UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BARBARA GRADY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

RCM TECHNOLOGIES, INC.,

Defendant.

CASE NO. 5:22-cv-00842 JLS-SHK

ORDER DENYING PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT (Doc. 31)

Before the Court is a Renewed Motion for Preliminary Approval of Class Action and PAGA Settlement filed by Plaintiff Barbara Grady. (Mot., Doc. 31.) Having considered the Renewed Motion and held a hearing, the Court DENIES the Motion for the reasons stated below.

I. BACKGROUND

Plaintiff Barbara Grady initiated this putative wage-and-hour class action against Defendant RCM Technologies, Inc. and the case was removed to federal court on May 19, 2022. The parties have come to a settlement agreement for which they now seek preliminary approval from the Court. A more detailed procedural history and a summary of Grady's claims were previously recited in the Court's Order Denying Without Prejudice Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement (Doc. 30).

As the Court explained in that Order, preliminary approval of the parties' class action settlement was denied and the Court noted five primary concerns with the settlement agreement. First, Grady's counsel failed to explain what investigation had been done in the case and provide information about the details of the alleged wage claims. (Order at 10.) Second, counsel failed to calculate a maximum potential recovery amount and compare it to the settlement amount. (*Id.* at 12–13.) Third, the Court had concerns that the proposed attorneys' fee award was too high, particularly given that there was no significant discovery or motions practice in the case. (*Id.* at 16.) Fourth, the Court also worried that the proposed service award for Grady was too high, given that it exceeded the average class member's recovery by a factor of 26.5 and was based on an improper consideration of Grady's released claims. (*Id.* at 20–21.) Fifth, the proposed distribution formula was based on number of weeks worked, even though the number and length of shifts serve as better proxies for the size of an individual class member's claim. (*Id.* at 23–24.) After being denied preliminary approval of the settlement, Grady filed this Renewed Motion and made substantive changes to the terms of the proposed settlement.

A. **Amendments to the Settlement Agreement**

The key terms of the amended Settlement are as follows. RCM continues to offer a total gross settlement amount of $1,600,000. (Amended Settlement Agreement ("Agreement") ¶¶ 15, 51, Doc. 31-2.) The gross settlement amount will be allocated as follows: (1) $200,000 will be allocated to the putative class's PAGA claims (*id.* ¶ 52); (2) a reduced amount of up to 25 percent of the gross settlement fund, or $400,000, will be allocated to attorneys' fees for class counsel (*id.* ¶ 4); (3) up to $15,000 will be allocated to compensate class counsel for litigation costs incurred in prosecuting this action (*id.*); (4) a reduced amount of up to $5,000 will be allocated to Grady as a class representative service award (*id.* ¶ 8); (5) up to $31,050 will be allocated to the settlement administration costs (*id.* ¶ 60); (6) the remainder of the gross settlement amount—the "Net Settlement Amount"—will be distributed as payments to participating class members (*id.* ¶¶ 18, 59(e)–(f)). No funds will revert to RCM. (*Id.* ¶ 51.)

The parties estimate that a net settlement amount of $938,950 (larger than the previous amount of $805,616.67) will be distributed to participating class members. (Konecky Decl. ¶ 34, Doc. 31-1.) In the amended Agreement, the net settlement amount will now be divided to fund two different types of claims; 40 percent will be allocated to the "General Claim Fund" and 60 percent will be allocated to a "Waiting Time Penalty Fund." (Agreement ¶ 59(f)(i).) The reason for the 60/40 split is not well-explained in the Renewed Motion or supporting documents.

At the hearing, counsel represented that the greater allocation for waiting time penalties was intended to account for the fact that 92 percent of the proposed class are former employees, meaning that the supermajority of class members qualify for waiting time penalties. Additionally, counsel pointed out that individual claimants would have had a hard time proving the heightened state of mind requirement; violations must be willful, according to Cal. Labor Code § 203. Class Members who have not worked for RCM since March 7, 2023, will share equally in the Waiting Time Penalty Fund. (*Id.* ¶ 59(f)(v).)

As to the distribution of the General Claim Fund, each participating class member's individual share is now subject to an updated distribution formula, which is proportional to the number and length of "Workshifts." (*Id.* ¶ 59(f)(ii)–(iii).) The Settlement defines the term Workshift as "the number of shifts worked by each Class Member for Defendant as a non-exempt traveling nurse or like hourly position in California during the Class Period." (*Id.* ¶ 35.) Workshifts are then adjusted basted on length such that one shift of 3.5 hours equals one Adjusted Workshift, a shift that is between 3.5 and five hours is 1.5 Adjusted Workshifts, and so on. (*Id.* ¶ 59(f)(ii).) The General Claim Fund is allocated based on the total number of Adjusted Workshifts worked by each Class Member. (*Id.* ¶ 59(f)(iv).)

