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7 *Attorneys for Plaintiff and the Putative Class*

8

9   **UNITED STATES DISTRICT COURT**

10   **CENTRAL DISTRICT OF CALIFORNIA**

11

12 BARBARA GRADY, individually   Case No. 5:22-cv-00842 JLS-SHK
13 and on behalf of all others similarly
    situated,
14   **DECLARATION OF JOSHUA G.**
                                          KONECKY IN SUPPORT OF MOTION
15   Plaintiffs,   **FOR PRELIMINARY APPROVAL OF**
                                          CLASS ACTION AND PAGA
16   v.   **SETTLEMENT**
17
18 RCM TECHNOLOGIES, INC.,   **Date:** August 23, 2024
                                          Time: 10:30 a.m.
19   Defendant.   **Location:**
                                          First Street U.S. Courthouse
20   350 W. 1st Street, Courtroom 8A, 8th Floor,
                                          Los Angeles, CA 90012
21
22   Complaint Filed: February 7, 2022
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DECLARATION OF JOSHUA G. KONECKY ISO PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL
Grady, et al. v. RCM Technologies, Inc., Case No. 22-cv-00842-JLS-SHK

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.

10   3.   A true and correct copy of this Joint Stipulation of Class Action and PAGA

11   Settlement and Release ("Settlement Agreement") is attached to this Declaration as

12   **Exhibit A**.   A proposed Notice of Settlement, subject to court approval and formatting

13   by the Settlement Administrator, is attached as Exhibit 1 to the Settlement Agreement. For

14   the Court's convenience, the proposed Notice is also attached to this Declaration as

15   **Exhibit B**.

16   **EXPERIENCE OF COUNSEL**

17   4.   I have been counsel for Plaintiff and the proposed plaintiff class throughout this

18   case. I am a partner at Schneider Wallace Cottrell Konecky LLP, which is a leading private

19   plaintiff firm in employment and other class action cases. More details on the work,

20   experience and accomplishments of the firm can be found at www.schneiderwallace.com.

21   5.   A copy of my curriculum vitae, which contains a representative list of class

22   action and multi-plaintiff cases I have handled, is attached as **Exhibit C** to this

23   Declaration.

24   6.   My practice over the past twenty years has focused on the representation of

25   plaintiffs in class and representative actions involving wage and hour disputes. I have also

26   litigated class actions in employment discrimination and disability rights, including cases

27   involving access to public accommodations and educational services under the Americans

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1 with Disabilities Act of 1990 (ADA). I also have litigated and tried business disputes.

2   7.   As I mentioned above, my firm is a leading class action firm. Our partners and

3 attorneys have litigated major wage and hour class actions, have won several prestigious

4 awards, and sit on important boards and committees in the legal community. The Recorder

5 has listed our firm as one of the "top 10 go-to plaintiffs' employment firms in Northern

6 California." I also have been named by the Daily Journal as a top labor and employment

7 attorney in California and I have been on the Northern California Super Lawyers list every

8 year since 2011.

9   8.   I have been lead counsel and/or co-lead counsel in numerous class actions. In

10 this capacity, I have successfully litigated contested class certification motions in some

11 twenty or more cases and have brought several certified class actions to trial. I also have

12 negotiated numerous class action settlements, both before and after contested motions for

13 class certification.

14   9.   My experience includes class actions involving off-the-clock and meal and rest

15 periods claims asserted by nurses and other healthcare workers.

16   10.   Through the many employment class action cases that I have litigated and

17 observed, I have gained substantial experience in class action law and practice over the

18 years, including cases in the nursing and healthcare industry. I believe that my experience

19 in these cases has allowed me to develop, not just the skills to litigate and try such cases

20 successfully, but also to have good judgment in terms of understanding the strength, value,

21 and risks of them when it comes time to making decisions regarding settlement and

22 whether a potential settlement provides fair value at various stages of the litigation.

23   **INITIAL PHASE OF THE LITIGATION AND FIRST SETTLEMENT**

24   11.   RCM Technologies (USA), Inc. ("Defendant" or "RCM") RCM is a "provider

25 of business and technology solutions," with headquarters in New Jersey. *See*

26 https://www.rcmt.com/about/; Deposition of Desiree Disotell – PMK ("PMK Depo") at

27 40:9-10, attached as Exhibit D hereto. A component of RCM's business is healthcare

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staffing. *See* https://www.rcmt.com/healthcare. RCM's "travel division" hires and assigns nurses to the RCM clients, including in California, which operate hospitals and clinics, skilled nursing facilities, and, during the Covid-19 pandemic, Covid testing. PMK Depo at 10:7-10; 54:22-55:16. RCM typically considers the nurses it places to be "temporary" employees. *Id.* at 138:17-24.

