing)
13 regarding these requests. When the parties were unable to resolve their differences, we
14 sought an informal discovery conference, which took place on November 8, 2022.

15 17. In the meantime, we met and conferred with them regarding the possibility of
16 exploring an early resolution and agreed to schedule a private mediation session. As part
17 of this process, we also met and conferred with Defense counsel regarding the production
18 of informal discovery that would enable us to meaningfully evaluate potential liability and
19 damages.

20 18. Before the mediation, Defendant provided us with documents and data that
21 assisted in evaluating the strengths and weaknesses of the claims and in preparing a
22 liability and exposure analysis for mediation.

23 19. On December 7, 2022, we engaged in mediation before Michael J. Loeb of
24 JAMS, an experienced mediator in this area of law. As part of the mediation process, we
25 had prepared a substantive mediation brief examining the evidence, the legal claims and
26 defenses, and potential scope of damages. Defense counsel also shared their mediation
27 brief and analysis with us. We vetted the claims through rigorous analysis and back-and-

1 forth that covered an array of issues, ranging from class certification and arbitration issues,
2 to merits questions and possible damages. We participated in the mediation with a well-
3 informed understanding of the disputed factual and legal issues that would be in play if
4 the case proceeded with further litigation.

5 20. The mediation was rigorous and conducted at arms-length. The mediator, Mr.
6 Loeb, explored and challenged the parties on many issues. After a full day of rigorous
7 negotiation, Mr. Loeb presented a mediator's proposal. After serious consideration,
8 discussions with our client, and further communications with Mr. Loeb, we accepted the
9 mediator's proposal for the core terms of the settlement. Defendant also accepted the
10 mediator's proposal. We then worked with Defense counsel to resolve some remaining
11 issues and questions so that the parties had a complete agreement.

12 21. On December 16, 2022, the parties filed a stipulation to stay the case pending
13 resolution of Plaintiff's motion for preliminary approval of the proposed class action and
14 PAGA settlement. ECF 23. The Court granted that request on January 10, 2023, ECF 24,
15 and a subsequent one to permit additional time to complete drafting of the long form
16 settlement agreement and proposed settlement notice. ECF 27.

17 22. The parties have now completed their drafting of the long form settlement
18 agreement and proposed settlement class notice. These finalized documents are attached
19 as **Exhibit A** and **Exhibit B** to this Declaration. Pursuant to California Labor Code §
20 2699(1)(2), my office has submitted a copy of the executed settlement agreement to the
21 Labor and Workforce Development Agency.

22 **VALUE AND TERMS OF THE SETTLEMENT AGREEMENT**

23 23. As memorialized in Paragraph 63 of the Settlement Agreement, there are an
24 estimated 1,420 Class Members who worked for RCM between October 8, 2017 and
25 October 22, 2022, and an estimated 29,660 Workweeks in the Class Period. (The Class
26 Period for the proposed settlement is October 8, 2017 to March 7, 2023.) As I explain in
27 further detail below, the Settlement Agreement contains an escalator clause to protect the

1 Class's interests in the event a material number of additional Settlement Class Members
2 and/or Workweeks are identified.

3 24. The proposed Settlement is for a non-reversionary Gross Settlement Amount of
4 \$1,600,000.00. Settlement Agreement at ¶ 15. This does not include the employer's side
5 of the payroll taxes associated with the settlement payments, which Defendant is obligated
6 to pay in addition to the Gross Settlement Amount. *Id.* at ¶¶ 12, 15, 48, 58.

7 25. The Net Settlement Amount is this gross amount minus: the \$200,000 allocated
8 to the claims for civil penalties under the PAGA; the settlement administration costs
9 (capped at \$31,050); the service award the Court may approve for the Class Representative
10 (up to \$15,000); the amount the Court may approve for reasonable attorneys' fees and
11 costs (up to one-third the total settlement amount in fees plus costs of not more than
12 \$15,000). *Id.* at ¶¶ 4, 18, 22, 33, 48, 49, 56(h) & (i), 57.

13 26. If the foregoing amounts are awarded, the Net Settlement Amount would be
14 approximately \$805,616.67. As mentioned above, there are approximately 1,420 Class
15 Members and 29,660 Workweeks. *See* Settlement Agreement at ¶ 63. At these numbers,
16 there would be an average award of \$567 per Class Member and \$27.16 per workweek,
17 plus the Class Member's share of the PAGA allocation. Each Class Member's award
18 would increase or decrease from the average based on his or her proportional share of the
19 Workweeks covered by the Class Period of the Settlement. *See* Settlement Agreement at
20 ¶ 56(f). The Class Period runs from October 8, 2017 to March 7, 2023. *Id.* at ¶ 7.

21 27. As set forth in Section 56(f), the individual settlement award for each Class
22 Member will increase or decrease from the average proportionally based on the number
23 of Workweeks he or she has in comparison to the Workweeks of all the Participating Class
24 Members combined. Under Section 56(g), the same pro-rata distribution method is used
25 to distribute the employee-share of the PAGA allocation, except the PAGA Period is
26 shorter than the Class Period due to the difference in statutes of limitations. In any event,
27 we believe that this is an objective, reasonable distribution formula because the value of

1 an individual's claim will tend to increase proportionally with his or her length of service.

2 28. The distribution formula described above is objective and straightforward to
3 administer. Additionally, the workweeks to input into the formula for each Settlement
4 Class Member and PAGA Member will come directly from Defendant's records.
5 Moreover, as explained in the Settlement Agreement and proposed Class Notice, Class
6 Members will receive notice of the number of Workweeks credited to them and will have
7 an opportunity to challenge Defendant's records if they do not believe the Workweeks
8 shown are accurate.

9 29. Given the strengths of the claims, the risks of litigation, and Defendant's
10 potential exposure, we believe that the proposed Settlement provides a strong result for
11 the Class, as discussed further below.

12 30. In addition, Settlement Class Members will have a release that is limited to just
13 those claims arising between October 8, 2017 and March 7, 2023, which were pled in the
14 Complaint and LWDA notice, based on or arising out of the factual allegations therein.
15 Settlement Agreement at ¶¶ 24 & 27.

16 31. Section 56(e) of the Settlement Agreement explicitly provides that there will be
17 no reversion of any of the \$1,600,000.00 gross settlement fund to Defendant. To the extent
18 there are any uncashed checks or other residual, it will be paid to a Court-approved *cy pres*
19 beneficiary or to the State Controller's Office, Unclaimed Property Division. *Id.* at ¶
20 56(g)(iii).

21 32. The proposed Settlement also protects class members by including an Escalator
22 Clause. Under the Escalator Clause, found at Paragraph 63 of the Settlement Agreement,
23 in the event the actual number of Class Members in the Class Period exceeds 1,420 by
24 more than 10% (1,562) or the actual number of Workweeks (pay periods) in the Class
25 Period exceeds 29,660 by more than 10% (32,626), at Defendant's option, it shall either
26 (1) pay a pro rata additional sum for the amount exceeding 10%; or (2) elect to end the
27 release date when the number of putative class members or workweeks exceeds 10% over

1 the represented amounts.

2 33. The case also alleged claims under California’s Private Attorneys’ General Act
3 (PAGA), California Labor Code section 2699 *et seq.* Under the PAGA, private individuals
4 step into the shoes of the Labor Commissioner to pursue claims for civil penalties, with
5 75% of the penalties paid to the Labor and Workforce Development Agency (LWDA) and
6 another 25% to be paid to the aggrieved employees. Here, the parties have allocated a
7 \$200,000.00 for the PAGA claims, with 75% of it earmarked for the LWDA. *See*
8 Settlement Agreement at ¶¶ 22 & 49.

9 34. In sum, given the complex nature of this dispute, the number of factual legal,
10 and procedural issues contested, and the risks and delays of continued litigation, as
11 described more below, we believe that this is a fair, reasonable, and strong result for the
12 class.

13 **NOTICE OF PROPOSED SETTLEMENT**

14 35. Class Members will be notified of the settlement by first class mail. The parties
15 have agreed to request that the Court appoint ILYM Group, Inc., to serve as the Settlement
16 Administrator. Lisa Mullins, the President of ILYM Group, is submitting a declaration
17 attesting to their qualifications to administer the settlement and their estimated costs for
18 doing so.

19 36. The Settlement Administrator will undertake its best efforts to ensure that the
20 notice is sent to the most current mailing address of each Class Member. The notice,
21 objection, opt-out and dispute procedures are set forth in Paragraphs 19, 29, 30, 36, and
22 56 of the Settlement Agreement. Notice will be by First Class Mail, with the Settlement
23 Administrator performing a National Change of Address search on all addresses before
24 the mailing as well as skip tracing and re-mailing of notices returned as undeliverable.
25 Additionally, in the event a notice remains undeliverable even after skip tracing and
26 re-mailing, the parties will endeavor to obtain email addresses to send the notice by email.

27 37. The proposed Notice of Settlement is attached as Exhibit 1 to the Settlement
28

1 Agreement and separately as **Exhibit B** to this Declaration. It provides, among other
2 things, a description of the case; the total settlement amount and how it will be allocated
3 (including information about Plaintiff's motion for attorneys' fees and costs and how to
4 review it); the procedures for opting out of the settlement, objecting to the settlement, and
5 disputing settlement calculations; and an explanation of how the settlement allocations
6 among Class Members will be calculated.

7 38. Each settlement notice also will be individually tailored to provide each Class
8 Member an estimate of the amounts his or her Individual Class Settlement Payment and
9 Individual PAGA Payment. *See* Notice at § 7. The Notices also will be tailored to provide
10 each Class Member with the number of Workweeks credited to him or her during the Class
11 Period and the formula for calculating the settlement payments. *Id.* at §§ 6-7. The Notice
12 also explains how Settlement Class Members can dispute Defendant's records as to the
13 number of Workweeks credited to them. *Id.* at § 6.

14 39. Additionally, Class Members will have forty-five days to decide whether to opt
15 out of the Agreement or object to any terms of the Agreement, including Plaintiff's
16 application for attorneys' fees and costs, and the proposed service awards. These
17 procedures are contained in Paragraphs 19, 29, and 30 of the Settlement Agreement and
18 explained in Sections 11 and 12 of the proposed Notice.

19 40. Additionally, as referenced above, the Settlement provides each Settlement
20 Class Member the opportunity, should they disagree with Defendants' records regarding
21 their number of Workweeks, to dispute the records by providing documentation and/or an
22 explanation to show a different number of workweeks. *See* Settlement Agreement at ¶ 36;
23 Class Notice at § 7.

24 **STRENGTHS, RISKS, AND COMPLEXITIES OF THE CASE**

25 Settlement Value

26 41. In our analysis, the proposed Settlement represents a beneficial and strong result
27 for the class. As discussed above, even after the maximum attorneys' fees and costs that
28

1 Plaintiff may seek under the Settlement Agreement, the highest service award permitted
2 under the Settlement Agreement, and the estimated costs of settlement administration, an
3 estimated Net Settlement Amount of approximately \$805,616.67 would be distributed to
4 the approximately 1,420 members of the Settlement Class. This works out to an average
5 share of approximately \$567 per person, and roughly \$27.16 per workweek. As I explain
6 above, Class Members with longer tenures will receive larger shares in proportion with
7 their more extended terms of service. In addition, Class Members in the PAGA Period
8 will receive an additional PAGA payment. This will bring substantial relief to the Class.

9 Summary of Strengths, Risks, and Complexity Analysis

10 42. In reaching the Settlement Agreement, we worked with Ms. Grady to weigh the
11 value of the proposed settlement against the risks and complexities of class certification,
12 demonstrating class liability, proving damages, responding to appeals, as well as the
13 consequences of further delay to Class Members.

14 43. While we remained committed to Plaintiff's case throughout the litigation, we
15 also were realistic regarding the risks going forward. First, the parties would have engaged
16 in a lengthy and complex motion practice. This would have included the risks of having
17 class certification denied in whole or in part. It also would have included having the claims
18 of a sizeable subset of the class sent to individual arbitration.

19 44. After this, there would be further motion practice (including motions for
20 summary judgment), and the possibility of a class action trial on some or all issues. This
21 would have carried substantial risks for both sides on the overarching liability questions
22 of whether Defendant committed wage and hour violations, and if so, the extent of the
23 those violations.

