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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DONNA LOUIE, an individual, VALERIE STRINGER, an individual, MARK STEELE, an individual, and DAN ROYSE, an individual, JULIE TEAGUE, an individual, and JERAHMEEL CAPISTRANO, on behalf of themselves, and on behalf of all persons similarly situated,

Plaintiffs,

vs.

KAISER FOUNDATION HEALTH PLAN, INC., a California Corporation, and Does 1 to 10,

Defendants.

CASE No. **08 CV 0795 IEG RBB**

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND ENTRY OF FINAL JUDGMENT AND ORDER DISMISSING ACTION

District Judge: Hon. Irma E. Gonzalez
Courtroom: 1, 4th Flr

Hearing Date: February 2, 2009
Hearing Time: 10:30 a.m.

Action Filed: May 1, 2008

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Plaintiffs Valerie Stringer, Donna Louie, Mark Steele, Dan Royse, Julie Teague, and Jerahmeel Capistrano ("Plaintiffs") respectfully submit this memorandum of points and authorities in support of his 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 and this Court has preliminarily approved the settlement by Order dated October 6, 2008. In accordance with the preliminary approval order, the required notice of the proposed settlement has been disseminated to the settlement class of 793 members of whom 619 (78.06%) filed claims. (See Declaration of Jacqueline Hitomi at ¶18, filed herewith). The purpose of this 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 October 4, 2007, Valerie Stringer filed a complaint in the Superior Court for the County of Alameda, State of California as Case No. RG 07349734, entitled *Valerie Stringer v. Kaiser Permanente, et. al.*, on behalf of a putative class of Product Specialists and Business Application Coordinators ("BACs") who worked on the KP HealthConnect project in California. The central allegation of the *Stringer* lawsuit was that the BACs had been misclassified as exempt. (Blumenthal Decl at ¶ 6(a).)

On November 13, 2007, Plaintiffs Mark Steele, Dan Royse, Julie Teague, and Jerahmeel Capistrano filed a complaint in the U.S. District Court for the Northern District of California entitled *Mark Steele, et al. v. Kaiser Foundation Health Plan, Inc.*, Case No. 3:07-cv-05743. The *Steele* Plaintiffs also alleged wage and hour claims on behalf of a putative class of Product Specialists and BACs who worked on the KP HealthConnect project in California, asserting

[1] Filed contemporaneously herewith is the Memorandum in Support of Award of Attorneys' Fees, costs and Plaintiffs's award.

essentially the same exempt misclassification claims as those asserted in the *Stringer* lawsuit.

On May 1, 2008, Donna Louie, filed a complaint in the U.S. District Court for the Southern District of California entitled *Donna Louie v. Kaiser Foundation Health Plan, Inc.*, Case No. 08 CV 0795 IEG RBB. Louie alleged similar claims as those asserted in the *Stringer* and *Steele* lawsuits, but on behalf of a separate class of Site Support Specialists who were not alleged as claimants in the other litigation and who worked on the KP HealthConnect project in California. Louie also worked as a BAC for Kaiser.

In order to coordinate all lawsuits for the purposes of the Settlement, the Parties agreed that the *Steele* and *Stringer* actions would be dismissed without prejudice and these plaintiffs added to this action. In accordance with this agreement, counsel for Donna Louie filed an amended complaint in *Louie* to also allege all claims set forth in the *Steele* and *Stringer* lawsuits, along with adding thereto as Named Plaintiffs all Plaintiffs in the *Steele* and *Stringer* actions and file the same with all Class Counsel as counsel for Plaintiffs as the First Amended Complaint herein (the "Action"). [Doc No. 3].

The Action asserts claims for violations of the Fair Labor Standards Act ("FLSA"), the California Labor Code and the California Business and Professions Code. The Named Plaintiffs allege that individuals employed by Kaiser as Product Specialists, Business Application Coordinators, and Site Support Specialists 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 sought 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.

The Settlement Class consists of "all persons who, at any time between October 4, 2003 and preliminary approval of the settlement [October 6, 2008], worked for Kaiser Foundation Health Plan, Inc. in California in connection with KP HealthConnect in the positions of Product Specialist, Business Application Coordinator ("BAC") or Site Support Specialist. (Blumenthal Decl. at ¶ 6(b).)