12. Barbara Ann Grady worked as a temporary nurse for RCM in September and October of 2020, during the Covid-19 pandemic. *See* Declaration of Barbara Grady, ¶ 2.

13. In approximately June 2021, Ms. Grady contacted my firm regarding concerns over unpaid, off-the-clock work and missed meal and rest periods at her placement sites. RCM had placed Ms. Grady in both skilled nursing facility settings and at COVID testing sites. Ms. Grady's time was tracked using timesheets. Ms. Grady reported that in both placement settings, she had to perform work before and after her official start time without compensation. She also reported difficulties in securing off-duty meal and rest periods.

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

15. On February 7, 2022, we filed Ms. Grady's class action and PAGA enforcement complaint in the San Bernardino County Superior Court. The complaint alleged that Defendant suffered and permitted Plaintiff and other similarly situated nurses and employees working in like hourly positions to work off-the-clock at their placements. The off-the-clock work included activities such as setting up and/or breaking down equipment. The complaint further alleged, among other things, that the nurses did not receive off-duty meal and rest periods at the frequency and duration required by California law. *See, e.g.*, Compl. (ECF No. 1-1) at ¶¶ 1-4. 20-28. The complaint sought back wages, penalties, and declaratory relief. *See id.* at p. 25:11-27:11. It alleged claims under California Labor Code §§ 201-204, 221-223, 226, 226.7, 510, 512, 1174, 1174.5, 1194, and 1198 *et seq.*; IWC Wage Order No. 5; the California Code of Regulations, Title 8 § 11040 and ¶¶ 7, 11, &

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1 12; the Private Attorneys General Act of 2004 ("PAGA"); and the California Business and

2 Professions Code. *Id.* at ¶¶ 36-109.

3   16.   On May 19, 2022, Defendant removed the action to this Court. ECF No. 1.

4 Defendant filed its Answer and Affirmative Defenses on the same day, denying the

5 allegations. ECF No. 1-2. Defendant also has maintained that putative class members have

6 worked at different sites, for different clients, and under different conditions of

7 employment (including under arbitration agreements), than Plaintiff, rendering class

8 certification unsuitable.

9   17.   On June 28, 2022, the parties conducted their initial Rule 26(f) conference. On

10 July 12, 2022, the parties exchanged initial disclosures.

11   18.   On August 2, 2022, we served Plaintiff's first sets of interrogatories and requests

12 for production of documents on Defense counsel. In the months that followed, we engaged

13 in ongoing meet and confer with Defense counsel (by videoconference and in writing)

14 regarding these requests and the appropriate scope of pre-certification discovery. When

15 the parties were unable to resolve their differences, we sought an informal discovery

16 conference with Magistrate Judge Kewalramani, which took place on November 8, 2022.

17   19.   On December 7, 2022, the parties engaged in a full-day mediation before

18 Michael J. Loeb of JAMS. In connection with the mediation, Defendant provided us with

19 relevant documents and data.

20   20.   With respect to documents, Defendant produced the written information and

21 instructions provided to nurses concerning timecard completion, timecard protocol, and

22 meal break requirements and procedures. Defendant also produced its Travel Assignment

23 Contract for nurses in California, which also showed Defendant's policies regarding

24 hourly pay, recording hours worked, and meal and rest periods.

25   21.   Defendant also produced data showing the following information for each

26 putative class member: (a) the job title of the nurse; (b) the date of each shift worked by

27 the nurse; (b) the hours clocked-in for each shift; (c) the hourly pay rate paid for each shift;

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1 (d) the location of the assignment for each shift; and (e) the type of service corresponding

2 to each shift (e.g. Covid testing, hospital work, schools, etc.) Defendant also provided

3 workweek information from which the number of wage statements issued to each Class

4 Member could be calculated.

5   22.   After the mediation, Defendant provided confirmatory discovery regarding the

6 data sources for the composition of the class list, hours worked and shift counts; meal and

7 rest period premium totals; and additional timekeeping and meal and rest break policies.

8   23.   The mediation on December 7, 2022 eventually resulted in a proposed settlement

9 for the alleged class action and PAGA claims. Ultimately, the proposed Settlement was

10 for a gross, non-reversionary settlement fund of $1,600,000.00, on behalf of a settlement

11 class consisting of approximately 1,414 individuals who worked a combined 90,939 shifts

12 for RCM as a traveling nurse or like hourly position anywhere in California between

13 October 8, 2017 and March 7, 2023. *See* ECF No. 31-2 at ¶¶ 6, 7, 15, 66.

14   24.   On May 2, 2023, the Court denied without prejudice Plaintiff's motion for

15 preliminary approval of the settlement for several reasons, including the failure to show

16 sufficient investigation into the claims and potential value of the case. *See* ECF No. 30.

