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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

HAZEL WALSH,

Case No. 3:11-cv-00050-JSW

Plaintiff,

**STIPULATED ORDER FOR
 INJUNCTION**

v.

KINDRED HEALTHCARE, INC., et al.,

Defendants.

1 Pursuant to the parties' stipulation, IT IS HEREBY ORDERED, ADJUDGED AND
2 DECREED as follows.

3 As referenced herein, the term "Class Counsel" means counsel of record for the Class
4 Plaintiffs, specifically, Stebner and Associates; The Law Offices of Michael D. Thamer; The Arns
5 Law Firm; Janssen Malloy LLC; Lieff, Cabraser, Heimann & Bernstein, LLP; and McKenna Long
6 & Aldridge LLP.

7 As referenced herein, the term "Defendant Facilities" means only the following entities:
8 Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation – Village
9 Square, Kindred Nursing Centers West, LLC, d/b/a Kindred Nursing and Rehabilitation – Golden
10 Gate; Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and Rehabilitation –
11 Tunnell Center, Kindred Nursing Centers West, LLC, d/b/a Kindred Nursing and Healthcare –
12 Victorian, Kindred Nursing Centers West, LLC, d/b/a Kindred Nursing and Transitional Care –
13 Santa Cruz, Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care and
14 Rehabilitation – Lawton, Kindred Nursing Centers West, LLC, d/b/a Kindred Nursing and
15 Healthcare – Livermore, Kindred Nursing Centers West, LLC, d/b/a Kindred Transitional Care
16 and Rehabilitation – Canyonwood, Kindred Nursing Centers West, LLC, d/b/a Kindred
17 Transitional Care and Rehabilitation – Valley Gardens, Kindred Nursing Centers West, LLC, d/b/a
18 Kindred Transitional Care and Rehabilitation – Bay View, Bayberry Care Center LLC d/b/a
19 Kindred Nursing and Healthcare – Bayberry, Medical Hill Rehab Center, LLC, d/b/a Kindred
20 Nursing and Rehabilitation – Medical Hill, Ygnacio Valley Care Center, LLC, d/b/a Kindred
21 Nursing and Rehabilitation – Ygnacio Valley, Hillhaven – MSC Partnership d/b/a Kindred
22 Nursing and Rehabilitation Nineteenth Avenue, Pacific Coast Care Center, LLC d/b/a Kindred
23 Nursing and Transitional Care – Pacific Coast, Greenbrae Care Center, LLC, d/b/a Kindred
24 Transitional Care and Rehabilitation Larkspur, Smith Ranch Care Center, LLC, d/b/a Kindred
25 Transitional Care and Rehabilitation Smith Ranch, Care center of Rossmoor, LLC, d/b/a Kindred
26 Transitional Care and Rehabilitation – Walnut Creek, Foothill Nursing Company Partnership d.b.a
27 Kindred Transitional Care and Rehabilitation – Foothill, Siena Care Center, LLC, d/b/a Kindred
28 Transitional Care and Rehabilitation – Siena, Kindred Transitional Care and Rehabilitation-Fifth

1 Avenue f/k/a Fifth Avenue Health Care Center.

2 This Court has jurisdiction over the Defendant Facilities, the Plaintiffs and all claims
3 asserted in this action.

4 **COMPLIANCE WITH LAW**

5 1. At all times, each of the Defendant Facilities shall comply with Health and Safety
6 Code section 1276.5 by providing a minimum of 3.2 actual nursing hours per patient day
7 (“NHPPD”) (herein the “3.2 NHPPD requirement”). Pursuant to Health & Safety Code
8 section 1276.5(b), “nursing hours” means the number of hours of work performed per patient day
9 by aides, nursing assistants, orderlies, registered nurses and licensed vocational nurses (excluding
10 Directors of Nursing in facilities of 60 beds or larger capacity) who perform direct nursing
11 services. Only direct caregivers shall be counted toward NHPPD. Notwithstanding the foregoing,
12 “nursing hours” includes the number of hours of work performed per patient day by Directors of
13 Nursing who perform direct nursing services when such Directors of Nursing have worked more
14 than 8 hours in one day or more than 40 hours in one week, as long as these additional nursing
15 hours are separately and properly documented and confirm that such direct nursing services were
16 provided to residents.¹ A person serving as an Assistant Director of Nursing or a Director of Staff
17 Development can be a direct caregiver when providing direct care nursing services beyond the
18 hours required to carry out the duties of these positions, as long as these additional direct care
19 nursing hours are separately and properly documented. In order to count for purposes of the 3.2
20 NHPPD requirement, an “aide” or “orderly” must qualify as a “nurse assistant” as that term is
21 defined in Health and Safety Code sections 1337(d)(1) and 1337.5.

22 2. At all times, the Defendant Facilities shall comply with Health and Safety Code
23 section 1599.1(a) by employing an adequate number of qualified personnel to carry out all of their
24 respective facility’s functions. Without limitation, this paragraph shall require that the Defendant
25 Facilities employ² an adequate number of qualified nursing personnel to provide skilled nursing

26 _____
27 ¹ “Properly documented” means the documentation described in Section 6 of the California
Department of Public Health’s “All Facilities Letter” dated January 11, 2011.

28 ² “Employ”, for purposes of this Injunction, shall mean “to use on a daily basis”.

1 services (as that term is defined in 22 California Code of Regulations (“CCR”) section 72309) at
2 the Defendant Facilities.

3 3. Throughout the term of this Injunction, the Defendant Facilities shall budget to
4 staff each Defendant Facility at not less than 3.4 NHPPD. Nothing stated herein shall relieve the
5 Defendant Facilities of the obligation to provide sufficient staffing at levels in excess of 3.4
6 NHPPD to the extent required based on patient acuity or other applicable factors.

7 4. At all times, the Defendant Facilities shall comply with the provisions of 42
8 C.F.R. section 483.30(e) and Health and Safety Code section 1276.65(f) (herein the “Posting
9 requirement”) by posting the following information in a prominent public place at the Defendant
10 Facilities: (a) the actual direct care nursing hours for each shift; and (b) the resident census for
11 each day. In addition, the Defendant Facilities shall retain the daily posted nurse staffing sheets
12 for the term of this Injunction, or the period required under applicable law, whichever is longer.

13 5. At all times, the Defendant Facilities shall comply with 22 CCR section 72327 by
14 employing a Director of Nurses eight hours a day on the day shift, five days out of each week
15 throughout the year, at the Defendant Facilities (herein the “DON requirement”).

16 **THIRD PARTY MONITOR/COMPLIANCE REPORTS**

17 6. A third party monitor (“Monitor”) shall be appointed to review Compliance
18 Reports (defined below) submitted by the Defendant Facilities and undertake all other necessary
19 actions to monitor the Defendant Facilities’ compliance with the terms of this Injunction. All fees
20 and costs of the Monitor shall be paid by Defendants up to a maximum of \$100,000 in total; any
21 fees and/or costs exceeding that amount shall be borne solely by Plaintiffs’ counsel, provided that
22 there will be no cap on monitor expenses in the event Defendants violate the injunction. Class
23 Counsel shall select the third party Monitor.

24 7. As referenced herein, the “Final Effective Date” means (a) if no appeal from the
25 Judgment is filed, the date of expiration of the time for the filing or noticing of any appeal from
26 the Judgment; or (b) if an appeal from the Judgment is filed, and the Judgment is affirmed or the
27 appeal dismissed by a judgment or order of the California Court of Appeal (“Appellate
28 Judgment”), thirty days after the date of such affirmance or dismissal; or (c) if a petition for

1 review of the Appellate Judgment is filed and denied, the date the petition is denied; or (d) if a
2 petition for review of the Appellate Judgment is filed and granted, or the California Supreme
3 Court orders review of the Appellate Judgment on its own motion, and the Appellate Judgment is
4 affirmed or the review proceeding dismissed, and no petition for a writ of certiorari with respect to
5 the California Supreme Court's judgment affirming the Appellate Judgment or dismissing the
6 review proceeding ("Review Judgment") is filed, the date of expiration of the time for the filing of
7 such a petition for a writ of certiorari; or (e) if such a petition for a writ of certiorari is filed and
8 denied, the date the petition is denied; or (f) if such a petition for a writ of certiorari is filed and
9 granted, the date of final affirmance of the Review Judgment or final dismissal of the review
10 proceeding initiated by the petition for a writ of certiorari; or (g) should there be no objections to
11 the settlement filed and ultimately ruled upon by the trial court, the date of final approval of the
12 settlement by the trial court.

