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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

15 VALERIE CASHON, on behalf of herself and
16 all others similarly situated,

17 Plaintiffs,

18 v.

19 KINDRED HEALTHCARE OPERATING,
INC., a Delaware Corporation; GENTIVA
20 CERTIFIED HEALTHCARE CORP., a
Delaware Corporation; and DOES 1 through
21 15, inclusive,

22 Defendants.

) Case No. 3:16-cv-04889-RS

) ~~[PROPOSED]~~
) **ORDER APPROVING PAGA**
) **SETTLEMENT, CERTIFYING**
) **SETTLEMENT CLASS AND**
) **PRELIMINARILY APPROVING CLASS**
) **SETTLEMENT**
) **(AS MODIFIED BY COURT)**

) **Date: April 19, 2018**
) **Time: 1:30 p.m.**
) **Judge: Hon. Richard Seeborg**
) **Location: Courtroom 3**
) **17th Floor**
) **United States Courthouse**
) **450 Golden Gate Ave.**
) **San Francisco, CA**

26 Plaintiff's unopposed motion to certify a settlement class and to approve a PAGA
27 settlement and preliminarily approve a class settlement came on for hearing before this Court on
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1 April 19, 2018, the Honorable Richard Seeborg presiding. Having fully considered the papers
 2 submitted in support of the motion and having carefully analyzed the Class Action Settlement
 3 Agreement and Stipulation, the Notice of PAGA and Class Action Settlement, and the Claim
 4 Form and in recognition of the Court's duty to make a preliminary determination as to the
 5 reasonableness of a proposed class action settlement, the Court hereby GRANTS Plaintiff's
 6 motion as follows:

7 **BACKGROUND OF THE LAWSUIT**

8 1. This class action lawsuit alleges that Defendants Kindred Healthcare Operating,
 9 Inc. ("Kindred") and Gentiva Certified Healthcare Corp. ("Gentiva") violated applicable
 10 provisions of the Labor Code, the Business and Professions Code and the Industrial Welfare
 11 Commission's (the "IWC") Wage Orders with respect to Clinicians or piece rate employees by
 12 doing all of the following: 1) failing to pay for rest and meal breaks, and nonproductive time;
 13 2) failing to pay for all hours worked; 3) failing to pay minimum wage for all hours worked;
 14 4) failing to provide accurate wage statements; 5) failing to keep accurate payroll records;
 15 6) failing to pay overtime compensation; and 7) failing to provide meal or rest periods. The
 16 lawsuit further sought penalties against Kindred and Gentiva for: 8) waiting time penalties;
 17 9) unfair competition; 10) violations of the Private Attorneys General Act of 2004; 11) failing to
 18 reimburse; and 12) violation of the Fair Labor Standards Act.

19 2. After the initial Complaint was filed, the Parties participated in extensive
 20 settlement negotiations including, without limitation, two mediations before a neutral mediator
 21 who specializes in wage and hour mediations. Those negotiations and mediations led to an
 22 agreement to settle the case and execution of a Settlement Term Sheet. The negotiations were
 23 conducted after the Parties engaged in extensive and contested litigation, including discovery of
 24 hundreds of pages of documents and payroll records for Class Members over the entire Class
 25 Period, reviewed and analyzed timekeeper data for Class Members over the entire Class Period,
 26 engaged in motion practice before the Court, and deposed Plaintiff and several persons most
 27 qualified (PMQ) in connection with approximately 20 separate topics.

1 3. Following execution of the Settlement Term Sheet, the Parties negotiated and
 2 executed a Class Action Settlement Agreement and Stipulation (the "Settlement Agreement"),
 3 filed with the Court on April 6, 2018. A true and correct copy of the fully-executed Settlement
 4 Agreement is attached as Exhibit 1 to the Declaration of Anthony M. Perez, Jr. ("Perez
 5 Declaration".) The Settlement Agreement provides for the full settlement and release of all PAGA,
 6 class and representative claims encompassed by the Complaint, the first Amended Complaint, the
 7 second Amended Complaint and otherwise sets forth the terms of the proposed Settlement which
 8 is before the Court for approval. Defendants Kindred and Gentiva continue to deny all allegations
 9 of wrongdoing, and do not admit or concede that they have, in any manner, violated the Fair Labor
 10 Standards Act, California Labor Code, the California Unfair Competition Law, any Wage Orders
 11 or any other law. Defendants Kindred and Gentiva also deny that this case is appropriate for class
 12 action treatment other than for purposes of settlement.