17   25.   On September 7, 2023, the Court denied Plaintiff's renewed motion for

18 preliminary approval based on the lack of information provided to assess commonality,

19 typicality, and the reasonableness of the settlement, among other things. *See* ECF No. 35

20 at 9:5-10:17, 12:21-13:8.

21   26.   On February 5, 2024, the Court denied the parties' request to conduct a joint

22 survey of class members as part of the settlement approval process and ordered Plaintiff

23 to show cause why the stay should not lift so that litigation may resume. *See* ECF No. 38.

24 Plaintiff responded that she would no longer seek approval of the settlement and that

25 litigation should resume. ECF No. 39. On February 18, 2024, the Court discharged the

26 Order to Show Cause and set a litigation schedule for the case. ECF No. 40.

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1

FURTHER DISCOVERY AND SECOND MEDIATION

2   27.   Following receipt of the Court's Order, we engaged in significant written

3 discovery, depositions, and further investigation directed toward both class certification

4 issues and the merits of the claims. Defendant produced additional documents and data

5 beyond what was earlier produced. This consisted of class member contact information

6 and additional policies and additional procedures applicable to California placements

7 during the putative class period. We also propounded, and Defendant answered,

8 interrogatories to show the breakdown of assignment types and work settings within the

9 originally alleged class, including related information pertaining to that breakdown.

10 Defendant also supplemented information produced previously in the case showing, by

11 employee ID, the daily work hours recorded, the type of service being provided, the

12 applicable wage rates, and related information.

13   28.   Both parties also proceeded with depositions. Defendant took the deposition of

14 the named Plaintiff. We took the deposition of Defendant's Director of National

15 Recruiting, and the deposition of Defendant's 30(b)(6) designee on topics including: the

16 work assignments, settings, and job duties of the putative class members; the policies,

17 procedures, and practices pertaining to meal and rest periods; the policies, procedures, and

18 practices pertaining to wages and compensation of putative class members; and the

19 policies, procedures, and practices pertaining to approval and/or payment of overtime and

20 double time, amongst other topics.

21   29.   We engaged in further informal discovery as well, interviewing putative class

22 members and obtaining signed declarations in support of the Motion for Class

23 Certification.

24   30.   On June 21, 2024, we filed Plaintiff's Motion for Class Certification. *See* ECF

25 No. 41. The Motion for Class Certification provides further discussion of the relevant

26 facts, based on the deposition testimony, Class Member declarations, and documentary

27 evidence, and other discovery obtained by Plaintiff. The Motion also presents discussion

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1   of Plaintiff's theories of liability and Rule 23 analysis, citing supporting caselaw. This

2   factual background and discussion of Plaintiff's theories of liability is summarized in the

3   Memorandum of Points and Authorities submitted with the instant motion.

4   31.   After we filed the Motion for Class Certification, the Parties met and conferred

5   regarding the potential to re-engage in settlement discussions in advance of the class

6   certification hearing. The Parties then participated in a full-day mediation with mediator

7   Michael Loeb on July 2, 2024.

8   32.   The mediation was conducted at arms-length. The mediator, Mr. Loeb, was

9   actively involved. We developed an exposure analysis based on Defendant's data, which

10   we shared with Mr. Loeb and with counsel for Defendant. Defendant also had its own

11   exposure analysis. My partner, Nathan Piller and I, negotiated for Plaintiff. Ms. Grady

12   was present as well. Defense counsel and Defendant's CFO were there for the defense.

13   We worked constructively but also disagreed on a range of issues. At several points during

14   the day, we thought the negotiations may have broken down. In the early evening, Mr.

15   Loeb presented a mediator's proposal. After serious consideration, discussions with Ms.

16   Grady, and further communication with Mr. Loeb, we accepted the mediator's proposal

17   for the material terms of the settlement. Defendant also accepted the mediator's proposal.

18   On July 8, 2024, Mr. Loeb reported to us that the mediator's proposal had been accepted

19   by both parties. We then worked with Defense counsel to resolve some remaining issues

20   and details so that the parties had a complete agreement.

21   33.   The proposed settlement presented in the instant motion is different from the

22   settlement submitted by the Parties in the previous motions for preliminary approval.

23   Among other things, the current proposed settlement has a narrower Settlement Class,

24   covers a shorter Settlement Class Period, has a different distribution formula, and has a

25   higher per class member recovery, than the earlier settlement.

26   34.   The proposed Settlement Agreement is attached as **Exhibit A** to this

27   Declaration.   Attached as **Exhibit B** to this Declaration is a proposed settlement notice.

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The proposed settlement notice is also attached as Exhibit 1 to the Settlement Agreement.

35.   On July 11, 2024, the Parties submitted a stipulated request to vacate the class certification hearing and set a preliminary approval hearing. *See* ECF No. 42. On July 14, 2024, the Court vacated the Class Certification Motion and directed Plaintiff to file her Motion for Preliminary Approval of the Class and PAGA Settlement. *See* ECF No. 43.