As to PAGA payments, 75 percent of the $200,000 will be paid to the California Labor and Workforce Development Agency and 25 percent will be distributed to Class Members. (*Id.* ¶ 52.) The distribution of that 25 percent will be calculated in proportion to the number of pay periods worked during the PAGA Period. (*Id.* ¶ 59(g).) The "Class Period" extends from October 8, 2017 to March 7, 2023, and the "PAGA Period" extends from July 22, 2020 to March 7, 2023. (*Id.* ¶¶ 7, 23.) Grady has identified 1,414 class members who worked for RCM in California during the relevant period. (Mot. at 9.) The distribution of these three funds—the Waiting Time Penalty Fund, the General Claim Fund, and the PAGA Fund—will result in an average claim per class member of $664. (Mot. at 17.)

B. **Scope of Pre-Settlement Investigation**

In addition to these changes to the settlement's terms, the Renewed Motion provides some additional information about the scope of the parties' investigation. In advance of the parties' mediation, which took place in December 2022, RCM produced timecard protocols, meal break procedures, and shift data that specified the date of shift, the hours clocked, the hourly pay rate, and the location of the shift's assignment. (Konecky Decl. ¶¶ 22–23.) The Renewed Motion and other supportive filings do not describe what information was in these produced documents or what conclusions the parties were able to draw from this investigation.

Grady provides limited information about her own experience as a traveling nurse for RCM, including that she worked there for about six weeks from August 30, 2020 to October 17, 2020. (*Id.* ¶ 13.) In that time, she was staffed at both a COVID-19 testing facility and at a "skilled nursing facility," which appears to refer to a hospital. (*Id.*) She reported that, at both sites, she had to perform work before and after her scheduled shift time without compensation and had trouble securing meal and rest periods. (*Id.*)

In the Complaint, Grady attributes these violations to two of RCM's practices. First, she alleges that RCM instructed her to enter timecards that reflected only assigned shift times, regardless of actual time worked. (Complaint ¶ 23, Doc. 1-1.) This resulted in under-compensation for various overtime and off-shift tasks that she had to complete. Grady explained that when staffed at a hospital, she had to do several pre- and post-shift tasks such as completing charting, handling patient hand-offs, and submitting to mandatory temperature checks. (*Id.* ¶ 21–22.) When staffed at COVID-19 testing centers, she had to arrive one hour prior to her shift to unload supply trucks and setup the clinic. (*Id.* ¶ 24.) Second, Grady alleges that RCM failed to provide adequate staffing to enable nurses to take statutorily mandated meal and rest periods. (*Id.* ¶ 26.) But regardless of whether the break period was taken, RCM would still deduct pay and deny premium pay to nurses who worked during their breaks. (*Id.* ¶¶ 27–28.) These more specific allegations were not restated in the Renewed Motion and it is not clear whether Grady's pre-settlement investigation corroborated these allegations or not.

The Renewed Motion also calculates RCM's maximum potential exposure. The maximum liability on the wage-and-hour claims would be $12,251,257 if there were non-compliant break periods on every shift and 45 minutes of off-the-clock work. (Konecky Decl. ¶ 39.) Acknowledging that this assumes a high violation rate, Grady also calculated RCM's liability as $2,827,613 if there was one non-compliant break period per week and 15 minutes of off-the-clock work per shift. (*Id.* ¶ 42.) These totals do not include the civil penalties which Grady suggests could have been as high as $19,607,427. (*Id.* ¶ 40.)

Grady now renews her request for preliminary approval of the proposed settlement, arguing that the changes she has made to the Settlement Agreement have addressed the Court's concerns. (*See generally* Mot.) She once again asks the Court to: (1) grant preliminary approval of the Settlement; (2) certify the proposed Class; (3) appoint Grady as Class Representative and her attorneys as Class Counsel; (4) appoint ILYM Group, Inc. as the Settlement Administrator; (5) approve the proposed Class Notice for distribution to the Class members; and (6) schedule a hearing for final approval of the settlement. (*See generally id.*)

II. CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES

The parties have stipulated to certification of a class for settlement purposes only. (Mot. at ii.) Therefore, the Court must determine whether to certify the proposed class pursuant to Rule 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure.

A. Legal Standard

"A party seeking class certification must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b)." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th Cir. 2013). Rule 23(a) sets out four requirements for class certification:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defense of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interest of the class.

Fed. R. Civ. P. 23(a). "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350

(2011). This requires a district court to conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 350–51.

"Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Id.* at 345. Here, the parties seek a conditional certification of the class under Rule 23(b)(3). Rule 23(b)(3) permits maintenance of a class action if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

B. **The Proposed Class Does Not Satisfy Rule 23(a) Requirements**

Here, the parties have met the numerosity requirement. The 1,414 identified class members meets the general class size required for numerosity. *See*, *e.g.*, *Bruno v. Quten Rsch. Inst.*, 280 F.R.D. 524, 533 (C.D. Cal. 2011) ("A proposed class of at least forty members presumptively satisfies the numerosity requirement."). And as to adequacy, Grady and her counsel do not appear to have any conflicts of interest that impede their ability to represent the class. *See*, *e.g.*, *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1007 (9th Cir. 2018) ("Determining whether representation is adequate requires the court to consider two questions: '(a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" (quoting *In re Mego Fin. Cop. Secs. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000))).

But the Court has concerns about Grady's ability to demonstrate commonality and typicality on this record. Rule 23(a)(2) specifies that there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 349-50 (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). A plaintiff must allege that the class's injuries "depend upon a common contention" that is "capable of classwide resolution." *Id.* at 350. In other words, the "determination of [the

common contention's] truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Id.* Most importantly for the purposes of this case, "[w]hat matters to class certification . . . is not the raising of common questions—even in droves—but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132–32 (2009)). The Court explained in its previous order that "any renewed motion for preliminary approval must show that the proposed class in fact meets the Rule 23(a) … requirements—generic recitations professing conformity with Rule 23 will not do." (Order at 27.)

As to commonality, the Renewed Motion sets out several common questions in this case, including:

> (a) whether Defendant suffered and permitted Plaintiff and the other Class Members to work unscheduled overtime, through its policies with the Class Members and/or its clients; (b) whether Defendant suffered and permitted nurses to perform tasks off-the-clock, such as equipment setup and breakdown, and patient-hand-offs; (c) whether Defendant's policies failed to account for and compensate nurses for pre- and post-shift work, such as equipment setup and breakdown, and patient hand-offs; (d) whether Defendant required and/or suffered and permitted nurses to work through and/or remain on-duty during their meal and/or rest periods; (e) whether Defendant had sufficient policies and procedures to permit the nurses to verify their unscheduled work time with their placement sites or otherwise; (f) whether Defendant had sufficient policies and procedures to provide the nurses with off-duty meal and rest periods at their host facilities; (g) whether Defendant provided overtime and double time compensation; and (h) whether Defendant provided meal and rest period penalty pay.

(Mot. at 10–11.) Grady adds that these questions can all be resolved by looking at RCM's policies and procedures as they relate to compensation, break times, and staffing. (Mot. at

10.) But this does not provide the necessary level of specificity. This list of questions would apply in almost any wage-and-hour claim. And the contentions in the Renewed Motion do not make it possible to determine whether RCM's own policies provide common answers to these questions in the present case.

There are several gaps in information that render it difficult for the Court to assess commonality. For example, RCM staffed class members at both COVID-19 testing centers and hospitals. (Konecky Decl. ¶ 13.) At the most basic level, the Court does not even know how many locations hosted RCM nurses, what number of those locations were COVID-19 testing centers, what number were hospitals, and whether there were other types of host sites where proposed class members were staffed. Nor can the Court tell how assignments differed across these types of host sites. Grady experienced about an hour of uncompensated pre-shift work at the testing center and an unspecified amount of time of uncompensated off-shift work at a "skilled nursing facility." (*Id.*; Complaint ¶¶ 22 & 24.) There is no way to tell how much uncompensated time Grady even accrued at her various assignments and the Court cannot ascertain if these amounts of off-the-clock work were standard across all locations.

Similarly, Grady asserts that it was difficult to take mandated break periods, but there is no information about how break periods operated. Did an individual host site's break procedures have any effect on how RCM nurses took breaks? Were some locations better at guaranteeing break time for RCM nurses? Based on the information before the Court, it is impossible to tell. Grady's claims about RCM's staffing shortages feature corresponding unknowns. Did RCM provide all staffing at the host sites such that its staffing policies were responsible for a shortage? Did staffing shortages burden RCM nurses and impose on their break periods in the same way at all host sites?

The overall result is that the Court cannot determine that RCM's policies and practices provide a common answer to all the questions raised by this class action. Based on the threadbare information provided, it is possible that there would be significant differences in how RCM's policies affected the members of the proposed class, resulting in

uncommon injuries. The list of information gaps that the Court has just recounted is non-exhaustive and is instead meant to be illustrative. The gist is that, as presented in the Renewed Motion and supporting documents, the Court cannot determine whether the proposed class members have suffered the same injury and whether there are common answers to the list of common questions for the proposed class.

