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Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

SHELBY STEWART, CHARLETA DABROWSKI, BENEDICT JOHNSON, and KENYA MAYFIELD, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN, INC., KAISER FOUNDATION HOSPITALS, THE PERMANENTE MEDICAL GROUP, INC., and SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP,

Defendants.

Case No.: CGC-21-590966

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR (1) PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT; (2) CERTIFICATION OF SETTLEMENT CLASSES; (3) APPOINTING CLASS COUNSEL; (4) APPROVING NOTICE PLAN AND DIRECTING DISTRIBUTION OF NOTICE; AND (5) SETTING A SCHEDULE FOR THE FINAL APPROVAL PROCESS

Complaint filed: April 22, 2021

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I. INTRODUCTION

On April 23, 2021, Plaintiff Shelby Stewart, Charleta Dabrowski, Benedict Johnson, and Kenya Mayfield, ("Plaintiffs" or "Class Representatives") in the above-captioned action filed Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement and Memorandum of Law in Support of Motion for Preliminary Approval of Class Settlement Motion for Preliminary Approval of Class and Representative Action Settlement and Certification of Settlement Classes ("Motion"). Plaintiffs now submit supplemental information in support of their request. As described below, Plaintiffs more than satisfy the requirements for certification of a settlement class, and the class settlement meets the requirements for settlement approval.

II. ARGUMENT

A. Certification for Settlement Purposes is Appropriate.

Plaintiffs seek certification of the following Class for settlement purposes:

All current and former, full-time, non-union, non-clinical Black employees employed by Defendants Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, The Permanente Medical Group, Inc. or Southern California Permanente Medical Group ("Defendants") from January 1, 2015 until March 31, 2021 (the "Class Period") at the Director level and below in the Administrative Support or Consulting Services job families in the California locations of the Program Offices Region, Northern California Region, Southern California Region, and the KP-IT region (the "Class").[1]

As described in Plaintiffs' Motion, a class may be certified under Code of Civil Procedure section 382 if: (1) it is ascertainable and its members are too numerous for joinder to be practical; (2) the representative and absent class members share a community of interest and questions of law and fact common to the class predominate over questions unique to individual class members; (3) the representative's claims are typical of the class' claims; and (4) the representative will fairly and adequately represent the class' interests. *See, e.g.*, *Richmond v. Dart Industries, Inc.,* 29 Cal.3d 462, 470 (1981). Plaintiffs supplement their original submission

[1] The Class excludes those working as Interns or in Student Temporary jobs.

regarding ascertainability of the proposed Class and the Plaintiffs' typicality and adequacy as proposed Class Representatives.

1. <u>The Class is Ascertainable.</u>

A class is "ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover." *Harper v. 24 Hour Fitness, Inc*., 167 Cal.App.4th 966, 977 (2008). Plaintiffs here maintain that they have proposed an identifiable class based on an employee's race, job, geographic location, and time period, and that all of those are ascertained by review of Defendants' personnel and payroll data. *See* Declaration of Felicia M. Medina, §13 (*submitted herewith*) ["Medina Supp. Decl."]. Information about racial self-identification is verifiable in Defendants' data. *See* Defs.' Response, at 1; Declaration of Derek Sumimoto, ¶ 5.

2. <u>The Class Representatives are Typical and Adequate.</u>

Typicality "requires a showing that the class representative has claims or defenses typical of the class." *See, e.g.*, *Fireside Bank v. Superior Court*, 40 Cal.4th 1069 (2007). The adequacy requirement is met where the class representative is represented by counsel qualified to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class's interests. *McGhee v. Bank of America*, 60 Cal.App.3d 442, 451 (1976). Plaintiffs contend that both requirements are satisfied here. Plaintiffs respectfully provide their own declarations, demonstrating that all Plaintiffs are members of the Class they seek to represent, with the same claims as the Class, and with no conflicts between themselves and Class members. *See* Declaration of Shelby Stewart, ¶¶ 2-4; Declaration of Charleta Dabrowski, ¶¶ 2-4; Declaration of Benedict Johnson, ¶¶ 2-4; Declaration of Kenya Mayfield, ¶¶ 2-4; *see also* Declaration of Felicia M. Medina; Declaration of Kelly M. Dermody) (submitted on April 23, 2021, describing counsel qualifications).

B. <u>Preliminary Settlement Approval is Warranted.</u>

The purpose of the preliminary evaluation of a proposed class action settlement is to determine only whether the overall settlement is within the range of possible approval. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 234–235, 251 (2001). The following "well-

recognized factors" are typically considered when evaluating the reasonableness of a proposed settlement: (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 through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of government participants; and (8) the reaction of the class members to the proposed settlement. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 128 (2008) [citing *Dunk*, 48 Cal.App.4th at p. 1801]. At the preliminary approval stage, "the settlement need only be potentially fair, as the court will make a final determination of its adequacy at the hearing on final approval, after such time as any party has had a chance to object and/or opt out." *Acosta v. Trans Union, LLC,* 243 F.R.D. 377, 386 (C.D. Cal. 2007).

As described in Plaintiffs' Motion, and supplemented herein, all *Kullar* factors are satisfied.

1. The Amount Offered in Settlement is Reasonable.

Under the terms of the Settlement Agreement ("Settlement" or "Agreement"), Defendants have agreed to pay over $11.5 million in non-reversionary monetary benefits to the Class, along with substantial business practice changes that Plaintiffs believe will address the concerns raised by Plaintiffs in the Complaint.[2] As supplemented below, this is manifestly reasonable and deserving of preliminary settlement approval.

a. The Monetary Exposure Was Generated By Use of Sophisticated Expert Analysis of Payroll Data.