36.   Pursuant to California Labor Code § 2699(l)(2), my office submitted a copy of the Settlement Agreement to the Labor and Workforce Development Agency (LWDA) on July 26, 2024. We have not received comment from the LWDA to date.

MATERIAL TERMS OF THE SETTLEMENT

37.   The proposed Settlement Class consists of current and former non-exempt employees of RCM who were nurses assigned by RCM to staff COVID-19 testing and/or vaccination sites for San Bernardino County (including assignments at San Bernardino County's Arrowhead Regional Medical Center), and at K-12 schools for Los Angeles Unified School District (LAUSD), or Ginkgo Concentric (Ginkgo), between March 1, 2020 until March 7, 2023 (the Class Period), and who do not submit a timely and valid request for exclusion from the settlement. *See* Settlement Agreement at ¶ 6.

38.   As memorialized in Paragraphs 6 and 68 of the Settlement Agreement, there are an estimated 1,097 Class Members who worked an estimated 61,902 shifts during the Class Period. Within this broader Class, there are an estimated 382 Class Members who were assigned to work approximately 25,667 shifts at "pop up" Covid-19 testing and vaccination centers for San Bernardino County (including San Bernardino County's Arrowhead Regional Medical Center), 109 assigned to work approximately 6,412 shifts at the LAUSD K-12 schools, and 612 assigned to work approximately 29,823 shifts at Ginkgo Concentric, with 6 of the Class Members working for more than one client.

39.   The proposed Settlement is for a non-reversionary Gross Settlement Amount of $1,658,410.00. *See* Settlement Agreement at ¶ 15. This Gross Settlement Amount does not include the employer's side of the payroll taxes associated with the settlement

1   payments, which Defendant is obligated to pay in addition to the Gross Settlement

2   Amount. *Id.* at ¶¶ 12, 15. Paragraph 53 of the Settlement Agreement explicitly provides

3   that there will be no reversion of any of the Gross Settlement Amount to the Defendant.

4   To the extent there are any uncashed checks or other residual, it will be paid to a Court-

5   approved *cy pres* beneficiary. *Id.* at ¶ 61(g)(iii).

6   40.   The case also alleged claims under California's Private Attorneys' General Act

7   (PAGA), California Labor Code section 2699 *et seq*. Under the PAGA, private individuals

8   step into the shoes of the Labor Commissioner to pursue claims for civil penalties, with

9   75% of the penalties paid to the Labor and Workforce Development Agency (LWDA) and

10   another 25% to be paid to the aggrieved employees. Here, the parties have allocated

11   $165,841.00—10% of the Gross Settlement Amount—for the PAGA claims, with 75% of

12   it earmarked for the LWDA. *See* Settlement Agreement at ¶¶ 22, 54.

13   <div align="center">**SETTLEMENT VALUE AND DISTRIBUTION FORMULA**</div>

14   41.   The Net Settlement Amount is the Gross Settlement Amount minus: the

15   $165,841.00 allocated to the claims for civil penalties under the PAGA; the settlement

16   administration costs (estimated to be $39,220);[1] the service award the Court may approve

17   for the Class Representative (up to $5,000); and the amount the Court may approve for

18   reasonable attorneys' fees and costs (up to twenty-five percent of the total settlement

19   amount in fees plus costs of not more than $50,000). *Id.* at ¶ 18.

20   42.   If the foregoing amounts are approved, the Net Settlement Amount would be

21   approximately $984,746.50 and the portion of the PAGA allocation to be distributed to

22   the PAGA Members would be $41,460.25, for a total net settlement value to the Class and

23   PAGA Members of $1,026,206.75. As mentioned above, there are approximately 1,097

24   _____

25   [1] The Settlement Administrator's initial estimate of Settlement Administration Costs was

26   $33,000, which is the amount specified in the Settlement Agreement. However, the Settlement Administrator subsequently adjusted its estimate to $39,220, after the Settlement Agreement had been fully executed. Accordingly, and subject to approval of

27   the Court, the Parties will discuss the preparation of an addendum to the Settlement

28   Agreement to reflect this adjustment.

1   Class Members and 61,902 shifts. *See* Settlement Agreement at ¶ 68. At these numbers,

2   there would be an average award of $897.67 per Class Member and $15.91 per shift, plus

3   the PAGA Member's share of the PAGA allocation.