The lawsuit has been actively litigated since the first complaint was filed in October 2007. 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.

The defense of this case by Defendant was aggressive and contentious from the start. Specifically, 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. 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. Plaintiffs and the members of the Class also lacked supporting documentation for their individual overtime hours, creating difficulties in quantification of monetary relief at trial. Finally, Defendant contended that like many other wage and hour cases, individual issues would preclude class certification. (Blumenthal Decl at ¶ 6(c).)

The parties agreed to mediation before nationally recognized mediator Anthony Piazza. Necessary discovery was provided by Defendant prior to the settlement negotiations. 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. (Blumenthal Decl at ¶ 7(a).)

The May 13, 2008 mediation session was contentious and intense. Counsel for the Parties, after settlement negotiations lasting the entire day, reached an agreement, based upon Mr. Piazza's expertise as a mediator and the uncertainties of protracted litigation. (Decl. Blumenthal ¶ 7(c).) By reason of the settlement, Kaiser has agreed to pay $5.4 million, as payment in full of all of the Class claims arising from the events described in the FAC 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 California class action law. (Decl. Blumenthal ¶ 7(e).)

By the end of June 2008, the settlement agreement was finalized, at which time the preliminary motion requesting Court approval of the settlement was prepared and filed by Class Counsel.[2] On October 6, 2008, this Court preliminarily approved the class settlement and ordered that notice of the proposed settlement be disseminated to the members of the Class. 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 October 27, 2008 to the 793 current and former employees who comprise the Class. (Decl. of Hitomi at ¶5). The results were that seven (7) Class Members requested exclusion and no Class Members objected to the settlement. (Decl of Hitomi at ¶12).

Importantly, the excellent result obtained by this settlement is evidenced by the overwhelmingly positive response of the Class. As detailed in the Declaration of Hitomi, with respect to the BAC employees, the claims submitted represent 83.32% of the total workweeks for these employees, and with respect to the SSS employees, the claims submitted represent 91.04% of the total workweeks for these employees. (Decl of Hitomi at ¶¶ 20-21).

[2] 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 ("Blum. Decl.") submitted in support of this Motion.

II. THE SETTLEMENT BEFORE THE COURT

The Class Settlement Period is the period from October 4, 2003 through October 6, 2008 (the date of Preliminary Approval). In consideration for settlement of this Action and a release of the claims described in paragraph 8 of the Settlement Agreement, Kaiser agrees to pay a Gross Fund Value sum to the Class Members not to exceed Five Million, Four Hundred Thousand Dollars ($5,400,000) ("GFV"), less Class Counsel's attorneys' fees, costs and expenses, the Named Plaintiffs' incentive awards, PAGA payments, and the costs of settlement administration. (Blumenthal Decl 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 12(d)(1) of the Settlement Agreement. (Decl. Blumenthal, ¶ 3(b).)

As per paragraph 12(d)(2) of the Settlement Agreement, the class shall be broken into a BAC/Product Specialist Subclass and a Site Support Specialist Subclass. The portion of the NFV to pay claims shall be divided so that 40.74% of the fund is allocated to the Site Support Specialist subclass and 59.26% is allocated to the BAC/Product Specialist subclass. The Claims Administrator shall initially determine each Class Members' share of the NFV. The initial calculation shall determine the total number of work weeks of each Class Member for the Class Period between October 4, 2003 and October 6, 2008, and then dividing each Class Members applicable work weeks by the total of all the applicable work weeks for that employees'

subclass to get a percentage of the NFV to be allocated to the Class Members as their share under the initial calculation. Where employees worked in both subclasses, the administrator shall perform a separate calculation for their share as derived from work in each subclass. For purposes of this calculation, a "workweek" shall be defined as the total number of payroll hours the employee worked during the class period in a Product Specialist, BAC, or Site Support Specialist position, divided by 40. The final calculation of the total number of work weeks for the Class shall be determined for the Class Period from October 4, 2003 and October 6, 2008. The Claims Administrator shall advise counsel for both Parties as to the final calculation of total work weeks. (See Decl of Hitomi at ¶¶ 20-21). The final calculation shall first determine the correct GFV and the NFV are properly calculated. 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.