Before negotiating a recovery here, Plaintiffs first generated an alleged class exposure based on what they believe to be sophisticated expert analysis. *See* Medina Supp. Decl., ¶¶ 12-14, 16-18. Plaintiffs' expert, Dr. Alex Vekker, conducted the analysis based on Defendants' personnel and payroll data and his creation of statistical models to determine whether there was a

[2] The Agreement has been executed through the signatures of counsel, in compliance with newly-amended California Code of Civil Procedure section 664.6 (amended as of January 2021), which permits attorneys to sign settlements on behalf of clients. *See* CCP § 664.6.

statistically-quantifiable race effect on pay or promotion. *Id.*, ¶ 13. Plaintiffs consider Dr. Vekker to be a renowned labor economist. *Id.*, ¶ 12 and Ex. H.

Specifically, Defendants produced 1,377 MB of personnel data containing 72 variables with information unique to each employee in a covered position (both class and non-class members) dating back to 2015. *See* Medina Supp. Decl., ¶ 13. The variables in the data that pertain to compensation and promotion, or which could inform such employee outcomes, were isolated and analyzed. *Id.* Such variables included all categories of compensation (*e.g.*, "Rate" or "salary plan"), role/level (*e.g.*, "Job group" and "Job Function"), department ("Org Unit"), performance ("Ratings"), seniority ("Hire date"), tenure/time in position ("Department Entry Date"), job family, age at hire (as a proxy for lateral experience), promotions ("Grade"), and geographic location ("GL Location"). *Id.* Dr. Vekker analyzed this data and isolated the variables that he believed could explain pay and promotion outcomes. He did this to conduct a regression analysis to determine in his view if Black employees are under-paid and under-promoted compared to similarly situated non-Black employees. *Id.*

Below are the tables generated by Dr. Vekker upon which he concluded a Class exposure of approximately $31.7 million for pay and promotion shortfalls:

Base Pay Exposure to Parity (2015-2020)	$24,843,294
Incentive Compensation Exposure to Parity (2015-2020)	$4,254,945
Base Pay Exposure to Parity (January 1, 2021-March 31,2021)	$1,486,574
Incentive Compensation Exposure to Parity (2021)	$1,142,596
Total:	**$31,727,409**

Medina Supp. Decl., ¶¶ 13-14, 16-18.

Importantly, Defendants also retained a labor economist expert to evaluate the data through statistical modeling and regression analysis. Medina Supp. Decl., ¶ 13. While Dr. Vekker's analysis demonstrated a significant shortfall in pay and promotions for Class members,

Defendants' models did not. In addition, through the course of the expert statistical work, each side hotly disputed whether their adversary's model (and any resulting exposure numbers) accurately captured conditions, whether the models would be sufficient under the California Equal Pay Act, and whether they would withstand scrutiny by a factfinder at trial. In particular, the parties disagreed over Dr. Vekker's decision to exclude the variable "grade" from his model. While Defendants contend that employees in different grades are not doing substantially similar work (and therefore should not be compared for differences in pay), Plaintiffs contend that grade is influenced by prior under-promotions of African Americans and its use in the model would artificially underestimate the economic compounding of lost pay and promotions alleged by the Class. If Plaintiffs were unsuccessful in advocating for their expert model, however, the potential exposure here would be dramatically lower, or even non-existent according to Defendants.

b. <u>The Proposed Discounted Recovery is Appropriate.</u>

As described above, Plaintiffs' $31.7 million exposure number – against which the Plaintiffs invite the Court to assess the reasonableness of the Settlement – is a disputed calculation. While Plaintiffs contend that the Settlement provides a recovery of over 36% against exposure, Defendants generated their own statistical analyses which show little to no variation in the pay of Class Members and other comparable employees. If the parties were to use Defendants' analyses as the benchmark, the Settlement would result in an exponential overpayment (*i.e.*, more than 100% of exposure for calculated shortfalls) to Class Members here.

Accordingly, one of the major risk considerations for the parties to consider is the chance that a jury might side with one party or the other, not only on liability but also on the damages calculations, including that it might render a judgment in Plaintiffs' favor but identify a damages number that is nevertheless less than Plaintiffs' expert's model. The parties also must assess the risk that at any given stage of the case (major motions, summary judgment, trial, appeal) one or the other side will lose on a major risk assessment, and also consider the possibility that in trying to liquidate all risk through litigation they could run into future uncertainties with the development of law or the changing views of factfinders at trial. These all weigh in favor of

discounting recoveries to achieve what Plaintiffs believe to be certain fair-value now versus uncertain recovery in an uncertain future.

Regardless, a 36% recovery on potential exposure is substantial, certain relief, especially when so many issues remain in dispute and unresolved.[3] In similar circumstances, courts reviewing settlement relief for employee classes have readily approved recoveries near 36%, or even amounts that are substantially *less* and in cases that are significantly more advanced in litigation favoring plaintiffs than this one. *See, e.g.,* Medina Supp. Decl., ¶ 20, Ex. I (*Chen v. Western Digital*, No. 8:19-cv-00909-JLS-DFM (C.D. Cal. 2021) (Final Order approving recovery between 10.8% and 15.9%); *id.*, Ex. E (*McNaulty, et al. v. Alameda Contra Costa Transit District*, Case No. RG189339766 (Alameda Superior Court 2020) (Final Approval granted where 37% of damages recovered)); Declaration of Kelly M. Dermody, Ex. P (submitted herewith) ["Dermody Supp. Decl."] (Judge Koh approving $435 million settlement reflecting recovery of 14% of damages); *see also In re Toys "R" Us-Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438 (C.D. Cal. 2014) (granting final approval of a settlement providing for 3% value on released claims worth up to $13.05 billion); *Reed v. 1-800 Contacts, Inc.*, 2014 U.S. Dist. LEXIS 255 (S.D. Cal. Jan. 2, 2014) (granting final approval where settlement represented 1.7% of possible recovery on claims worth potentially $499,420,000); *In re LDK Solar Secs. Litig.*, 2010 U.S. Dist. LEXIS 73530, at *6 (N.D. Cal. June 21, 2010) (granting final approval where settlement was 5% of estimated damages); *In re Tableware Antitrust Litig.*, 2007 U.S. Dist. LEXIS 89998, at *7 (N.D. Cal. Nov. 28, 2007) (granting final approval where settlement represented 4% of estimated single damages of about $12.5 million).