4   43.   The Parties also agreed to a distribution formula that values the shifts for

5   providing Covid testing at the "pop up" sites and Los Angeles Unified School District

6   (LAUSD) Covid testing and vaccination sites at a rate of 1.5 to 1 as compared to shifts for

7   the Ginkgo Concentra K-12 school assignments. The reason for this proposed formula is

8   that the nurses assigned to K-12 Ginkgo school sites had relatively short shifts, averaging

9   approximately 4.7 hours, but were generally paid a guarantee for 6-hours. In comparison,

10   the average length of shifts worked at San Bernardino County was approximately 8.4

11   hours and the average at LAUSD was approximately 7.71 hours. Thus, while RCM's meal

12   and rest period policies, as well as its policies for how nurses should record their time,

13   were the same between the San Bernardino sites, LAUSD, and the Ginkgo Concentra K-

14   12 school sites, the shorter shift length at the Ginkgo sites means that the nurses in the

15   Ginkgo assignments as a practical matter would not be entitled to as many breaks and

16   would not work off-the-clock to the same extent as the nurses at the pop up locations.

17   44.   There are approximately 491 Class Members who were assigned to a total of

18   approximately 32,079 shifts at San Bernardino County and LAUSD, and 612 Class

19   Members assigned to a total of approximately 29,823 shifts at Gingko Concentra, with 6

20   Class Members having assignments at more than one client. *See* Settlement Agreement at

21   ¶ 68. Under the weighted shift distribution formula described in the preceding paragraph,

22   there would be an average award of $1,245.80 per Class Member and $18.95 per shift at

23   the San Bernardino County and LAUSD sites, and an average award of $618.71 to the

24   individual Class Members and $12.63 per shift at the Gingko sites, plus the PAGA

25   Members' shares of the PAGA allocation.

26   45.   The individual settlement award for each Participating Class Member will

27   increase or decrease from the averages proportionally based on the number of weighted

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1 shifts the Participating Class Member worked in comparison to the total weighted shifts

2 of all the Participating Class Members combined.

3 46.   Under Paragraph 61(g) of the Settlement Agreement, there is pro-rata

4 distribution method to distribute the employee-share of the PAGA allocation. This

5 distribution is based on pay periods, rather than shifts, because PAGA penalties are

6 assessed on a pay period by pay period basis. Additionally, the PAGA Period is shorter

7 than the Class Period due to the difference in statutes of limitations.

8 47.   We believe the formulae described above fairly reflect how the claim value of

9 the individual Class Members may increase or decrease depending on the number of shifts

10 worked, shift length, and number of pay periods. It does not address every contingency

11 or possible distinction, but it can be administered in an objective and manageable fashion.

12 Additionally, the shift and pay period information to input into the formula for each

13 Settlement Class Member and PAGA Member will come directly from Defendant's

14 records. Moreover, as explained in the Settlement Agreement and proposed Class Notice,

15 Class Members will receive notice of the number of shifts and pay periods credited to

16 them and will have an opportunity to challenge Defendant's records if they do not believe

17 the information shown is accurate.

18 **CALCULATION OF DEFENDANT'S POTENTIAL EXPOSURE**

19 48.   We calculated Defendant's potential exposure based on the recorded work hours

20 and wage rates for the Class Members provided by Defendant in Excel format. We

21 understand Defendant pulled this information from its ADP and SAP concur time and

22 payroll systems. This provided specific information as to the shifts worked, time recorded

23 for the shifts, the client for the shifts, and the hourly wage rate, for each Class Member.

24 49.   Based on Defendant's wage rate data, we calculated an average wage rate of

25 $37.59 for the nurses assigned to San Bernardino County, $29.33 for the nurses assigned

26 to LAUSD, and $40.78 for the nurses assigned to Gingko. The weighted average hourly

27 wage for the Settlement Class Members is approximately $38.27.

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50.   Our exposure calculation is then premised on Class Members having one noncompliant rest period per shift, one noncompliant meal period per shift, and 30 minutes of off-the-clock set-up and clean up work per shift (calculated at time and a half), except for the Class Members at the Gingko sites. Because the Gingko Class Members had an average shift length of 4.7 hours and were generally guaranteed pay for six hours, we did not include noncompliant meal periods or off the clock work in our calculations for them. This resulted in potential damages of $2,369,068 in rest period premium wages, $1,152,886 in in meal period premium wages, and $864,664 in alleged off-the-clock wages, for a total of $4,386,619.79. Using a 7% interest rate for meal and rest periods (*Naranjo v Spectrum Security Services, Inc.*, 13 Cal.5th 93, 122 (2022)), and a 10% interest rate for off-the-clock work (Cal Labor Code § 3289(b)), we calculated interest to be $1,332,013. Thus, the total exposure we calculated for the unpaid premium and overtime wages, including interest, is $5,718,633.

51.   We also calculated penalties based on a 100% violation rate for inaccurate wage statements under Labor Code § 226 to be $1,902,850. With respect to waiting time penalties, we calculated exposure based on a 100% violation rate of $8,705,848, based on Defendant's representation that over 95% were former employees, which is consistent with the composition of the class being temporary employees doing Covid testing and vaccination from March 2020 to March 2023.