24 45. Even if we had continued to litigate this case, the results were far from
25 guaranteed. Defendants hotly contested many of the issues. First and foremost, Defendant
26 vigorously contested the overarching question of whether it was suffering and permitting
27 Class Members to work off-the-clock and to miss meal and rest periods, or that it was

1 failing to provide double time or premium pay as the law requires.

2 46. Assuming Plaintiff prevailed on class certification, then the merits and damages
3 would have been hotly contested. Indeed, even if Plaintiff prevailed on some or all of her
4 claims, the measure of damages presented further risk.

5 47. Furthermore, one or more appeals would be likely given the nature of this case.
6 Assuming we prevailed on class certification and liability, Defendant might appeal any
7 number of determinations regarding class action status, liability, evidentiary rulings, and
8 damages, causing potentially years of further delay. Throughout it all, Defendant might
9 continue to argue that they maintained lawful policies and procedures and paid the Class
10 Members sufficiently under California law.

11 48. Based on my experience in this case and other wage and hour class actions
12 (including other cases involving nurses and medical professionals), I would estimate that
13 litigating this case through trial and possible appeals would have required thousands of
14 more hours of attorney and paralegal time (per side) and hundreds of thousands of dollars
15 in out-of-pocket expenses. This additional investment of resources may have caused the
16 parties to become more entrenched in their positions, making the case more difficult to
17 settle at a later stage. These very practical considerations confirm our judgment, as
18 experienced class action attorneys in cases such as this, that the proposed settlement
19 provides fair value and a beneficial result for the class.

20 49. In sum, the result after dispositive motion practice, trial and appeals was
21 uncertain, except for the fact that it would potentially mean years of delay. While it is
22 possible that Plaintiff could have won more than the current settlement value, it is also
23 possible she could have won less (in either current value or absolute terms), or nothing at
24 all. In contrast, the total settlement amount of \$1,600,000.00 will result in definite,
25 immediate and substantial recoveries for the individual Settlement Class Members and the
26 class overall. The proposed Settlement, therefore, offers a guaranteed, meaningful value
27 to the Settlement Class Members that fairly and reasonably accounts for the very real risks

1 and delays of continued litigation, protracted discovery battles, motion practice, trial, and
2 appeal.

3 **PROPOSED SERVICE AWARD**

4 50. Ms. Grady provided a valuable service in the prosecution of this case. She spoke
5 with Counsel at length, providing important information, documents, and insight
6 regarding Defendant's policies and practices. As a traveling nurse who works short-term
7 assignments and inevitably must apply to work for multiple staffing companies, she also
8 faced professional risks by publicly stepping forward to challenge the policies and
9 practices of a major staffing company in the industry.

10 51. Ms. Grady also has agreed to a release that is broader than the class release.

11 52. The Agreement permits Ms. Grady to seek a service award in an amount not to
12 exceed \$15,000. We believe that this amount fairly reflects her risks and contributions to
13 achieve this settlement on behalf of the class. This will be further discussed when Plaintiff
14 files her motion for service award and supporting declarations in connection with the final
15 fairness hearing.

16 **ATTORNEYS' FEES AND COSTS**

17 53. Pursuant to Fed. R. Civ. P. 23(h), we intend to file a separate motion for
18 attorneys' fees and costs on a date to be set by the Court. The separate motion for
19 attorneys' fees and costs will provide analysis as to the reasonableness of the fees and
20 costs sought and show how they fall within the range of fees awarded in similar class
21 action cases. The separate motion will also include, among other things, the evidentiary
22 documentation that this Court's procedures require.

23 **EXHIBITS**

24 54. A true and correct copy of the Class Action Settlement Agreement is attached to
25 this Declaration as **Exhibit A**.

26 55. A true and correct copy of the proposed Notice to Class is attached hereto as
27 **Exhibit B**.

1 56. A true and correct copy of my curriculum vitae is attached hereto as **Exhibit C**.

2
3 I declare under penalty of perjury under the laws of the State of California and the
4 United States of America that the foregoing is true and correct and is based upon my
5 personal knowledge. Executed on March 3, 2023, in Berkeley, California.

6
7 /s/ Joshua G. Konecky

8 Joshua G. Konecky
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28