13 **CERTIFICATION OF SETTLEMENT CLASS**

14 4. Based on the findings and conclusions set forth below in Subparagraphs (a)-(e), the
 15 Court determines that this case meets the requirements for certification of a class under Rule 23(a)
 16 and 23(b)(3) of the Federal Rules of Civil Procedure for purposes of settlement, and hereby orders
 17 that this case is certified as a class action, for purposes of settlement only, on behalf of the
 18 following class: "All persons who were employed by either Kindred Healthcare Operating, Inc. or
 19 Gentiva Certified Healthcare Corp., or one of its/their direct or indirect subsidiaries, to provide
 20 skilled home health care services in California as Clinicians or piece rate employees at any time
 21 from August 24, 2012 through the date the Preliminary Approval Order is entered by the Court."
 22 The term "Clinicians" includes per diem, part-time and full-time home health aides, occupational
 23 therapists, occupational therapist assistants, physical therapists, physical therapy assistants,
 24 registered nurses, licensed practical nurses, licensed vocational nurses, medical social workers,
 25 nursing assistants, speech/language pathologists, speech/language therapists, and other clinicians
 26 paid on an hourly or per visit basis.

27 The findings and conclusions that follow are based on the Court's consideration of: the
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1 allegations, information, arguments, and authorities cited in the Motion and supporting
 2 memorandum and declaration; the allegations, information, arguments, and authorities provided in
 3 connection with the Complaints filed in this case; Defendants' agreement, for settlement purposes
 4 only, not to oppose certification of the settlement class specified in the Settlement Agreement; the
 5 terms of the Settlement; and the elimination of the need, on account of the Settlement, for the
 6 Court to consider any potential trial manageability issues that might otherwise bear on the
 7 propriety of class certification.

8 a. Numerosity. The Court finds that the Class is so numerous that joinder of
 9 all members is impracticable because there are more than 1,600 class members as of December
 10 2016. Class Members' identities can be ascertained from Defendants' records.

11 b. Common Questions of Law or Fact. The Court finds that, for purposes of
 12 this settlement only, there are questions of law or fact common to the Class, including but not
 13 limited to: whether Defendants have violated California Labor Code § 226.2 by failing to pay
 14 piece rate employees for rest and meal breaks and nonproductive time; whether Defendants
 15 violated California Labor Code §§ 226.2, 510, 1194 and IWC Wage Order 4 by failing to pay
 16 employees for all hours worked; whether Defendants violated California Labor Code §§ 226.2,
 17 1194, 1194.2, 1194.3, 1197 and 1197.1 by failing to pay minimum wage for all hours worked;
 18 whether Defendants violated California Labor Code §§ 226, 226.2 and 226.3 by failing to provide
 19 accurate wage statements; whether Defendants violated California Labor Code §§ 226.2, 1174 and
 20 1174.5 by failing to maintain accurate payroll records; whether Defendants violated California
 21 Labor Code §§ 510 and 1194 and IWC Wage Order 4 by failing to pay overtime compensation;
 22 whether Defendants violated California Labor Code §§ 226.7 and 512 and IWC Wage Order 4 by
 23 failing to provide rest and meal periods; whether Defendants are liable for waiting time penalties
 24 pursuant to California Labor Code §§ 201, 202, 203; whether Defendants violated California
 25 Labor Code § 558; whether Defendants violated California Business and Professions Code
 26 §§ 17200, *et seq.* by failing to pay minimum wages and overtime wages; whether Defendants have
 27 violated California Labor Code § 2802 by failing to reimburse for business expenses; and whether
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1 Defendants have violated the Fair Labor Standards Act.

2 c. Typicality of the Representative Plaintiff's Claims. The Court finds that, for
3 purposes of this settlement only, the claims of Plaintiff Valerie Cashon ("Representative Plaintiff")
4 are typical of the claims of the Class, in that her claims arise from the same alleged events and
5 course of conduct as the claims of the Class, and are based on the same legal theories.

6 d. Fair and Adequate Representation of the Class's Interests. The Court finds
7 that, for purposes of this settlement only, the Representative Plaintiff will fairly and adequately
8 represent the Class's interests, in that the Representative Plaintiff for purposes of this settlement
9 has the same interests as all members of the Class, has diligently and zealously prosecuted this
10 action to date, and is represented by experienced and competent attorneys who have the resources
11 necessary to represent the Class. The Court hereby appoints Plaintiff as the Class Representative,
12 for settlement purposes only, under Rule 23 of the Federal Rules of Civil Procedure.

13 e. Predominance and Superiority of the Class Action Procedure. The Court
14 concludes that, for purposes of this settlement only, the requirements of Federal Rule of Civil
15 Procedure 23(b)(3) are satisfied because questions of law and fact common to Class Members
16 predominate over any questions affecting only individual members and that a settlement class is
17 superior to other available methods for the fair and efficient adjudication of the controversy.

18 5. Appointment of Class Counsel. The Court hereby appoints, for purposes of this
19 settlement only, Anthony M. Perez, Jr. of Perez Law Offices and Charles L. Post, Brendan J.
20 Begley and Darrin M. Menezes of Weintraub Tobin Chediak Coleman Grodin Law Corporation as
21 counsel for the settlement class ("Class Counsel"). In making this appointment, the Court has
22 considered that Class Counsel has performed extensive work to date in identifying and
23 investigating potential claims in the action; that Class Counsel have extensive experience in
24 handling class actions and the types of claims asserted in this action; that Class Counsel is very
25 knowledgeable of the applicable law; and that Class Counsel have committed and will continue to
26 commit adequate resources to representing the Class.

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1 6. Appointment of Settlement Administrator. The Court appoints
2 Simpluris, Inc. as the Settlement Administrator.

3 **PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

4 7. The Court has reviewed the terms of the Settlement and the description of the
5 Settlement set forth in Plaintiff's moving papers. Based on that review, the Court concludes that
6 the Class Settlement has no obvious deficiency, appears to be fair, reasonable, and adequate, and
7 is within the range of possible settlement approval such that notice of the proposed class
8 settlement to the Class is appropriate.

9 8. The Court has read and considered the Perez Declaration in support of the Motion
10 for preliminary approval. Based on the Court's review of that Declaration, the Court finds that the
11 Settlement was negotiated at arms-length and is not collusive. The Court further finds that Class
12 Counsel were adequately informed about the strengths and risks of the Class's case when they
13 entered into the Settlement, and that they entered into the Settlement only after conducting
14 extensive informal and formal discovery and investigation, which included interviewing the
15 plaintiff and other current and former employees of Defendants in California, reviewing and
16 analyzing extensive work and payroll data for the Class produced by Defendants in the course of
17 discovery, deposing several persons most knowledgeable (PMQ) for Defendants on over 20
18 separate topics related to the lawsuit, and estimating potential Class recoveries on a per week or
19 pay period basis based thereon.

20 9. As to the proposed distribution plan for the Net Settlement Fund ("Distribution
21 Plan") set forth in the Agreement, the Court has read and considered the Perez Declaration and
22 finds that the proposed Distribution Plan does not improperly grant preferential treatment to any
23 segment of the Class. The Plan is rationally and reasonably related to the relative strengths and
24 weaknesses of the claims asserted and the associated potential recoveries.

25 10. The Court further finds on a preliminary basis that the payment of the Incentive
26 Award of \$20,000 to the Representative Plaintiff contemplated by the Settlement is proper, fair,
27 and reasonable in consideration of the facts that the Representative Plaintiff spent significant
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1 amounts of time assisting Class Counsel in investigating and preparing the Class's claims,
 2 searching for and producing documents, and that the Representative Plaintiff provided an
 3 extensive individual release to Defendants, in addition to the releases provided by all Plaintiff
 4 Class Members.

5 11. Accordingly, the Court hereby GRANTS preliminary approval to the Class
 6 Settlement.

7 **APPROVAL OF THE PAGA SETTLEMENT**

8 12. The Court hereby grants approval of the PAGA Settlement, including the
 9 settlement and release of the PAGA Claims, as defined in the Settlement Agreement, and the
 10 payment of One Hundred Fifty Thousand Dollars (\$150,000) from the Gross Settlement Fund to
 11 resolve the PAGA Claims ("PAGA Payment"). Within thirty (35) calendar days of this Order,
 12 Defendants shall transmit the PAGA Payment to the Settlement Administrator, and on the Mailing
 13 Date, the Settlement Administrator shall pay seventy-five percent (75%) of the PAGA Payment, or
 14 One Hundred Twelve Thousand Five Hundred Dollars (\$112,500), to the State of California Labor
 15 and Workforce Development Agency ("LWDA"), and twenty-five percent (25%) of the PAGA
 16 Payment, or Thirty-Seven Thousand Five Hundred Dollars (\$37,500), to the PAGA Releasees.
 17 PAGA Releasees will not have the opportunity to opt out of, or object to the PAGA Payment and
 18 settlement and release of the PAGA Claims, and shall be paid their portion of the PAGA Payment
 19 on a *pro rata*, based on the number of Days Worked, as a fraction of the total Days Worked by all
 20 PAGA Releasees. The payment to each PAGA Releasee shall be made in the form of a check to
 21 be mailed to each of them with the Class Notice and Claim Form on the Mailing Date.

22 13. Any PAGA Payment Check that are not cashed within 90 days shall escheat to the
 23 State of California and be submitted to the State of California unclaimed property fund in the
 24 name of the PAGA Releasee who is the payee of the check pursuant to California Code of Civil
 25 Procedure section 1510 et seq. (escheat laws).

26 14. All PAGA Claims are hereby dismissed with prejudice as to the Plaintiff and all
 27 PAGA Releasees. The claims in this Action and the PAGA Claims of each PAGA Releasee
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1 against Defendants Kindred and Gentiva, and against any and all of the Released Parties as
2 defined in the Settlement Agreement, are fully, finally, and forever released, relinquished and
3 discharged pursuant to the terms of the Settlement Agreement. All PAGA Releasees are
4 permanently enjoined from pursuing or seeking to reopen, any of the PAGA Claims, as defined in
5 the Settlement Agreement to the maximum extent permitted by law.

6 **APPROVAL OF CLASS NOTICE AND CLAIM FORM**

7 15. Plaintiff has submitted for the Court's approval a proposed form of Class Notice
8 and Claim Form that have been jointly agreed upon by the Parties (see Settlement Agreement,
9 Exhs. 1 and 2). The proposed Class Notice appears to be the best notice practical under the
10 circumstances and appears to allow Class Members a full and fair opportunity to consider the
11 proposed Settlement and develop a response. The Parties' proposed plan for distributing the Class
12 Notice and Claim Form set forth in the Settlement Agreement likewise appears to be a method that
13 is reasonably calculated to reach all members of the Class who would be bound by the Settlement.
14 Under this plan, a Settlement Administrator will distribute the Class Notice and Claim Form with
15 the PAGA Payment Check to Class Members by U.S. First Class Mail. There appears to be no
16 additional method of distribution that would be reasonably likely to result in the receipt of notice
17 by Class Members who may otherwise not receive notice pursuant to the proposed distribution
18 plan.

19 16. Accordingly, the Court HEREBY ORDERS that the Parties' proposed forms and
20 manner of distributing notice to the Class is approved. The Court directs the mailing of the Class
21 Notice and Claim Form by first-class mail to the Class Members in accordance with the
22 Implementation Schedule set forth below. The Court finds the dates and process selected for the
23 mailing and distribution of the Notice and Claim Form, as set forth in the Implementation
24 Schedule and the Settlement Agreement, meet the requirements of due process and provide the
25 best notice practicable under the circumstances and shall constitute due and sufficient notice to all
26 persons entitled thereto.

27 17. The Court orders the following Implementation Schedule for further proceedings:
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1 a. Within thirty (30) days from the entry of this Preliminary Approval Order,
2 Defendants shall provide to the Settlement Administrator in an electronic format reasonably
3 acceptable to the Settlement Administrator a list of Class Members that identifies for each Class
4 Member: 1) his/her name; 2) his/her Social Security Number; 3) his/her last-known address;
5 4) his/her last-known personal telephone number (if known); and 5) his/her total number of Days
6 Worked during the Settlement Period.

7 b. Within fifteen (15) days after the Settlement Administrator receives the list
8 of Class Members, the Settlement Administrator shall transmit via regular United States First
9 Class Mail the Class Notice, Claim Form and PAGA Payment Check to each Class Member. The
10 Settlement Administrator shall conduct one additional address search/check for any Class Notice,
11 Claim Form and PAGA Payment Check returned by the Post Office as “undeliverable.” If an
12 updated address is found, the Settlement Administrator shall promptly re-mail the Class Notice,
13 Claim Form and PAGA Payment Check to that address one time. The Settlement Administrator
14 will use appropriate skip tracing and National Change of Address (“NCOA”) searches to increase
15 the likelihood of delivery of the Class Notice, Claim Form and PAGA Payment Check, including
16 one address confirmation/update of all Class Members prior to the initial mailing. The Settlement
17 Administrator shall not perform more than one re-mailing to any Class Member. It shall be
18 conclusively presumed that each and every Class Member whose Class Notice, Claim Form and
19 PAGA Payment Check are not returned to the Settlement Administrator as undeliverable within
20 fifteen (15) calendar days after the Mailing Date has received the Class Notice, Claim Form and
21 PAGA Payment Check.