52.   With respect to potential civil penalties under PAGA, we calculated one set of penalties arising from meal and rest period violations, and another set arising from off-the-clock work, except that at Gingko Concentra we did not include the set for the off-the-clock work. We calculated them at $100 a pay period because there has not been a citation or liability finding against RCM. Using Defendant's pay period estimates (6,632 for San Bernardino County sites, 1,647 for the LAUSD sites, and 10,351 for the Gingko Concentra sites), we calculated exposure at $2,690,900. This assumes Plaintiff would prove at least one break violation per pay period for every employee within the PAGA limitations

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1 period, and at least one off-the-clock violation per pay period for the employees assigned

2 to the San Bernardino County and LAUSD sites.

3 ## **RISK ASSESSMENT AND COMPROMISE**

4   53.   The discovery, investigation, and legal analysis we performed over the course

5 of this case led us to the position that RCM's approach and policies were insufficient to

6 protect its nurses who were working at client sites during the often busy and chaotic time

7 during the first couple years of the Covid-19 pandemic. In our analysis, RCM's reliance

8 on its clients to provide breaks and prevent off-the-clock work, combined with

9 automatically deducting pay for meal periods presumed to occur and failing to pay

10 premium wages until late in 2022, created a strong case for class certification and liability

11 on the lawfulness of the policies. Indeed, RCM did not establish a comprehensive written

12 meal and rest period policy until late 2022 and, while its previous auto-deduct policy may

13 not have been facially unlawful in a strict sense, it did not appear to be facially lawful

14 either. Moreover, our interviews with Class Members demonstrated to us that there were

15 reoccurring problems in the field with respect to breaks and off-the-clock work.

16   54.   At the same time, our interviews with Class Members and our review of timecard

17 information produced by Defendant in the case also indicated that the resulting violation

18 rate would likely be substantially less than 100% and that it would be challenging to prove

19 on a class basis. While some Class Members experienced reoccurring violations (and

20 submitted strong declarations to that effect), our interviews with other Class Members

21 indicated a risk of variation in the frequency and extent of harm across the Class as a

22 whole.

23   55.   In addition, while disputed, there also was evidence presented by Defendant

24 indicating that the Class was unlikely to obtain the level of recovery contemplated by the

25 exposure analysis above.

26   56.   For instance, the parties vigorously disputed whether the auto-deduct policy

27 itself was facially unlawful, and by late 2022, RCM had implemented a more robust set

28

14

of written break and overtime policies. Similarly, while RCM's template emails to the nurses before the end of 2022 stated that local manager approval would be necessary to document deviations from the presumptive schedule (which Plaintiff maintains causes nurses to underreport their time and noncompliant breaks), RCM's timecards still had language on them instructing the nurses to accurately document their time (which RCM would argue demonstrates a lawful policy).

57.   Taken together, this meant there would be risk in prevailing on a claim that the policies themselves were unlawful on their face.

58.   This in turn raises a likelihood that Plaintiff would need to prove the extent of Defendant's liability based on representative testimonial evidence to establish a "pattern and practice" of noncompliant breaks and off-the-clock work. Proving liability in this manner carries its own risk and uncertainty. In this connection, as discussed above, the information we obtained in our interviews with the Class Members showed that while the common policies, in our estimation, caused numerous violations (as evidenced by those Class Members who did submit declarations), the overall violation rate and scope would be disputed, difficult to predict, and likely less frequent than the exposure analysis above contemplates.

59.   Defendant also maintained that its clients had documented, reliable procedures for ensuring meal and rest breaks were provided. While we dispute that this was the nurses' experience on the ground, these arguments nevertheless carried risk. Relatedly, Defendant would point to an array of timecards showing facial compliance, while we would argue that there was a practice of having timecards filled out superficially to give the appearance of compliance.

60.   Defendant also vigorously contested the overarching questions of whether it was suffering and permitting Class Members to work off-the-clock and to miss meal and rest periods, or that it was failing to provide overtime or premium pay as the law requires.

61.   Moreover, while we maintained that Defendant's common policies and lack of

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1   oversight fell short of the affirmative obligations it owed to the employees under

2   California law, Defendant hotly disputed these contentions.

3   62.   In the end, we had to weigh the mix of evidence as to how often nurses may have

4   worked off-the-clock or through breaks, whether such work was compelled or voluntary,

5   and the resulting impact on the likelihood of class certification, class decertification, class

6   liability, and/or a class-wide damages recovery.

7   63.   In light of the foregoing and based on the information we gained from our

8   interviews with Class Members, it is our judgment that the following deductions from the

9   exposure analysis above represent a reasonable benchmark for compromise. First, we

10   believe it is reasonable to estimate for settlement purposes that, on average, Class

11   Members did not receive a compliant meal period in one out of every 2.5 shifts; and did

12   not receive a compliant rest period in one out of every 2.5 shifts. This is a significant

13   adjustment from the exposure analysis above, and results in a reduced exposure figure of

14   $947,627.37 for the rest period claims and $461,154 for the meal period claims. When

15   adding the off-the off-the-clock claim, it results in a total exposure for unpaid premium

16   and overtime wages of $2,273,446 ($3,013,771 including interest).