13 8. Commencing on October 1, 2013, and for each quarter thereafter, as long as this
14 Injunction is in effect, each of the Defendant Facilities shall provide the Monitor with a quarterly
15 report, delivered on or before the 25th day of the third month of each quarter, that contains all of
16 the following information (herein, "Compliance Report") for that Facility: (a) the actual nursing
17 hours for each day during the prior 90-day period (the "reporting period"); (b) the resident census
18 for each day during the reporting period³; (c) the NHPPD for each day during the reporting
19 period; (d) the hire date, enrollment status, and the training commencement date for each nurse
20 assistant who is not yet certified, if any, whose hours have been included in the NHPPD
21 calculation during the reporting period; (e) the documentation described in Section 6 of the
22 California Department of Public Health's AFL dated January 11, 2011 for all Nursing Hours
23 claimed for the Director of Nurses, the Assistant Director of Nurses, the Director of Staff
24 Development and for any other personnel with primarily administrative and/or non-nursing titles

25 _____
26 ³ "Resident Census" means the number of residents in the facility on any given calendar day as set
27 forth in the Department of Public Health's Form 612. If the method of calculating the "Resident
28 Census" is changed by the Department of Public Health during the existence of this Injunction, the
"Resident Census" to be provided with the Compliance Report shall be calculated and reported as
is then required by the Department's rules and regulations.

1 or duties; and, (f) documentary evidence demonstrating actual dates, hours and assignments of all
2 registry personnel providing direct nursing care when said personnel's hours are included in the
3 NHPPD.

4 9. In the event that a question is raised by the Monitor with respect to information
5 contained in a Compliance Report, the Monitor shall request in writing clarifying information or
6 data from the Defendant Facilities in question. The Defendant Facilities shall provide a full and
7 complete response to any such request to the Monitor not later than fifteen (15) calendar days after
8 receiving the request.

9 10. Upon request in writing by the Monitor, Defendant Facilities shall provide to the
10 Monitor the applicable electronic payroll data and Resident Census reports (collectively, the
11 "Backup Data") for any Defendant Facility for the three month period immediately preceding the
12 request, provided that: (a) the request shall be limited to three (3) or fewer Defendant Facilities per
13 each Compliance Period; and (b) Defendants shall be provided with not less than fifteen (15)
14 calendar days to produce the Backup Data.

15 11. The data described in paragraphs 8 to 11 of this Agreement shall not be used by the
16 Monitor or Class Counsel for any purposes other than overseeing compliance with this Injunction.

17 12. The data provided to the Monitor under paragraph 8(c) of this agreement—the
18 NHPPD for each day during the reporting period—shall be provided to Class Counsel. No other
19 data referenced in paragraphs 8 to 11 of this Agreement will be provided to Class Counsel unless
20 the Monitor determines that the Defendant Facilities violated the terms of this Injunction. Class
21 Counsel may only use this data to enforce the Injunction in this lawsuit.

22
23
24 **OTHER PROVISIONS**

25 13. Nothing stated in this Injunction shall relieve the Defendant Facilities, or any of them,
26 from complying with any other applicable federal or state law or regulation.

27 14. This Injunction shall be effective as of July 1, 2013 and shall remain in full force until
28 June 30, 2015. If any of the Defendant Facilities violate the terms of this Injunction, however,

1 Plaintiffs may seek a Court order extending the Injunction duration, in addition to any other
2 available remedy. Any such extension, however, shall be limited to only the Defendant Facility
3 that did not comply with the terms of this Injunction.

4 15. The Court shall retain continuing jurisdiction over all parties and over this action to
5 enforce the terms of this Injunction.

6 16. Without limitation to the Defendant Facilities' obligations to comply with applicable
7 law and this Injunction and for purposes of enforcement of this Injunction only, the parties agree
8 as follows:

9 16.1 Plaintiffs will not seek to enforce the terms of this Injunction unless: (a) any
10 one of the Defendant Facilities fail to meet the 3.2 NHPPD or DON requirements on three
11 or more days in any Compliance Report; (b) any of the Defendant Facilities fail to meet the
12 Posting requirement on four or more days in any Compliance Report; (c) all Defendant
13 Facilities combined have 15 or more violations of the 3.2 NHPPD requirement in any
14 Compliance Report; (d) all Defendant Facilities combined have 15 or more violations of
15 the DON requirement or the Posting requirement in any Compliance Report, or (e) an
16 Enjoined Party fails to provide a timely and complete Compliance Report.

17 16.2 Prior to filing any motion to enforce the Injunction, Plaintiffs shall first
18 provide Defendants with not less than 7 (seven) calendar days notice within which to show
19 that no violation occurred; or that Court intervention is not warranted because (if
20 applicable) the non-compliance was caused by fire, flood, earthquake, disease outbreak or
21 some other cause completely beyond the control of Defendants. Plaintiffs will not seek to
22 enforce the Injunction against any Facility employees.

23 **IT IS SO ORDERED, ADJUDGED AND DECREED.**

24 DATED: December 16, 2013


The Honorable Jeffrey White
United States District Court Judge

26 **SO STIPULATED:**

27 DATED: 12/6/13

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Christopher J. Healey
McKenna, Long & Aldridge LLP
Attorneys for Plaintiffs

DATED: 12/6/13

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