As to typicality, Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). Grady says that her claims and injuries are of the same type as the claims and injuries of all class members; all harm is related to unpaid shift work, overtime pay, and the unavailability of meal/rest periods. (Mot. at 11.) Grady's assertions are conclusory, however, and the briefing provides no information demonstrating the truth of those assertions. When the absence of factual information is considered along with Grady's minimal experience with RCM — six weeks at two facilities— the Court cannot find typicality.

Because Plaintiff has not sufficiently demonstrated commonality or typicality, the Court need not address whether the proposed class satisfies the adequacy requirement[1] or the Rule 23(b)(3) requirements. For the foregoing reasons, the request to certify the class for settlement purposes is DENIED.

[1] Regarding adequacy, which requires vigorous representation of the entire class, the Court is concerned that the settlement distribution favors short-term employees over long-term employees, as discussed more fully in Section III.B. As a short-term employee, the named plaintiff is unfairly favored by this distribution, which does raise the question of whether she and her counsel have the best interests of the class in mind.

III. PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

A. Legal Standard

The legal standard for preliminary approval of a class settlement was explained in detail in the Court's previous Order Denying Without Prejudice Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement (Order, Doc. 30). To recap briefly, Federal Rule of Civil Procedure 23(e) requires judicial review and approval of any class settlement. *See* Fed. R. Civ. P. 23(e). A settlement may be approved only after the Court finds that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

To ensure compliance with Rule 23(e)(2), district courts in the Ninth Circuit are guided by the eight factors from *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566 (9th Cir. 2004). Those factors are:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

Kim v. Allison, 8 F.4th 1170, 1178 (9th Cir. 2021) (quoting *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

Rule 23(e), which Congress and the Supreme Court amended in 2018, provides four additional factors to consider:

> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3)[.]

Fed. R. Civ. P. 23(e)(2)(C); *see Kim*, 8 F.4th at 1179.

Preliminary approval and notice of the settlement terms to the proposed class are appropriate where "[1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with the range of possible approval. . . ." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation marks and citation omitted).

B. **Discussion**

In the Court's previous Order, it flagged concerns regarding: the extent of discovery and scope of investigation; the adequacy of class relief based on the failure to estimate the maximum potential recovery; the size of the proposed attorneys' fees; the size of the proposed service award; and the fairness of the proposed distribution formula. (Order at 7–25.) The parties ameliorated many of these concerns in the Renewed Motion, namely by providing a calculation of maximum potential recovery, reducing the size of attorneys' fees, reducing the size of the proposed service award, and amending the distribution formula so that it is prorated according to number of shifts worked and lengths of shifts rather than number of weeks worked. (*See generally* Mot.) But many of the unanswered questions that plague the request for class certification also plague the request for settlement approval. In addition, one of the revisions to the distribution formula does nothing to ameliorate the previous inequity and, in fact, makes the allocation less equitable.

Because of the cursory nature of the Renewed Motion, the Court remains uncomfortable with its ability to determine whether the settlement amount is reasonable. While the Court now has a better sense of *what documents* the parties examined, it still does not know with specificity *what information* was in those documents. It is near impossible for the Court to evaluate the fairness of $1.6 million as a proposed settlement amount or the fairness of $664 as the average claim distribution for these proposed class members. As the Court explained in its last order, "[t]he amount offered in settlement is

generally considered to be the most important consideration[] of any class settlement." *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1011 (E.D. Cal. 2019).

Further, the Court has significant concern as to the unexplained allocation of 60 percent of the recovery to waiting time penalties in the revised distribution formula. Because, according to counsel's description of the settlement, waiting time penalties would be shared equally among all former employees, this means the bulk of the award would be undifferentiated. In other words, as to 60 percent of the settlement fund, a class member who worked for one day would receive the same distribution as another employee who worked for six months, a year, or more. Moreover, the 8 percent of employees who are current employees would not receive any award based on waiting time penalties; they would be shut out of 60 percent of the fund. The true harm in a wage and hour action such as this one arises out of the deprivation of breaks and the failure to pay overtime. Hence, the longer an employee has worked under an unlawful policy, the greater the harm. It is highly unusual to have a settlement in which a careful allocation based on actual harm is set aside in favor of an allocation that disproportionately focuses on waiting time penalties. Here, such an approach also disproportionately favors the named plaintiff, whose tenure was very short term. Accordingly, it raises red flags on the issue of adequacy of representation, in addition to the equity considerations mentioned.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES the Renewed Motion for Preliminary Approval of Class Action and PAGA Settlement.

DATED: September 7, 2023

HON. JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE