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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

YVETTE SMITH, TIM DODSON, MOLLA ENGER, as individuals, on behalf of themselves, and on behalf of all persons similarly situated, Plaintiffs, vs. KAISER FOUNDATION HOSPITALS, INC., also d/b/a KAISER PERMANENTE INFORMATION TECHNOLOGY, a California Corporation; and, KAISER FOUNDATION HEALTH PLAN, INC., a California Corporation, and Does 1 to 10, Defendants.	**Case No.: 08-cv-02353-LAB-JMA** (Class Action) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT District Judge: Hon. Larry A. Burns Courtroom: 9, 2nd Flr Hearing Date: November 1, 2010 Hearing Time: 2:00 p.m. Action Filed: December 18, 2008

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Plaintiffs Yvette Smith, Tim Dodson and Molla Enger ("Plaintiffs") respectfully submit this memorandum of points and authorities in support of their motion for final approval of the class settlement and for entry of judgment and order dismissing action.

I. INTRODUCTION

The parties to this Action have reached a settlement. This Court preliminarily approved the settlement by Order dated March 18, 2010 [Doc. No. 29], based upon the Report and Recommendation of Magistrate Adler [Doc. No. 27].

In accordance with the preliminary approval order, the required notice of the proposed settlement was disseminated to the settlement class of 382 members, of whom 339 (88.7%) filed claims. (See Declaration of Christman at ¶¶ 3, 9 [Doc No. 32]). The entire Net Settlement Fund will be distributed to these claimants after payment of taxes. (Settlement Agreement at ¶¶ 9 and 12(a).)

The purpose of this Fairness Hearing is to determine whether the proposed settlement of the litigation should be finally approved, the amount of the award of attorneys' fees and costs to be paid Class Counsel, and the amount of the Plaintiffs' service award. Plaintiffs respectfully submit this Memorandum in support of final approval and the proposed entry of Final Judgment of this class action.[1]

On December 18, 2008, Plaintiff Yvette Smith filed a complaint in this Court on behalf of a putative class of Business Application Coordinator IIs and Senior Business Application Coordinators ("SBACs") who worked on the KP HealthConnect project in California. The central allegation of the *Smith* lawsuit was that the SBACs were misclassified as exempt. [Doc. No. 1]. (Decl. Blumenthal, ¶ 6(a)).

On July 31, 2009, Plaintiff Molla Enger filed a complaint in the U.S. District Court

[1] Filed contemporaneously herewith is the Memorandum in Support of Award of Attorneys' Fees, Costs and Plaintiffs' service award and a detailed discussion of the background of the case, the major events of the litigation, the settlement negotiations, the terms of the proposed Settlement and its benefit to class members is set forth in the Declaration of Norman B. Blumenthal ("Decl. Blumenthal").

for the Southern District of California entitled *Enger v. Kaiser Foundation Health Plan, Inc.*, Case No. 3:09-cv-01670-JLS-POR, alleging wage and hour claims on behalf of a putative class of Analysts and Senior Analysts (the "Analysts") who worked on the KP HealthConnect project in California. These claims asserted similar misclassification claims as those asserted in the *Smith* lawsuit. (Decl. Blumenthal, ¶ 6(a)).

The above referenced lawsuits both dealt with Kaiser employees who performed similar functions in connection with the KP HealthConnect project. The Parties recognized the similarities between the lawsuits and, as a result, agreed that these class actions are related and can be settled collectively. (Decl. Blumenthal at ¶ 6(a); Settlement Agreement, ¶¶ 1-3).

On November 11, 2009, Plaintiffs filed a Second Amended Complaint which consolidated the *Smith* and *Enger* actions. [Doc. No. 24]. In its final form, the Action asserts claims for violations of the California Labor Code §§ 204, 210, 218, 226, 226.7, 510, 512, 1194 and 1198, the Fair Labor Standards Act, 29 U.S.C. § 216, and the California Business and Professions Code §17200, along with claims for civil penalties under PAGA. The Plaintiffs allege that individuals employed by Kaiser as SBACs and Analysts were not paid overtime wages for all hours worked more than eight (8) in a day, forty (40) in a week, or on the seventh (7th) consecutive day of a workweek, and were not provided with all meal and rest breaks as required for non-exempt employees. The Action seeks various statutory penalties and restitution for unfair competition pursuant to California Business and Professions Code Section 17200 including disgorgement of profits, recovery of pre and post judgment interest, attorneys' fees, and costs. (Decl. Blumenthal, ¶ 6(b)).

The Settlement Class consists of "any individual who belongs to one of the following two subclasses:

> Smith Subclass:
> All individuals employed by Kaiser Foundation Hospitals and/or Kaiser Foundation Health Plan, Inc. as a Business Application Coordinator II and/or a Senior Business Application Coordinator for the time period December 18, 2004 through July 16, 2009.

> Enger Subclass:
> All individuals employed by Kaiser Foundation Hospitals and/or Kaiser Foundation Health Plan, Inc. as an Analyst or Senior Analyst on KP HealthConnect for the time period July 30, 2005 through August 1, 2009.

Settlement Agreement at ¶2.

The lawsuit has been actively litigated since the first complaint was filed in December 2008. There has been an ongoing investigation, and Class Counsel was provided with discovery and highly detailed and extensive information about the case, including Class Member data, data reflecting hours worked by the Class Members, job descriptions and relevant salary information for all positions at issue. (Decl. Blumenthal at ¶ 6(c).)

Plaintiffs and Defendant went through multiple meet and confer sessions and arguments to resolve issues related to the positions at issue in the litigation. Specifically, in Kaiser's view, the Settlement Class Members are properly classified as exempt because they spend the majority of their time engaged in work directly related to the general business operations of kaiser and were, therefore, covered under the administrative exemption. (See Report at page 12 [Doc. No. 27].) While Plaintiffs believed that they met the requirements for overtime compensation and in fact worked the overtime hours alleged in the complaint, an adverse ruling on either of these issues could have resulted in a defense verdict. Finally, Defendant contended that like many other wage and hour cases, individual issues and manageability problems would preclude class certification.

The parties agreed to mediation before David Rotman, one of the preeminent mediators of wage and hour class actions. Necessary discovery was provided by Defendant prior to the settlement negotiations. The parties prepared for the mediation by exchanging payroll data, calculating damages, and submitting mediation briefs to Mr. Rotman. Shortly before the mediation, the parties reached a settlement in both actions. There can be no doubt that counsel for both parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. (Decl. Blumenthal at ¶ 7(a).)

The negotiations between the parties was contentious and vigorous. Counsel for the Parties, after settlement negotiations over several days, reached an agreement, based upon Class Counsel's expertise and the uncertainties of protracted litigation.[2] (Decl. Blumenthal ¶ 7(c).) By reason of the settlement, Kaiser has agreed to pay $2.91 million, as payment in full of all of the Class claims arising from the events described in the SAC including Class Counsel's attorneys' fees and expenses, PAGA payments, Class Representatives' incentive awards, and the cost of class notice and claims administration.

After the mediation, the specific terms of the settlement required additional negotiation before the final written agreement could be signed. Class Counsel began the process of reviewing the settlement terms and drafting the settlement agreement and exhibits. Even after the parties reached an agreement in the memorandum of understanding, Class Counsel had to ensure that the terms of the final settlement stipulation were fair to every member of the class and retained the requisite opportunities for notice, exclusion, and objection in accordance with class action law. (Decl. Blumenthal ¶ 7(e).)

By the middle of August 2009, the settlement agreement was finalized, at which time the preliminary motion requesting Court approval of the settlement was prepared and filed by Class Counsel. [Doc. No. 28]. (Decl. Blumenthal at ¶7(f).) On February 4, 2010, Magistrate Adler found at the preliminary approval stage that "the Court finds the proposed settlement is fair, reasonable, and adequate." (Report at page 16 [Doc. No. 27].) Based upon the Magistrate's Report, on March 18. 2010 this Court preliminarily approved the class settlement and ordered that notice of the proposed settlement be disseminated to the members of the Class. [Doc. No. 29]. Notice of the settlement providing class members with an opportunity to file a claim for monetary relief, to opt out, or to object was then mailed on or about April 7, 2010 to the 382 current and former employees who comprise the Class. (Decl. of Christman at ¶¶3, 6 [Doc. No. 32].) The results were that five (5) Class

[2] Magistrate Adler found that "There is no evidence suggesting collusion." (Report at page 16 [Doc. No. 27].)

Members requested exclusion, who are identified in the Claims Administror's declaration, and no Class Members objected to the settlement. (Decl of Christman at ¶¶ 10, 11 [Doc. No. 32].)

Importantly, the excellent result obtained by this settlement is evidenced by the overwhelmingly positive response of the Class. (Decl. Blumenthal at ¶7(f).) As detailed in the Declaration of Christman, the claims were submitted by 339 employees which represents 88.7% of the total number of employees in the Settlement Class, and evidences favorable reception of the class to this Settlement. (See Declaration of Christman at ¶ 9 [Doc No. 32]).

II. THE SETTLEMENT BEFORE THE COURT

For purposes of this Settlement, a "Settlement Class Member" is defined as any individual who belongs to one of the following two subclasses:

> Smith Subclass
> All individuals employed by Kaiser Foundation Hospitals and/or Kaiser Foundation Health Plan, Inc. as a Business Application Coordinator II and/or a Senior Business Application Coordinator for the time period December 18, 2004 through July 16, 2009.
>
> Enger Subclass
>
> All individuals employed by Kaiser Foundation Hospitals and/or Kaiser Foundation Health Plan, Inc. as an Analyst or Senior Analyst on KP HealthConnect for the time period July 30, 2005 through August 1, 2009.

(Order dated March 18, 2010 [Doc. No. 29].)

In consideration for settlement of this Action and a release of the claims described in paragraph 19 of the Settlement Agreement, Kaiser agrees to pay a Gross Fund Value sum to the Class Members not to exceed Two Million, Nine Hundred Ten Thousand Dollars ($ 2.91 million) ("GFV"), less Class Counsel's attorneys' fees, costs and expenses, the Named Plaintiffs' incentive awards, PAGA payments, and the costs of settlement administration. (Decl. Blumenthal at ¶3(a).) The remaining Net Fund Value ("NFV") will be distributed as follows:

Each participating Settlement Class Member ("Participating Class Member") will be

entitled to a share of the NFV. To the extent that Class Members opt out or members of the Settlement Class fail to submit a valid Claim Forms so as to become a Participating Class Member their share of the NFV shall not revert to Kaiser, but rather shall first be used to pay the employer's share of payroll taxes with the balance then being redistributed to the Participating Class Members as part of the Settlement Amount available for distribution. The distribution of this excess unclaimed portion of the NFV over and above the amount required to cover the employer share of payroll taxes shall be proportional to each class claimant's original provisional share of the NFV as per paragraph 9(d) of the Settlement Agreement. (Decl. Blumenthal at ¶ 3(b).)

As per paragraph 2 of the Settlement Agreement, the class shall be broken into an SBAC Subclass and an Analyst Subclass. The portion of the NFV to pay claims shall be determined by dividing the NFV by the total number of workweeks in the two subclasses and multiplying that figure by the Settlement Class Member's individual workweek total. For determining each Class Members' share of the NFV, the Claims Administrator will first calculate the eligible "workweeks" by dividing the total number of payroll work hours recorded by the class member in any of the positions during the applicable class period for the respective subclass(es), divide that number by 40, and round that number to the nearest integer. (Decl. Blumenthal at ¶ 3(b).)

Next the Participating Class Members shall be allocated their prorated share of the available NFV using the formula set forth herein above. To the extent that this amount reallocates any non-reversionary amount to these Participating Class Members that amount shall first be used to pay employer's share of payroll taxes for the Participating Class Member. (Decl. Blumenthal at ¶ 3(b).)

As per paragraph 12(a) of the Settlement Agreement, Kaiser and their counsel will not oppose an attorneys' fees award to Class Counsel of 25% of the GFV to compensate Class Counsel for all of the work already performed in this case and all of the work remaining to be performed in documenting the Settlement, securing Court approval of the Settlement, making sure that the Settlement is fairly administered and implemented and

obtaining dismissal of the actions. Separate from this award for attorneys' fees, Class Counsel will separately recoup the actual litigation costs. (Decl. Blumenthal, ¶ 3(c).)

As per paragraph 12(b) of the Settlement Agreement, Class Counsel will request that Class Representatives Smith and Dodson receive an enhancement award to be deducted from the GFV, of $25,000 each for their service as a Class Representative. Plaintiff Molla Enger will also apply for an enhancement award to be deducted from the GFV of $20,000. These awards will be paid in addition to their individual claims for a share to which they are otherwise entitled through the claims process. Kaiser will not oppose this request. (Decl. Blumenthal, ¶ 3(d).)

As per paragraph 12(f) of the Settlement Agreement, the reasonable costs of the Claims Administrator associated with the administration of this Settlement not to exceed $30,000 will be paid for from the GFV. The Claims Administrator will be Gilardi & Company LLC. (Decl. Blumenthal ¶3(e).)

As per paragraph 12(a) of the Settlement Agreement, the Parties have allocated a total of Twenty-Thousand Dollars ($20,000) to a PAGA Settlement Fund. Kaiser agrees to establish this as a segregated PAGA Settlement Fund from the GFV consisting of a maximum of $20,000. Labor Code section 2699(i) requires that any settlement under this section is distributed as follows: 75% to the State's LWDA for enforcement of labor laws and education of employers and 25 % to aggrieved employees. Therefore, $15,000 will be paid to the State. The remaining $5,000 will be distributed on a pro rata basis to Qualified Claimants, as defined in paragraph 14(c) (the "PAGA Award"). (Decl. Blumenthal ¶3(f).)

Within fifteen (15) business days of preliminary approval by the Court, Kaiser will deposit the first thirty-thousand dollars ($30,000) into an account with the Claims Administrator. The remainder of the GFV will be deposited into the same account within ten (10) business days after final approval by the Court. (Decl. Blumenthal ¶3(g).)

The Settlement in this case of $2.91 million represents a substantial benefit for the Class. The calculations estimates for the amount due for the nonpayment of wages were

calculated by DM&A, Plaintiffs' damage expert. (Decl. Blumenthal at ¶8(d)). For the employees comprising the Class, the payroll and time records of Kaiser were used to calculate the overtime compensation owed to each member of the Class. According to the calculations of DM&A, Kaiser was subject to total claims of $ 6,464,159.97 for the entire Class Period for the combination of unpaid overtime, missed meal breaks, and missed rest breaks for the entire Class that was susceptible to sold proof. The settlement of $2,910,000, before deductions, represents 45% of the subject claims and after deduction of the PAGA payment of $20,000, the attorneys' fee payment of $727,500, the claims administration payment of $30,000, and the Class Representatives' incentive awards of $70,000, the NFV will equal $2,082,500, which is nearly 32% of a full recovery, assuming these amounts could be proven at trial. (Decl. Blumenthal at ¶8(d)).

This recovery exceeds the 25% to 35% of the actual estimated loss to the settlement approved in Glass v. UBS Fin. Servs., 2007 U.S. Dist. LEXIS 8476 (N.D.Cal. Jan. 27 2007). As a result, the Settlement provides the Class with a recovery that compares favorably to what would have been sought at trial and a larger recovery than obtained in similar litigation. (Decl. Blumenthal at ¶8(d).)

The settlement is fair, adequate and reasonable to the class and should be finally approved. (Decl. Blumenthal ¶3(g).) In sum, this settlement valued at $2.91 million is an excellent result and provides the Class Members with the opportunity to receive a substantial recovery of thousands of dollars to each claimant. This result is particularly remarkable in light of the fact that liability in this case was far from certain in light of the defenses asserted by Kaiser. (Decl. Blumenthal at ¶ 3(g).)

III. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT FINAL APPROVAL

When a proposed class-wide settlement is reached, it must be submitted to the court for approval. 2 H. Newberg & A. Conte, Newberg on Class Actions (3d ed. 1992) at §11.41, p.11-87. Court approval of a class settlement is considered at a final settlement approval

hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented and class members may be heard regarding the settlement. *See* Manual for Complex Litigation, Second §30.44 (1993). During final approval, the court must determine whether the settlement is fair, reasonable and adequate. *See* Officers for Justice v. Civil Service Com'n, etc., 688 F.2d. 615, 625 (9th Cir. 1982) and Fed. Rules Civ. Proc., rule 23(e).

Governing the settlement of class actions, the Federal Rules of Civil Procedure, §23 (e) specifically provides:

> The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

F.R.C.P. § 23(e)(1)(c).

Class action settlements should be approved where (1) the proposed settlement is fairly and honestly negotiated; (2) serious questions of law and fact exist placing the ultimate outcome of the litigation in doubt; (3) the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the parties have determined that the settlement is fair and reasonable. Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 324 (5th Cir. 1984); Marcus v. State of Kansas, 209 F. Supp. 2d 1179 (D.Kan. 2002); Lopez v. City of Santa Fe, 206 F.R.D. 285, 288 (D.N.M. 2002). Each of those four criteria is satisfied here.

As discussed in detail below, this Settlement was reached through arm's-length negotiations. The Settlement was negotiated by experienced counsel for the Class and represented by adequate class representatives, who protected the interests of the Class Members. (See Report at page 9 [Doc. No. 27].) There were complex legal and factual issues that placed the ultimate outcome of this litigation in doubt. Accordingly. the immediate value of the settlement to the Class Members far outweighs the possibility of relief if this protracted and expensive litigation had continued through trial and appeal. Finally, the considered judgment of all parties to the Settlement is that the Settlement is fair

and reasonable in light of the immediate benefit provided by the Settlement to the Class Members, which is a conclusion that is reinforced by the overwhelming response of the Class Members submitting claims.

Settlements of disputed claims are favored by the courts. Waits v. Weller, 653 F.2d 1288, 1291 (9th Cir 1981) ("settlement encouraged in appropriate class action settlements"). In evaluating settlements, the courts have long recognized that compromise is particularly appropriate since such litigation is difficult and notoriously uncertain.

Settlement is especially favored in class actions because it minimizes the litigation expenses of all parties and reduces the strain on judicial resources. Officers for Justice, supra, 688 F.2d at 625 ("voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation"); Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir.1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."); In re Dept. Of Energy Stripper Well Exemption Litig., 653 F.Supp. 108, 115 (D.Kan.1986) ("It is in the interests of the courts and the parties that there should be an end to litigation and the law favors the peaceful settlement of controversies.")

"[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Officers for Justice, supra, 688 F.2d at 625. Under this standard, the court must decide whether the proposed settlement falls within the range of reasonable settlements, taking into account that settlements are compromises between the parties reflecting subjective, unquantifiable judgments concerning the risks and possible outcomes of litigation. Id.

In cases such as this one, courts have repeatedly emphasized that there is a strong initial presumption that the compromise is fair and reasonable. In re Heritage Bond Litig.,

2005 U.S. Dist. Lexis 13555, at *11 (C.D. Cal. 2005). Courts are advised not to adjudicate the merits of the action, nor substitute their judgment for that of the parties who negotiated the settlement, nor should they reopen and enter into negotiations with the litigants in the hopes of improving the terms of the settlement. Id., at *11; Officers for Justice, supra 688 F.2d at 625.

The essential evaluation is whether, given the risks of litigation and the range of probable results, the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. Officers for Justice, supra 688 F.2d at 625; Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). Here, the facts and circumstances compel the conclusion that the proposed settlement satisfies that standard.

IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. The Test for Fairness

To determine whether a proposed settlement is fair, reasonable, and adequate, courts consider some or all of the following factors: "(1) the strength of plaintiffs' 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 proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." Officers for Justice, supra, 688 F.2d at 625; see also Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003).

The list of factors is not exhaustive and should be tailored to each case. Officers for Justice, at 625. Due regard should be given to what is otherwise a private consensual agreement between the parties. Id. The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Id, at 625. "**Ultimately, the [trial] court's**

determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice."[3] Id.

The question whether a proposed settlement is fair, reasonable and adequate necessarily requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "'the terms of the compromise with the likely rewards of litigation.'" Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied 464 U.S. 818 (1983) (quoting Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968)). Therefore, many courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. Kirkorian v. Borelli, 695 F. Supp. 446, 451 (N.D. Cal. 1988); Reed v. General Motors Corp., 703 F.2d 170, 175 (5th Cir. 1983); Weinberger, 698 F.2d at 74; Armstrong v. Board of School Directors, 616 F.2d 305, 325 (7th Cir. 1980); Fisher Bros. v. Cambridge-Lee Indus., Inc., 630 F. Supp. 482, 489 (E.D. Pa. 1985). For example, in Lyons v. Marrud, Inc., [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 93,525 (S.D.N.Y. 1972), the court noted that "[e]xperienced and competent counsel have assessed these problems and the probability of success on the merits. They have concluded that compromise is well-advised and necessary. The parties' decision regarding the respective merits of their position has an important bearing on this case." Id. at ¶ 92,520.

B. The Settlement Satisfies the Test for Fairness

1. The Investigation and Discovery are Sufficient to Allow Counsel and the Court to Act Intelligently

The stage of the proceedings at which this settlement was reached militates in favor of final approval of the settlement. The agreement to settle did not occur until Class Counsel possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the monetary results that could be obtained through

[3] All emphasis to quotations added and all internal citations omitted unless otherwise indicated.

further litigation.[4] There was no need for continued litigation simply to reaffirm what was already known by the negotiating parties.

During the relevant time period of 2005 through 2009, Kaiser was in the business of providing operating medical facilities and providing medical services to consumers in California. As part of these operations, Kaiser implemented a HealthConnect computer project to upgrade and integrate Kaiser's computer systems. To perform this HealthConnect computer project, Kaiser employs substantive substantial numbers of employees with the titles of Analyst and Business Application Coordinator which employees Kaiser designated as "exempt" from overtime compensation requirements imposed by California law.

This class action was filed on December 18, 2008, on behalf of a putative class of Business Application Coordinator IIs and Senior Business Application Coordinators ("SBACs") who worked on the HealthConnect project in California. On July 31, 2009, the *Enger v. Kaiser Foundation Health Plan, Inc.*, Case No. 3:09-cv-01670-JLS-POR, action was filed on behalf of a putative class of Analysts and Senior Analysts who worked on the HealthConnect project in California. These cases both involved employees on the HealthConnect project and the actions were consolidated into a single complaint. [Doc. No. 24]. The theory of these cases was that the Plaintiffs and putative class members were not exempt from overtime because they did not qualify for the "administrative" exemption and were therefore misclassified by Kaiser. (Decl. Blumenthal ¶5).

Kaiser opposed this claim, and argued that the general "administrative" exemption applied to Plaintiff because they engaged in duties related to Kaiser's general business operations. Of the defenses asserted by Defendants, the factual defenses asserted to support the exemption from overtime compensation presented serious risks both to establishing class

[4] Magistrate Adler found in his Report and Recommendation that "Plaintiffs have adequately demonstrated that the agreement to settle did not occur until Class Counsel possessed sufficient information to evaluate the case and make an informed decision about settlement." (Report at p.15 [Doc. No. 27].)

certification and liability. (Blumenthal Decl at ¶8(c).) Plaintiffs obtained information concerning the positions themselves, including the job descriptions, as well as dates of employment and compensation paid to each class member. The parties then decided to use the services of a mediator to see if the case could be resolved, and engaged David Rotman for this purpose. Shortly before the mediation date, the parties reached this Settlement.

Class Counsel has litigated similar overtime cases against other employers. (Blumenthal Decl at ¶2.) Although Plaintiffs and Class Counsel believed that their case had merit, they recognized the potential risks, both sides would face if litigation of this action continued. As the federal court recently held in Glass v. UBS Fin. Servs., 2007 U.S. Dist. LEXIS 8476 (N.D.Cal. January 27 2007), where the parties faced uncertainties similar to those in this litigation:

> In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. "The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." See *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further litigation is substantial.

Id. at *12.

Lengthy mediation briefs were researched and prepared. Accounting experts were engaged by the parties to prepare different calculations of the damages under possible outcome scenarios. (Blumenthal Decl at ¶7(a).)

During the negotiations, which was both contentious and arm's-length, Kaiser vigorously disputed liability, and especially whether the administrative exemption applied to the class members, and the amount of overtime worked by the employees. Moreover, Kaiser disputed that the class could be certified because individual issues predominated as to the applicability of the administrative exemptions that would to be separately determined for each Class Member based on their individual experience. While other cases have approved class certification in overtime wage claims, class certification in this action would have been

hotly disputed and was by no means a foregone conclusion. (Blumenthal Decl at ¶7(b).)

Based on the complexity of the case, the novelty of the legal issues, the substantial risks and uncertainty of the outcome on both liability and certification issues, as well as the need to ascertain damages without precise time records, Plaintiffs believe that the result is an excellent one and is more than fair and in the best interests of the Class Members. There can be no doubt that counsel for both parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation, given the relative strengths and weaknesses of their positions. (Blumenthal Decl. at ¶ 7(d).)

2. The Settlement Was Reached Through Arm's Length Bargaining

This settlement was the result of arm's-length negotiations as well as formal and informal settlement conferences between the parties through their respective attorneys. Through informal discovery procedures, Kaiser disclosed confidential information relating to their organization, the various employment positions, the size of the putative class, the overtime hours recorded, salary ranges and the number of workweeks for the Class Members. This information permitted Class Counsel to evaluate liability and prepare valuation estimates. After comprehensive legal and factual analysis, including the factual and legal defenses asserted and prepared by Kaiser, Class Counsel possessed sufficient information for intelligent evaluation of the case for purposes of settlement. (Blumenthal Decl at ¶7).

Prior to the initiation of settlement discussions, Class Counsel reviewed and outlined the case based upon the provided information, and determined the conditions of settlement which would be fair and reasonable to the Class. Class Counsel was experienced in the types of settlement appropriate to resolve these overtime claims, as Class Counsel has previously litigated and settled other employment actions. Initial informal settlement discussions were productive and encouraged both parties to further analyze their positions and to pursue formal mediation. (Blumenthal Decl. at ¶7.)

Following this discovery and discussion between counsel, the parties agreed to mediation before David Rotman, a respected mediator for wage and hour class actions. The parties prepared for the mediation by exchanging payroll data, calculating damages, and submitting mediation briefs to Mr. Rotman. Plaintiffs also retained an expert in computer systems, Wayne Norris, to help explain and analyze the work performed by the employees at issue. Shortly before the mediation, the parties reached this settlement. At the end of the day, after his independent review of the facts in this case, David Rotman determined the amount that he believed was fair, reasonable, and adequate, and recommended a settlement amount to the parties as the mediator's proposal that was not subject to further negotiation. Counsel for the parties, after contentious negotiations, both agreed to accept the mediator's proposal, which was given great weight by the parties given David Rotman's expertise as a mediator and as a jurist, and the uncertainties and cost of the years of litigation the parties faced if the mediators' proposal was not accepted. (Blumenthal Decl. at ¶7.) Most importantly, Plaintiffs and Class Counsel believe that this settlement is fair, reasonable and adequate. By reason of the settlement, Kaiser agreed to make a payment of Two Million, Nine Hundred Ten Thousand Dollars ($ 2.91 million) representing 45% of the maximum claim value in full discharge of all claims asserted in this action, without a reversion to Kaiser, as payment in full of all claims arising from the events described in the Second Amended Complaint including Class Counsel's attorneys' fees and costs, incentive awards for the Class Representatives, PAGA payments, and the cost of class notice and claims administration.

After the mediation, the specific terms of the settlement required additional negotiation before the final written agreement could be signed. Class Counsel began the process of reviewing the settlement terms and drafting the settlement agreement and exhibits. Even after the parties reached an agreement, Class Counsel had to ensure that the terms of the Settlement were fair to every member of the class and contained the requisite opportunities for notice, exclusion, and objection in accordance with California class action law. By the middle of August 2009, the settlement agreement was finalized and executed, at

which time the preliminary motion requesting Court approval of the settlement was prepared and filed by Class Counsel on September 1, 2009. [Doc. No. 20]. On March 18, 2010, this Court preliminarily approved the class settlement as fair, reasonable and adequate based upon the Report of Magistrate Adler, and ordered that notice of the proposed settlement be disseminated to the members of the Class. [Doc. No. 29]. Notice of the settlement providing class members with an opportunity to opt out or object was then mailed by January 11, 2010 to the 198 employees who comprise the Class. (Declaration of Christman at ¶3 [Doc. No. 32].) In response to the notice, not one Class Member has objected to the proposed settlement. (Blumenthal Decl at ¶4). Plaintiffs and Class Counsel believe that this settlement is fair, reasonable and adequate.