By any measure, the proposed monetary recovery is reasonable.

2. The Proposed Business Practice Changes Enhance the Overall Settlement and Support Approval.

a. The Proposed Changes are Informed By Expert Analysis.

Plaintiffs crafted business practice change (*i.e.*, injunctive) relief by interviewing numerous experts about the issues in this case, and were informed by significant prior experience

[3] A brief summary of the case is set forth in paragraph 4 of the Medina Supp. Decl.

with business interventions that work and by scholarship on state-of-the-art practices in the areas of compensation, HR management, and racial equity. *See* Dermody Supp. Decl., ¶ 3. This research generated substantial support for the relief negotiated here, including in particular three core programs related to Plaintiffs' allegations: (1) job analysis covering class jobs, (2) pay and complaint monitoring, and (3) multiple types and styles of trainings and competencies. *See* Settlement Agreement, Ex. B. In addition, the prior experience of Class Counsel with APTMetrics as an independent expert in multiple employment settlement monitoring periods supported the retention of APTMetrics here. *Id.*, ¶3.a.; *see also* Declaration of Julia Bayless, ¶¶ 3-8 (describing APTMetrics' expertise and scope of work).

b. The Proposed Business Practice Changes Enhance the Settlement.

Although injunctive relief is just one part of the proposed Settlement here, courts assessing the adequacy of a multi-part settlement are instructed to view "the complete package taken as a whole, rather than the individual component parts." *Officers for Just. v. Civ. Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). To assess whether a Class settlement *overall* is adequate, the first question is whether the overall consideration is sufficient for the release of claims. And, determining what might be appropriate consideration is informed by the remedies the claims might provide if Plaintiffs were to prevail.[4] *See Romero v. Securus Techs., Inc.*, No. 16CV1283 JM (MDD) (S.D. Cal. June 16, 2020) 2020 WL 3250599, at *6 (court may consider "plaintiffs' expected recovery [at trial] balanced against the value of the settlement offer").

Here, Plaintiffs have alleged claims for which the remedies are primarily monetary. Accordingly, the adequacy of this settlement may be assessed entirely by reviewing the monetary relief and recognizing that Defendants are changing the challenged practices. *See, e.g., Lerma v. Schiff Nutrition Int'l, Inc.*, No. 11CV1056-MDD, 2015 WL 11216701, at *7 (S.D. Cal. Nov. 3,

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[4] To be clear, a court is not limited to only considering the value of those remedies which could be achieved by judgment. For example, if a consumer suffered from errant credit reporting, it might be more valuable to her for her credit report to be fixed than to receive a de minimis statutory payment for the error, even if the legal remedy at trial only provided for the latter.

2015) (finding even limited injunctive relief fair, adequate and reasonable because "the Court has weighed that limited value against the small or nonexistent potential value of the injunctive relief Class Counsel could be expected to obtain at trial and the very significant risks of continuing the litigation.") (citing *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998)); *Moore v. PetSmart, Inc.*, No. 5:12-CV-03577-EJD, 2015 WL 5439000, at *6 (N.D. Cal. Aug. 4, 2015), *aff'd*, 728 F. App'x 671 (9th Cir. 2018) ("While the monetary recovery obtained for settlement class members is significant, the injunctive relief agreed upon is less impressive . . . . Nonetheless, as a whole, the monetary amount offered to purported class members is substantial enough to weigh this factor in favor of settlement.").

That said, the parties here negotiated for much more than just cash in order to improve processes that Plaintiffs and Class Counsel believe will *solve* the concerns that Plaintiffs raised in the lawsuit. By all measures, this relief exceeds what Plaintiffs could have achieved at trial, and will enhance opportunities for African Americans for years to come. *See* Settlement Agreement Ex. B (requiring, for example, that a qualified independent job analysis be performed for all Covered Positions, pay monitoring, as well as numerous trainings on mitigating and avoiding bias that Plaintiffs and Class Counsel believe will facilitate an equitable workplace culture). This compares favorably to other race discrimination settlements approved by courts. *See, e.g., Marolda v. Symantec Corp.*, No. 08-CV-05701 EMC, 2013 WL 12310821, at *5 (N.D. Cal. Apr. 5, 2013) (finding settlement fair, adequate and reasonable because "Defendants have offered a substantial amount of money in settlement, and the injunctive and equitable relief provided for in the Settlement conveys significant benefits to the Class"); Dermody Supp. Decl., Exs. K-O, Q-S (employment class settlements with monetary and injunctive relief which were approved by Northern District of California Judges Edward Chen, Phyllis Hamilton, Thelton Henderson, Susan Illston and Claudia Wilkin; by Eastern District of New York Judge Pamela Chen; and by District of Columbia District Judge Richard Roberts).

Finally, despite extensive review of settlement orders in state and federal court, Plaintiffs observed that courts have not established a precise benchmark or metrics for assessing what is "adequate" (much less "significant") injunctive relief. *See, e.g.*, *Staton v. Boeing Co*., 327 F.3d

938, 945–46, 959 (9th Cir. 2003) (value of injunctive relief is "most often not sufficiently measurable"). Here, though, Defendants have generated budget numbers, which make this assessment possible in part[5], and reflecting an obligation to spend millions of dollars on business practice changes under this Settlement *in addition to* the over $11.5 million it is paying to the Class. *See* Settlement Agreement, § 10.A; Defs.' Response, at 1-3; *see also* Bayless Decl., ¶ 9 ($2 million cost estimate for APTMetrics); Declaration of Valentin Estevez, ¶ 7 ($150,000 cost estimate for Welch Consulting); Declaration of Susan Terrill, ¶ 4 ($2.8 million cost estimate for NeuroLeadership Institute). It cannot be disputed that this is a significant, tangible benefit to the Class. Notably, the injunctive relief negotiated by Plaintiffs here became the foundation for injunctive relief negotiated in the parallel class action for Latinx employees (*Cuenca v. Kaiser Permanente*, No. RG20065123 (Alameda Superior Court)), which Judge Stephen Kaus recently described as "significant." *See* Dermody Supp. Decl., Ex. I, at p. 2 (Preliminary Approval Order).

3. The Settlement Terms are Appropriate.

a. Contingency Fund

Reserve funds are appropriate in class settlements, especially where there could be unforeseen data omissions that only come to light after employees observe colleagues whom they believe to be similarly situated receive checks. In recent years, it has thus become more common in employment cases to create a reserve fund to address the potential for unexpected gaps in class data that omit qualified persons from notice and payment. *See, e.g.*, *In re High-Tech Employee Antitrust Litig.*, Case No. 11-CV-02509 LHK at §IV.A.6 ($250,000 reserve fund approved by Judge Lucy Koh in 2015) (Dermody Supp. Decl., Ex. P); *Cuenca v. Kaiser Foundation Health Plan, Inc.*, No. RG20065123, Order at 2 ($50,000 reserve fund approved by Alameda County Superior Court Judge Stephen Kaus in 2021) (Dermody Supp. Decl., Ex. I). This can happen for any number of reasons but in a case where class identification requires, in part, a racial self-identification, it is appropriate to reserve funds for the possibility that such self-identification was not accurately reported by the employee at the time of hire. *See* Defs.' Response, at 1; Sumimoto

[5] These budget numbers likely undercount the value to the Class of remedies that Plaintiffs and Class Counsel believe are designed to enhance career and pay opportunities over many years.

Decl., ¶ 5 (describing process for racial self-identification at time of hire. Otherwise, once the fund is paid out, there is no money left to pay anyone who appears late for an excusable reason.

b. <u>PAGA Allocation</u>

Because Plaintiffs alleged claims under the California Private Attorneys General Act of 2004, Cal. Lab. Code section 2698, *et seq.* ("PAGA"), the Settlement provides for an allocation of $115,047.59 in PAGA penalties, with 75% ($86,285.70) of the proceeds being paid to the state and 25% going to the employees. *See* Settlement Agreement, §V.D.2. This amount equates to 1% of the Settlement fund, and is consistent with allocations routinely approved by California courts. *See, e.g.*, Medina Supp. Decl., ¶ 19, Ex. I (*Chen v. Western Digital*, Case No. 8:19-cv-00909-JLS-DFM (C.D. Cal.) (Final Order granting allocation to LWDA at 1%, or $75,000 of $7,7500,000 class settlement))*;* Ex. J (*Pan v. Qualcomm*, Case No. 16-cv-01885-JLS-DHB (S.D. Cal. 2017) (granting allocation to LWDA of $19,500 from $19,500,000 class settlement)); Ex. K (*McNaulty, et al. v. Alameda Contra Costa Transit District*, Case No. RG189339766 (Alameda Superior Court 2020) (Final Order granting allocation to LWDA of $2,015 from $340,000 class settlement)); *see also* Dermody Supp. Decl., Ex. I, at p.1 (*Cuenca v. Kaiser Foundation Health Plan, Inc.*, No. RG20065123 (Alameda County Superior Court) (June 15, 2021 Order Granting Prelim. Approval, with same 1% PAGA allocation consisting of $73,726 from $7,372,586 class settlement)).

The PAGA claim has a one-year statute of limitation and only permits an aggrieved employee to recover penalties that range from $50 to $100 per violation, per pay period. *See ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019) (clarifying and limiting the scope of PAGA remedies in civil actions to statutory penalties). The allocation was negotiated bearing these limitations in mind, and in consideration of other risks in litigation affecting the EPA claim, including uncertainty regarding certain elements under the law, which have not yet been determined by California's appellate courts, and the normal, significant risks in class litigation generally.

The entire Settlement, including the proposed allocation of PAGA penalties, was submitted to the LWDA on June 18, 2021. *See* Dermody Supp. Decl., Ex. A (confirming email).

However, because Class Members can opt out of the Settlement for purposes of the class claims, but cannot opt out of the settlement of the PAGA Claims, the parties propose to add this limitation in the Notice to the Class:

> "However, because the State of California was notified of the potential Labor Code violations in the *Stewart* matter and will receive $86,286 as a result, you will not be able to bring claims for penalties under California's Private Attorney General Act, Cal. Lab. Code §§ 2698 *et seq.* even if you opt out, if the Settlement is approved with the PAGA payment going to the State. At that point, a court could deem those claims for penalties litigated and resolved, and you will be equitably estoppel from bringing duplicative claims."

See Dermody Supp. Decl., Ex. B (Amended Notice), at 3 ("Option C").

c. <u>Pay Monitoring and Remediation</u>

The Settlement requires Defendants to complete a job analysis to ensure that employees in a Covered Position who are performing substantially similar work are paid equitably, to conduct pay monitoring for three annual cycles, and to remediate any pay disparities identified in the pay equity monitoring.[6] These are significant benefits because Plaintiffs and Class Counsel believe they will squarely address the core concerns raised by the Plaintiffs in this case.

d. <u>Timeline for Business Practice Changes</u>

The Settlement requires Defendants to meet Class Counsel every six months to ensure compliance with all terms of the Settlement Agreement. *See* Settlement Agreement, § IX ("Defendants' Counsel and Class Counsel will meet at least once every six (6) months, beginning six months after the Effective Date, regarding compliance, and may confer more frequently at their discretion or as dictated by information either Party gathers."), *id.*, Ex. B at § K ("Class counsel will receive semi-annual written reports from the Compliance Monitor summarizing Defendants' progress on implementing and/or completing each term of the Business Changes described herein…"); *see also id.*, Ex. B at § G.3 (Belong@KP subject to the ongoing 6-month compliance reporting). In addition, Exhibit B to the Settlement Agreement specifies certain