22 c. Claim Forms must be completed and postmarked on or before the expiration
23 of the Notice Period and returned to the Settlement Administrator, in compliance with the terms of
24 the Settlement Agreement and Class Notice. Class Members who submit a Claim Form shall be
25 deemed to have consented to join the Action pursuant to the FLSA and released their claims under
26 the FLSA as described in this Agreement to the extent required by law. Class Members who do
27 not return a valid Claim Form with a postmark date on or before the expiration of the Notice
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1 Period are not entitled to an Individual Settlement Payment but shall remain subject to the release
2 of the Released Claims as defined in this Agreement to the maximum extent permitted by law.

3 d. Requests for exclusion from the Settlement must be postmarked on or
4 before the expiration of the Notice Period and returned to the Settlement Administrator, in
5 compliance with the terms of the Settlement Agreement and Class Notice. Any Class Member
6 may seek exclusion from the Settlement, except the PAGA portion of the settlement as provided in
7 the Settlement Agreement. Requests for exclusion that do not comply with this paragraph and the
8 requirements set forth in the Settlement Agreement and Class Notice shall not be effective.

9 e. Objections to the Class Settlement must be filed with the Court by the close
10 of the Notice Period in compliance with the terms of the Settlement Agreement and Class Notice.
11 Objections must state the specific grounds on which they are being made and include all
12 supporting facts. If an objector intends to appear at the Final Approval Hearing, either in person or
13 through an attorney, the objector must file and serve with the objection a notice of intention to
14 appear at the Final Approval Hearing. Objections that do not comply with this paragraph and the
15 requirements set forth in the Settlement Agreement and Class Notice shall not be considered.

16 **FINAL APPROVAL HEARING RE CLASS SETTLEMENT**

17 18. A Final Approval and Fairness Hearing on the separate questions of whether (i) the
18 proposed Class Settlement, (ii) the proposed award of Class Counsel's Fees and Expenses to Class
19 Counsel, and (iii) the proposed Class Representative's Incentive Award should be finally approved
20 as fair, reasonable, and adequate as to the members of the Class is scheduled for **1:30 p.m. on**
21 **August 30, 2018**, which is more than 130 days after the Motion for Preliminary Approval was
22 filed, in the Courtroom of the Honorable Richard Seeborg. All briefs and materials in support of
23 an Order granting Final Approval of the Class Settlement, an Order granting Class Counsel's
24 attorneys' fees and costs, and an Order granting the Class Representative's Incentive Award shall
25 be filed and served by July 5, 2018, which falls two weeks before the deadline for Class
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1 Members to “opt out” or object to the settlement.¹

2 19. If, for any reason, the Court does not execute and file an Order of Final Approval,
3 or if the Effective Date of the Settlement does not occur for any reason, the Settlement Agreement
4 and the proposed Settlement that is the subject of this Order, and all evidence and proceedings had
5 in conjunction therewith, shall be without prejudice to the status quo ante rights of the Parties to
6 the litigation, as more specifically set forth in the Settlement Agreement.

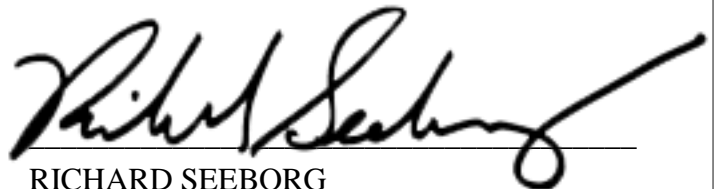
7 20. This Order, the Settlement Agreement, and all papers related thereto, are not, and
8 shall not be construed to be, an admission by Defendants Kindred and Gentiva of any liability,
9 claim or wrongdoing whatsoever, and shall not be offered as evidence of any such liability, claim
10 or wrongdoing or the appropriateness of class certification in the non-settlement context in this
11 Action or in any other proceeding. The Settlement and this Agreement shall have no impact on
12 the validity or enforceability of the Dispute Resolution Agreements entered by the Class
13 Members, and the settlement shall not prejudice Defendants or the Released Parties from seeking
14 to enforce such Dispute Resolution Agreements.

15 21. Pending further order of this Court, all proceedings in this matter other than those
16 contemplated herein and in the Settlement Agreement are stayed.

17 22. This Court reserves the right to adjourn or continue the Final Approval Hearing
18 from time to time without further notice to Class Members.

19 IT IS SO ORDERED.

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21 Dated: April 20, 2018



RICHARD SEEBORG
United States District Judge

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27 ¹ This is consistent with the Ninth Circuit’s holding in *In re Mercury Interactive Corp. Securities Litigation* that FRCP
28 23(h) requires a district court “to set the deadline for objections to counsel’s fee request on a date after the motion and
documents supporting it have been filed.” 618 F.3d 988, 993 (9th Cir. 2010)