3. Counsel is Experienced in Similar Litigation

Class Counsel in this matter has extensive class action experience in many fields and has represented thousands of persons nationwide in actions including labor and overtime litigation, securities shareholder litigation, constitutional challenges to state and local statutes, collateral protection insurance cases, consumer refund actions and tobacco litigation. An exhaustive list of previous and current class action cases managed and settled by the Class Counsel in this action is provided to the Court by way of the Declaration of Norman Blumenthal submitted in support of this motion. Class Counsel have participated in every aspect of the settlement discussions and have concluded the settlement is fair, adequate and reasonable and in the best interests of the Class. (Blumenthal Decl. at ¶ 2 and ¶ 3(d).)

4. There Are No Objectors to the Settlement and Few Opt-Outs

After dissemination of the class notice to the 382 members of the Class, which provided each class member with the terms of the settlement, **not one class member has filed an objection to the settlement** and only five (5) class members requested exclusion from the settlement. (Blumenthal Decl. at ¶ 4.) The absence of any objector strongly

supports the fairness, reasonableness and adequacy of the Settlement. See In re Austrian & German Bank Holocaust Litigation 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."); Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118-119 (3d. Cir. 1990) (29 objections out of 281 member class 'strongly favors settlement'); Laskey v. Int'1 Union, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed settlement should be considered when determining fairness of settlement.)

Importantly, every Class Member was given the opportunity to participate in the Settlement under the same terms. Of the total 382 employees in the Class, there are 339 who filed claims, representing 88.7% of the employees in the Class. (See Declaration of Christman at ¶¶ 3, 9 [Doc No. 32]).

Here given the fact that not one Class Member objected and the overwhelming majority of Class Members filed claims, the Court can conclude that the settlement is fair, reasonable and adequate.

5. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

The complexities and duration of further litigation cannot be overstated. As discussed above, Kaiser asserted substantial and real defenses to this action. Even if Plaintiffs were successful on class certification and at trial, there is little doubt that Defendant would post a bond and appeal in the event of an adverse judgment. A post-judgment appeal by Defendant would have required many more years to resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total, then the case could have dragged on for years after the appeal. The benefits of a guaranteed recovery today, of the very remedy that Plaintiff would seek at trial, outweigh an uncertain result three or more years in the future. (Blumenthal Decl. at ¶ 8(a).)

Both the Plaintiffs and Class Counsel recognize the expense and length of a trial in this action against Defendant through possible appeals which could take at least another

three years. Class Counsel also have taken into account the uncertain outcome and risk of litigation, especially in complex actions such as this Action. Class Counsel are also mindful of and recognize the inherent problems of proof under, and alleged defenses to, the claims asserted in the Action. Moreover, post trial motions and appeals would have been inevitable. Costs would have mounted and recovery would have been delayed if not denied, thereby reducing the benefits of an ultimate victory. Plaintiffs and Class Counsel believe that the settlement set forth in the Stipulation confers substantial benefits upon the Settlement Class and each of the Settlement Class Members. Based upon their evaluation, Plaintiffs and Class Counsel have determined that the settlement set forth in the Stipulation is in the best interest of the Class. (Blumenthal Decl at ¶8(b).)

Similarly, Defendant has concluded that settlement of this Action is desirable in the manner and upon the terms and conditions set forth in the Stipulation in order to avoid the expense, inconvenience, and burden of further legal proceedings, and the uncertainties of trial and appeals. There can be little doubt that the agreed upon settlement of claims is the most efficient and cost-effective method to provide refunds to the members of the Class who are current and former employees of Defendant.

V. CONCLUSION

For the reasons stated herein and in the accompanying declarations, Plaintiffs respectfully submit that the proposed settlement satisfies the standard of fairness established by the federal courts and should therefore be finally approved.

Dated: October 12, 2010

BLUMENTHAL, NORDREHAUG & BHOWMIK

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