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[66] These pay equity analyses are conducted looking forward because past pay issues are being resolved in this action. In addition, these pay equity analyses focus on persons performing substantially similar work at the time the review is conducted and considers current jobs/roles and not prior jobs and roles. Thus, employees who are no longer employed by any Defendant in a Covered Position will not be subject to the pay equity analyses.

deliverables within specific time periods and the monitoring requirements for various programs. *See, e.g.*, *id.*, Ex. B, at § A (complete within one year after the Effective Date), § B.1 (reported annually), § B.2 (within 3 months of annual pay equity analyses), § C.1 (completed within 18 months after the Effective Date), § C.2 (reported annually), § D.1 (completed within 18 months after the Effective Date), § D.2 (completed within 18 months after the Effective Date), § E (reported annually per § E.3), § F (within one year after the Effective Date and reported annually), § G.1 and § G.2 (reported annually), § G.3 (part of 6-month reporting process), § I (reported annually), § J (reported annually). All of these ensure that the Business Practice Changes are not aspirational but instead are executed timely and completely.

In addition, the Settlement provides for a 3-year monitoring period with regard to annual pay equity monitoring and annual monitoring of Defendants' promotion data for Covered Positions. While compliance periods are subject to negotiation, it is appropriate to have a period that is long enough for the proposed programs to be implemented. Because the Settlement includes particular deadlines for programs (as described above), three years is an appropriate period here. *See* Medina Supp. Decl., § 5. In addition, although monitoring periods may be longer or shorter, a 3-year period is common where it can ensure enough time for new programs to be implemented and monitored. *See, e.g.*, *id.*, Ex. A at § 14.8 (employment class settlement in *Pan v. Qualcomm,* No. 16-cv-01885-JLS-DHB (S.D.Cal.), where Judge Josephine L. Staton approved three year compliance period); Ex. B, at § 3.1 (employment class settlement in *Chen v. Western Digital,* No. 8:19-cv-00909-JLS-DFM (C.D. Cal), where Judge Janis L. Sammartino approved two-year compliance period); Ex. C at § II.B (employment class settlement in *Branner v. Covenant Aviation Security LLC,* No. 20:CIV-03164 (San Mateo Superior Court 2020), where Judge Marie S. Weiner approved a three year compliance period); Dermody Supp. Decl., Ex. M, at § IX.A (employment class settlement in *Calibuso v. Bank of America*, No. 10-1413-PKC (E.D.N.Y. 2013), where Judge Pamela Chen approved three years of monitoring); *cf.* Dermody Supp. Decl., Ex. N, at § 4.10.1 (employment class settlement in *Ellis v. Costco Wholesale Corp.*, No. 04-3341-EMC (N.D. Cal.), where Judge Edward Chen approved two years of monitoring).

e. Compliance Monitor Role

The Settlement designates Kaiser Foundation Health Plan Vice-President Todd Trotter as the internal "Compliance Monitor" for the post-Settlement implementation period. *See* Settlement, §IX, Ex. B. To be clear, Mr. Trotter is not being designated as a person who will determine whether Defendants are complying with their promises under the Settlement; *that* is Class Counsel's role. Instead, Mr. Trotter has been designated as the senior leader within the Kaiser Permanente organizations who shall have internal responsibility for *implementation* of the myriad programs described in the Business Practice Changes, *id.*, Ex. B, so that the Class can be assured that one senior person has accountability, can set internal deadlines, and will be answerable if Class Counsel is concerned about the completeness or timeliness of Defendants' Business Practice Changes.[7] Class Counsel will continue to assess Defendants' completeness in this regard and will remain in an arm's length, adversarial posture to Defendants throughout this period. *See id.*, §§ IX, XV.N, and Ex. B at § K. Under the Agreement, Class Counsel will be engaged in compliance monitoring every 6 months for a period of three years, and if Class Counsel believes that Defendants are out of compliance, the Agreement has a streamlined process for raising concerns, first with a mediator, and if not resolved, then with the Court. *Id.*

Because the parties do not want to cause any confusion *for the Class* as to what "compliance" means in this context, Plaintiffs have submitted a revised form of Notice (agreed to by the parties) that omits reference to a "Compliance Monitor" so as to not inadvertently suggest that an *internal* person is determining whether Defendants are performing adequately. *See* Dermody Supp. Decl., Ex. B.

f. Dispute Resolution/Enforcement of Settlement Terms

The Court retains jurisdiction to enforce the terms of the Settlement. *See* Settlement §XV.N.3 ("The San Francisco County Superior Court shall retain continuing jurisdiction for enforcement of this Settlement."). However, the parties here negotiated for an informal

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[7] Plaintiffs agreed to Mr. Trotter in this role based on his skillset, as confirmed in an interview with him. *See* Dermody Supp. Decl., ¶4; *see also* Defs.' Response, at 5; Declaration of Todd Trotter. Mr. Trotter is African American and one of the most senior African American leaders in the Kaiser Permanente organizations. Dermody Supp. Decl., ¶4.

resolution process if disputes arise after judgment is entered, engaging an experienced mediator who is familiar with the case, in the expectation that such process will be much faster than a court proceeding. *Id.* This is common in class employment settlements with post-settlement business practice changes, to ensure that disputes can be resolved quickly so the Class does not suffer prejudice due to the delays attendant to the formal litigation process. *See* Medina Supp. Decl., ¶ 6; *see, e.g.*, Dermody Supp. Decl., Exs. K-O, Q-S (attaching employment class settlements with post-settlement practice changes and an interim resolution process, involving Abercrombie & Fitch, Bank of America, Costco, Federal Express, McCormick & Schmick's, Morgan Stanley, and Smith Barney). The parties also expect that in almost all instances the interim, alternative process would obviate the need for further court action, much like the role of a special discovery master in complex litigation. In addition, Defendants will pay for the mediator unless, after the first proceeding, the mediator determines that a subsequent proceeding was brought by Class Counsel in bad faith. *See* Settlement §XV.N.2 ("For the first request for services by Judge James pursuant to this Paragraph, Defendants shall pay Judge James' fees and expenses separate and apart from the Settlement Fund. For all subsequent mediations and/or requests for services by Judge James pursuant to this Paragraph, Defendants shall pay Judge James' fees and expenses unless it is determined that the request for service was made in bad faith, in which case Judge James' fees and expenses shall be paid by Class Counsel."). This is a benefit to the Class and does not prevent Class Counsel from going to the Court if they are not satisfied with the mediation process.

g. Scope of Releases

(i) Class Release

Fairness of the Settlement is assessed in relation to the class claims being released. Specifically, courts consider whether the consideration paid for the release of class claims is adequate, considering the risks of litigation, and whether the class has been given sufficient notice of the potential release of claims in exchange for a monetary settlement. *See Wershba*, 91 Cal.App.4th at 234–235, 251. Here, the release follows the Complaint allegations. Claims that are outside the case, such as for termination, retaliation, and harassment, are excluded from the

release. *See* Settlement, § VI.A ("For the sake of clarity, Released Claims shall not include any individual, non-class claims Class Member Releasors may have for alleged racial harassment, alleged retaliation, and/or alleged termination."). To the extent the release specifies other types of issues, including "demotion," these claims are only released to the extent they relate to pay and/or promotion discrimination. *Id.* (limiting release to claims "based on any facts alleged. . . in this Action. . . relating to race discrimination in pay or promotion, or any alleged denial of equal pay based on race.").[8] This is appropriately tailored. *See, e.g.*, *Carlotti v. ASUS Computer Intl.,* (N.D. Cal. Nov. 19, 2019), No. 18-cv-03369-DMR, 2019 WL 6134910, at *14 (approving broad class release which related to facts and claims in complaint).

(ii) <u>Section 1542 Waiver</u>

As reflected in the Settlement Agreement, there is no § 1542 waiver applicable to the Class; instead, only the Plaintiffs are subject to such waivers in connection with their individual claims. *See* Settlement Agreement, § VI.A (class release with no § 1542 waiver), §VI.B (named Plaintiff release with § 1542 waiver). As a belt and suspenders proposition, the proposed form of Order submitted herewith confirms that the § 1542 waiver does not apply to the Class.[9] *See* Dermody Supp. Decl., Ex. D, at 4 (§III.A.2).

(iii) <u>Release of Non-Class Claims</u>

In Plaintiffs' opening submission, they informed the Court that the individual Plaintiffs negotiated to resolve their non-Class claims after the Class relief was negotiated. *See* Medina Decl., ¶ 29 (submitted on April 23, 2021); Medina Supp. Decl., ¶¶ 7, 9. In the accompanying Supplemental Declaration of Felicia Medina, Plaintiffs provide additional information about the proposed individual settlement payments for the release of non-class claims by the four Class Representatives. *See* Medina Supp. Decl., ¶¶ 7-11. As indicated, the non-class claims are those claims based on issues beyond the class pay and promotion claims at issue in the class settlement,

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[8] The Court's questions about text in the Notice summarizing the Release have been addressed by revisions reflected in the Amended Notice. *See* Dermody Supp. Decl., Ex. B, at § 9.

[9] There is no suggestion that the Class is subject to § 1542 in the Agreement, and the final order (if any) entering the release will not reference § 1542.

including for alleged gender bias, age discrimination, racial harassment, retaliation, and even termination/separation from employment.[10] *Id.*, ¶ 7. It is also the normal course for named class representatives to receive payment after the class settlement is approved and retain their rights to sue Defendants if the class settlement is not approved. *Id.*, ¶ 10. Moreover, all of these resolutions were negotiated with the assistance of an independent mediator, *see* Medina Decl., ¶ 29 (submitted on April 23, 2021) and Medina Supp. Decl., ¶ 9, and each Class Representative has confirmed they did not trade the Class's interests for their own. *See* Declaration of Shelby Stewart, ¶ 4; Declaration of Charleta Dabrowski, ¶ 4; Declaration of Benedict Johnson, ¶ 4; Declaration of Kenya Mayfield, ¶4.

If the Class were to receive specific information about the valuation of these non-class claims, it would increase the risk of serious confusion to the Class about claims the Class is not releasing and violate the financial privacy of the Class Representatives. If this information were added to a Class notice, it would require a host of additional disclosures about the nature of the allegations, as well as Defendants' specific denials, that would not assist the Class is determining whether the consideration here is appropriate for their own release of Class claims. Courts readily approve class settlements where, as here, the class representatives settled individual, non-class claims after settling the class allegations. *See* Medina Supp. Decl., Ex. D (*Branner, et al. v. Covenant Aviation Security LLC*, Case No.: 20-CIV-03164 (San Mateo Superior Court 2020) (motion for preliminary approval; final approval granted in 2021); *id.*, Ex. E (*McNaulty, et al. v. Alameda-Contra Costa Transit District*, Case No. RG189339766 (Alameda Superior Court) (motion for preliminary approval; final approval granted in 2020)); *id.*, Ex. F (*Chen v. Western Digital*, Case No.: 8:19-cv-00909-JLS-DFM (C.D. Cal.) (motion for preliminary approval; final Approval granted in 2021)) ; *id.*, Ex. G (*Pan v. Qualcomm*, Case No. 16-cv-01885-JLS-DHB (S.D. Cal) (motion for preliminary approval; final Approval granted in 2017)); Dermody Supp. Decl., Ex. I (*Cuenca v. Kaiser Permanente*, Case No. RG20065123 (Alameda Superior Court) (June 15, 2021 Order Granting Preliminary Approval of Class Settlement)).

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[10] Because the settlements are confidential, information about the proceedings and the amounts negotiated are filed here under seal. *See* Medina Supp. Decl., at 7-8, Ex. 1.