17   64.   Realistically, we also had to consider the risks of not achieving class certification

18   (or defeating a motion for decertification if we did obtain class certification). Assuming

19   we prevailed at class certification and then demonstrated class-wide violations on some or

20   all of Plaintiff's claims, proving liability on a class-wide basis and the measure of damages

21   presented further risk. Furthermore, if we prevailed on class certification and liability,

22   Defendant might appeal any number of determinations regarding class action status,

23   liability, evidentiary rulings, and damages, causing potentially years of further delay.

24   Throughout it all, Defendant would be expected to continue to argue that it maintained

25   lawful policies and procedures and paid the Class Members sufficiently under California

26   law.

27   65.   With respect to just the class certification component, we believe it reasonable

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1   to assess a 50% discount to account for the risk that the case would not be certified as a

2   class action. We also believe it is reasonable to assess a further deduction of 50% to

3   account for risks on the merits and risks of appeal. This level of discount results in a

4   reduced total exposure figure for the unpaid wages and interest of $795,706.

5   66.   Plaintiff also asserts claims for waiting time penalties, inaccurate wage

6   statement penalties and PAGA penalties. While these penalty claims have the potential to

7   be eye-popping, we had to be realistic about the likelihood of showing a consistent level

8   of violation and how they would be assessed. Furthermore, these claims presented the

9   additional risks and difficulties of needing to prove that the violations were "willful," to

10   obtain waiting time penalties under Labor Code § 203, and "knowing and intentional" and

11   causing "injury" for wage statement penalties under Labor Code § 226(e). Additionally,

12   PAGA claims are subject to discretionary reductions and there also is a good faith defense

13   for the penalty claims. Realistically, the defense arguments and other considerations

14   discussed above that cause risk for the underlying claims are compounded, in our analysis,

15   for the penalty claims, given the need to show intent and similar considerations. Using a

16   50% discount for the risks of class treatment and then a 90% discount for the risks of

17   obtaining penalties, may seem steep, but we believe it is reasonable. Applying them to

18   the penalty claims results in waiting time penalties of $435,292, inaccurate wage statement

19   penalties of 95,142, and PAGA penalties of $269,090. This results in total penalties of

20   $799,524, and total wages, penalties, and interest of $1,988,778.

21   67.   There are still other considerations that in our view make the settlement

22   reasonable. First, the core of the alleged violations occurred during a unique time in recent

23   history: the height of the Covid-19 pandemic, which we hope and believe is in the rearview

24   mirror. Second, after Plaintiff filed this action (and in our view, as a result of this action),

25   RCM made its human resource policies in California more robust, hiring a California labor

26   specialist and promulgating a new set of policies and procedures. While we do not purport

27   to assert that the new policies solve all the problems, we recognize that they are a positive

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1 development. And, while the new hire and policies are not a measure of damages that can

2 be quantified here, they are a beneficial result of this action. Finally, even assuming

3 success at trial and a substantial recovery, that result might still be outweighed by the

4 substantial investment of fees, costs, and delay, particularly when compared to the

5 meaningful monetary recovery offered by the Settlement and the changes RCM has made

6 to its policies going forward.

7   68.   These very practical considerations confirm our judgment, as experienced class

8 action attorneys in cases such as this, that the proposed settlement provides fair value and

9 a beneficial result for the class. While it is possible that Plaintiff could win more than the

10 current settlement value, it is also possible she could win less (in either current value or

11 absolute terms), or nothing at all. In contrast, the proposed settlement will secure and

12 reasonable recoveries for the individual Settlement Class Members and the Cass overall.

13 We believe it is a fair result in light of the potential exposure, risks, and practicalities of

14 this case.

NOTICE OF PROPOSED SETTLEMENT

16   69.   Class Members will be notified of the settlement by first class mail and email.

17 The parties have agreed to request that the Court appoint JND Legal Administration

18 ("JND"), to serve as the Settlement Administrator. Alexander Williams, the Vice President

19 of Operations at JND, has submitted a declaration attesting to their qualifications to

20 administer the settlement and their estimated costs for doing so.

21   70.   The Settlement Administrator will undertake its best efforts to ensure that the

22 notice is sent to the most current mailing address of each Class Member. The notice,

23 objection, opt-out and dispute procedures are set forth in Paragraph 61 of the Settlement

24 Agreement. Notice will be by First Class Mail (and email where available), with the

25 Settlement Administrator performing a National Change of Address search on all

26 addresses before the mailing as well as skip tracing and remailing of notices returned as

27 undeliverable.

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

72.   Each settlement notice also will be individually tailored to provide each Class Member an estimate of the amounts his or her Individual Class Settlement Payment and Individual PAGA Payment. *See* Notice at § 7. The Notices also will be tailored to provide each Class Member with the number of shifts credited to him or her during the Class Period, and the formula for calculating the settlement payments. *Id.* The Notice also explains how Settlement Class Members can dispute Defendant's records as to their employment dates and number of shifts credited to them. *Id*.

73.   Additionally, Class Members will have forty-five days to decide whether to opt out of the Agreement or object to any terms of the Agreement, including Plaintiff's application for attorneys' fees and costs, and the proposed service awards. These procedures are contained in Paragraphs 19, 29, and 61 of the Settlement Agreement and explained in Sections 11 and 12 of the proposed Notice.

74.   Additionally, as referenced above, the Settlement provides each Settlement Class Member the opportunity, should they disagree with Defendant's records regarding their employment dates and number of shifts, to dispute the records by providing documentation and/or an explanation to show different employment dates and/or shifts. *See* Settlement Agreement at ¶ 36; Class Notice at § 7.

PROPOSED SERVICE AWARD

75.   Ms. Grady provided a valuable service in the prosecution of this case. She initiated the case, consulted with Counsel at length, and provided important information

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1 regarding Defendant's practices. As a traveling nurse who works short-term assignments

2 and inevitably must apply to work for multiple staffing companies, she also faced

3 professional risks by publicly stepping forward to challenge the policies and practices of

4 a major staffing company in the industry.

5   76.   The time and effort Plaintiff invested into this case was substantial. Ms. Grady

6 has submitted a declaration in support of the instant motion that describes her

7 contributions. *See* Declaration of Barbara Grady in Support of Motion for Preliminary

8 Approval. She appeared for deposition, appeared for the mediation, and had numerous

9 phone calls and meetings with our office throughout the case to provide information and

10 evidence. *Id.* at ¶ 12. She not only initiated the case, but continued her commitment to

11 the Class even when the circumstances may have prompted others to settle individually or

12 quit. *Id.* at ¶¶ 10-11.

13   77.   Plaintiff intends to seek a service award of $5,000 by separate motion to be heard

14 at the final approval hearing. This is approximately 0.3% of the Gross Settlement Amount.

15   **ATTORNEYS' FEES AND COSTS**

16   78.   The Amended Settlement Agreement provides that Plaintiff's counsel can move

17 for a maximum fee award of 25% the Gross Settlement Amount ($414,602.50), plus actual

18 out-of-pocket costs not to exceed $50,000. To date, our firm has invested over 875 hours

19 into the case for a lodestar of approximately $783,352. This does not include the

20 additional time we will work on the case going forward, including work with the

21 Settlement Administrator during implementation, work on the final approval motion and

22 related papers, and responding to inquiries from Class Members. Based on experience, I

23 know this time can be substantial. Thus, we anticipate that the maximum fee permitted

24 under the Settlement Agreement would result in a negative multiplier on our lodestar.

25   79.   Pursuant to Fed. R. Civ. P. 23(h), we intend to file a separate motion for

26 attorneys' fees and costs on a date to be set by the Court. The separate motion for

27 attorneys' fees and costs will provide analysis as to the reasonableness of the fees and

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1   costs sought and show how they fall within the range of fees awarded in similar class

2   action cases. The separate motion will also include, among other things, the evidentiary

3   documentation that this Court's procedures require.

EXHIBITS

5   80.   A true and correct copy of the Amended Class Action Settlement Agreement is

6   attached to this Declaration as **Exhibit A**.

7   81.   A true and correct copy of the proposed Notice to Class is attached hereto as

8   **Exhibit B**.

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

10   83.   Attached hereto as **Exhibit D** are true and correct copies of excerpts of the

11   Deposition of Desiree Disotell. Ms. Disotell appeared as Defendant's Person Most

12   Knowledgeable witness in this case pursuant to Rule 30(b)(6) of the Federal Rules of Civil

13   Procedure.

14   84.   Attached hereto as **Exhibit E** is a true and correct copy of Plaintiff's Rule

15   30(b)(6) deposition notice.

16   85.   Attached hereto as **Exhibit F** are true and correct copies of excerpts of the

17   Deposition of Tricia Spangler.

18   86.   Attached hereto as **Exhibit G** is a true and correct copy of RCM Technologies

19   USA), Inc.'s Responses to Plaintiff's Second Set Interrogatories to Defendant RCM

20   Technologies (USA), Inc.

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22   I declare under penalty of perjury under the laws of the State of California and the

23   United States of America that the foregoing is true and correct and is based upon my

24   personal knowledge. Executed on July 26, 2024, in Berkeley, California.

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26   */s/ Joshua G. Konecky*
                                                     Joshua G. Konecky

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