Importantly, there is no requirement that individual settlements of non-class claims be disclosed *to the class* or require that this be inserted into the class notice.[11] *See, e.g.*, California Rule of Court 3.766(b),[12] and the state class approval checklists.[13] Out of an abundance of caution, however, practitioners typically disclose in their settlement submissions if there were non-class claims resolved *after* the class claims were settled to ensure that the court understands there was no collusion. *See* Medina Supp. Decl., Exs. D-G, *supra*; *see also* Dermody Supp. Decl., Ex. J, at 5, FN3 (*Cuenca v. Kaiser Foundation Health Plan*, Case No. RG20065123 (Alameda Superior Court) (June 15, 2021 Mot. for Prelim. Approval)). This was the practice followed here.

h. Distribution Process

Plaintiffs believe that the distribution formula here is appropriate and follows Dr. Vekker's data analysis, by allocating the monetary relief based on weeks worked in the class period, pay rate, and whether a class member was exempt or non-exempt. *See* Settlement, §X.D.2. If Class Members believe the information about their weeks worked or other personnel data is incorrect, there is a simple process for them to alert the Settlement Administrator to correct the objectively verifiable information. *Id.*, §§X.C.3-4; *see also id.*, §§V.B.4, V.B.7. Every Settlement Class Member will receive compensation under the Settlement just by being Settlement Class Members. *Id.*, §X.C.1.

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[11] While federal courts follow the provisions requiring disclosures set forth in the Class Action Fairness Act, 28 U.S.C. §§ 1711-15, this technically only applies to settlements negotiated in *conjunction* with the class settlement. 28 U.S.C. § 1715(b)(2)(B)(5); *see also* Manual for Complex Litigation, Fourth § 21.631.

[12] The class proponent must submit a statement regarding class notice and a proposed notice to class members. The statement must include the following items: (1) Whether notice is necessary; (2) Whether class members may exclude themselves from the action; (3) The time and manner in which notice should be given; (4) A proposal for which parties should bear the costs of notice; and (5) If cost shifting or sharing is proposed under subdivision (4), an estimate of the cost involved in giving notice. California Rule of Court 3.766(b).

[13] *See* County of San Francisco Superior Court of California Complex Litigation – Class Action Materials; *see also* Los Angeles Superior Court, Complex Civil Department Checklist for Preliminary Approval of Class Action Settlement; and County of Alameda Superior Court of California Procedural Guidelines for Preliminary Approval of Class Action Settlements.

In addition, Settlement Class Members may submit a claim form requesting an enhancement if they believe they were denied a promotion.[14] Settlement, §§X.C.1-2. Because "lost" promotions are not recorded as a field in employee data, and therefore there was no objective means to determine which of Defendants' employees had a promotion claim, Plaintiffs proposed a simple enhancement claim form in order for the class to claim damages for denied promotions. Medina Supp. Decl., ¶ 17. The 10% promotion enhancement (via the claim form) is related to how Plaintiffs have determined Defendants' employment policies on promotions correspond to pay increases. *Id.*, ¶ 18. If a Class Member checks a box, he/she/they get the adjustment. No further evidentiary support is needed.[15] There will be no fact finding about the merits of any claims.

Nevertheless, the parties are amenable to withdrawing the Claim Form entirely if the Court does not believe it serves the Class interests as well as the distribution formula alone (which does not require any claim form to be filed).[16]

i. <u>Check-Cashing</u>

The Settlement provides a 90-day period for Settlement Class Members to cash checks.[17] Agreement, § X.E. Data shows that almost all employees cash settlement checks within 90 days. *See* Declaration of Jennifer Keough ("Keough Decl."), ¶ 9 (97% cash checks within 90 days). In addition, there will be multiple attempts by the Settlement Administrator here to follow up with

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[14] Claim forms are often well-suited to claims for which there is not good data (*e.g.*, denied applicants, lost promotions). *See, e.g.*, Dermody Supp. Decl., Ex. O at § XVII.F (settlement agreement with claim forms in *Gonzalez v. Abercrombie & Fitch*, No. 03-2817 SI, 04-4730 SI (N.D. Cal. 2005), an employment class case alleging race discrimination in hiring, firing, and job assignment). The rationale is that those who believe they have such claims will self-identify, thus ensuring that the Settlement Fund as a whole is not diluted for a small number of potential claims. Because there is no reversion to Defendants here, all of the settlement money will be paid out to Settlement Class Members, and 100% of the Settlement Class Members will recover money under the Settlement no matter how many of them claim the 10% adjustment.

[15] The parties have further streamlined and clarified the Claim Form. *See* Dermody Supp. Decl., ¶ 8.

[16] If the claim form is retained here, it may be submitted by U.S. Mail and online, as these options ensure ease of submission for Settlement Class Members. *See also* Keough Decl., ¶ 13 (no need for additional email option, which adds administrative burden with no tradeoff).

[17] Checks will contain release language to further inform Settlement Class Members that they are taking part in a Settlement that carries with it a release of claims.

those Class Members who do not cash checks promptly. *Id.*, ¶ 10 (JND will call Class Member twice unless able to speak with the Class Member or leave a voicemail on first attempt, and also will send an email if it is unable to reach the Class Member after one voicemail or two unanswered calls). Nevertheless, if the Court would prefer, the parties would agree to extend the time for Class Members to cash checks, including from 90 days to 180 days. If such time is extended, the period just needs to be modified in the Class Notice. *Cf.* Dermody Supp. Decl., Ex. I, at 2 (*Cuenca v. Kaiser Foundation Health Plan, Inc.*, No. RG20065123 (Alameda County Superior Court) (June 15, 2021 Preliminary Approval Order requiring the Notice to specify a 90-day check cashing period)).

j. Tax Treatment

The Settlement sets forth an allocation of Settlement payments as being 33.33% wages and 66.67% non-wages. Settlement, §X.G.2. This allocation reflects the different tax implications for wages, which are subject to payroll taxes (FICA, etc.) in addition to income tax, while non-wages are only subject to income tax. Parties typically negotiate the allocation based on whether the claims include penalties or non-wage income. *See, e.g.*, Dermody Supp. Decl., Ex. O, at § XVII.N (settlement agreement in *Gonzalez v. Abercrombie & Fitch*, No. 03-2817 SI, 04-4730 SI (N.D. Cal.), allocating the fund as 15% wages, 85% emotional distress damages); *id.*, Ex. P at § IV.B (settlement agreement in *In re High-Tech Litig. Employee Antitrust Litig.*, Case No. 11-CV-02509 LHK (N.D. Cal.), allocating the fund as 1/3 wages, 2/3 other income).[18]

k. Judgment and Continuing Jurisdiction

While the Settlement Agreement describes the termination of all litigation as being through "dismissal" (Settlement Agreement ¶ VI.A), in fact the termination of proceedings (if any) will be accomplished by way of the entry of a Judgment.[19] Likewise, the Settlement

[18] Thus, a section 17200 or PAGA claim might be construed differently than a labor code violation, even if both concerned overlapping facts. Likewise, it could be argued that alleged damages for employer "willfulness" is in a different tax category than straight wages. Here, the Released Claims include multiple claims that have non-wage penalty and/or liquidated damages provisions (*e.g.*, PAGA, California Equal Pay Act, section 17200 claims). Therefore, it could be concluded that exposure from non-wage penalties dwarfed any exposure from unpaid wages.

[19] Notice of final judgment will be given to the class via the Settlement Administrator's website. *See* Keough Decl., ¶ 15. This is memorialized in the amended proposed Preliminary Approval

Agreement describes a four-year term of continuing jurisdiction to correspond to the continuing Business Practice Changes work. Settlement Agreement ¶ V.A. However, there is no reason to limit the Court's continuing jurisdiction to enforce the Settlement past Judgment. The amended proposed Preliminary Approval Order reflects these clarifications: that termination will be by Judgment and that jurisdiction to enforce the Settlement will continue indefinitely. *See* Dermody Supp. Decl., Ex. D.[20]

4. <u>**The Settlement Administrator's Communications to the Class are Appropriate.**</u>

Plaintiffs supplement the prior submission with a complete set of all proposed Class communications. *See* Keough Decl., Exs. 1-7 (Amended Notice, Amended Claim Form, Cover Email for Email Notice, Envelope text for mailed Notice, Reminder Postcard for Check Cashing, Reminder Email for Check Cashing, and Notice of Award).

In addition, the proposed revisions to the Notice are described in ¶ 6.b of the Dermody Declaration, including these revisions: streamlining and shortening certain sections, moving the class definition to the first page, moving to the beginning of the Notice the chart on possible actions to take, setting forth the start of the class period (*i.e.*, January 1, 2015) in the release, adding a disclaimer regarding opting out and not seeking PAGA penalties, deleting description of requirements for court appearances and to an internal compliance monitor (to avoid confusion), adding directions to access the docket and the court's website, confirming that the case website will contain the key documents and orders (including judgment, if entered), and adding the case number to every page). The instructions for opt-outs has been amended to request that they also reference the case number, and the opt-out attestation has been modified, as indicated in italics, to be:

> "I will, however, be covered and bound by the Business Changes provided by the Settlement *if employed by Defendant(s).*"

Order. *See* Dermody Supp. Decl., Ex. D, at III.A.8.

[20] The Court's Orders entering and/or clarifying terms of the Agreement will govern.

See Dermody Supp. Decl., Ex. B (proposed Amended Notice).[21] These changes are reflected in clean and redlined versions of the Notice submitted herewith. Dermody Supp. Decl., Exs. B-C (proposed Amended Notice and redlined Amended Notice showing proposed changes).[22]

5. The Administrator's Proposed Work and Costs Are Warranted.

The Settlement provides for administration costs of up to $45,000. Settlement, §§X.A, XI.E. The Keough Declaration supplements the prior submission by describing JND's qualifications, the tasks it will perform, and basis for the $45,000 cost estimation.[23] *See* Keough Decl., ¶¶ 2-8, 16-18.

[21] The Settlement Administrator will accept objections and opt outs so long as they can be associated with a specific Class Member, so just a name will be sufficient if it is not a common name, and the Administrator will make concerted efforts to identify the person if the information is unclear. *See* Keough Decl., ¶ 14.

[22] The Notice period is 45 days is to accommodate the delay that may occur from re-mailing. While notice periods of 30 days were once common, a 45-day notice period is now standard. *See, e.g.*, Dermody Supp. Decl., Ex. O, at §XVII.D (approving 30-day period in *Gonzalez v. Abercrombie & Fitch*, No. 03-2817 SI, 04-4730 SI (N.D. Cal.)); *id.*, Ex. I at 2 (approving 45-day period in *Cuenca v. Kaiser Foundation Health Plan, Inc.*, No. RG20065123 (Alameda County Superior Court)).

[23] Plaintiffs will further supplement the record in advance of final approval with respect to requested counsel fees and costs, and service awards.

III. CONCLUSION

For the reasons set forth herein and in Plaintiffs' opening brief, Plaintiffs respectfully request that the Court (1) certify the proposed Class for Settlement purposes and appoint the Plaintiffs as Class Representatives and their counsel as Class Counsel; (2) approve the proposed Settlement preliminarily; and (3) approve the Notice plan and all proposed Class Communications – *i.e.*, the Amended Notice, Amended Claim Form, Cover Email for Email Notice, Envelope text for mailed Notice, Reminder Postcard for Check Cashing, Reminder Email for Check Cashing, and Notice of Award (attached as Exhibits 1-7 to the Keough Decl.).[24]

Dated: October 14, 2021

Respectfully submitted,

By: ______________________________

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[24] A revised [Proposed] form of Order is filed herewith, and a redline showing changes, are attached as Exhibits D-E, respectively, to the Dermody Declaration.