As per paragraph 12(c)(2) of the Settlement Agreement, Kaiser and their counsel will not oppose an attorneys' fees award to Class Counsel of 25% of the Settlement Amount, or $1,350,000 to be deducted from 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 shall be entitled to recoup up to $100,000 for their reasonable litigation costs. (Decl. Blumenthal, ¶ 3(c).)

As per paragraph 12(c)(4) of the Settlement Agreement, Class Counsel will request that each Class Representative receive an incentive award to be deducted from the GFV, of $25,000 per Named Plaintiff for their service as a Class Representative, in addition to their individual claim 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(c)(3) of the Settlement Agreement, the reasonable costs of the Claims Administrator associated with the administration of this Settlement not to exceed $50,000 will be paid for from the GFV. The Claims Administrator was CPT Group. (Decl. Blumenthal, ¶ 3(e).) CPT has verified that CPT will incur a total of $40,000.00 in costs associated with the administration of the Settlement. (Decl. of Hitomi at ¶22).

As per paragraph 12(c)(1) of the Settlement Agreement, the Parties have allocated a total of Thirty-three Thousand Three Hundred Thirty Three Dollars and Thirty-three Cents ($33,333.33) to a PAGA Settlement Fund. Kaiser agrees to establish a segregated PAGA Settlement Fund from the GFV consisting of a maximum of $33,333.33. 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, $25,000 will be paid to the State. The remaining $8,333.33 will be distributed on a pro rata basis to Qualified Claimants, as defined in paragraph 14(c) (the "PAGA Award"). (Decl. Blumenthal, ¶ 3(f).)

The settlement is fair, adequate and reasonable to the class and should be finally approved. (Blumenthal Decl. ¶3(g).) In sum, this settlement valued at $5.4 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 there were no records showing that precise amount of overtime worked by the Class Members worked. Further, liability in this case was far from certain because some or all of the Class Members may have been exempt from overtime pay requirements as Defendants asserted in this litigation as some courts have found in employment cases involving similar facts. (Blumenthal Decl 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 and with the assistance of mediation conducted by the preeminent mediator, Anthony Piazza on May 13, 2008. The Settlement was negotiated by experienced counsel for the Class who vigorously protected the interests of the Class Members. 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.

The list of factors is not exhaustive and should be tailored to each case. Id., 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.

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

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

During the relevant time period of 2003 through 2008, Kaiser was in the business of providing medical insurance, billing and services. To maintain a coordinated computer system for Kaiser's business, entitled KP HealthConnect, Defendant employed a substantial number

of employees to implement, train and maintain the KP HealthConnect system. When Defendant employed these employees, Defendant designated these employees as "exempt" from overtime compensation requirements imposed by California law.

These related class actions were filed on October 4, 2007, November 13, 2007 and May 1, 2008 by SSS and BAC employees of Kaiser. Following discussions between counsel, the existing *Stringer* action and the existing *Steele* action filed November 13, 2007, were folded into this case in the consolidated First Amended Complaint. [Doc. No. 3]. The theory of the case 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.

Kaiser opposed this claim, and argued that the general "administrative" exemption applied to Plaintiff because they exercised discretion on matters of general importance to Kaiser's general business operations. The defense of these cases by Defendant was aggressive and contentious from the start. Of the defenses asserted by Defendants, the factual defenses asserted to support the exemption from overtime compensation, to reduce the size of the class and to diminish the number of overtime hours worked presented the most serious threats to the claims asserted. (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 Anthony Piazza for this purpose.

Class Counsel has litigated similar overtime cases against other employers, including overtime cases on behalf of computer support personnel. (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 mediation, which was both contentious and arm's-length, Kaiser vigorously disputed liability, and especially whether the administrative exemption applied to the class members, and disputed the number of overtime hours alleged to have been worked. Moreover, Kaiser disputed that the class could be certified because individual issues predominated as to the applicability of the professional and 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

extensive formal and 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 total number of workweeks for the Class. 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, including a previous employment action against Kaiser. Initial informal settlement discussions were productive and encouraged both parties to further analyze their positions and to pursue settlement. (Blumenthal Decl. at ¶7.)

Following this discovery and discussion between counsel,, the parties agreed to mediation before Anthony Piazza, one of the preeminent mediators for wage and hour class actions. The all-day mediation session held on May 13, 2008 was intense, with neither side giving ground throughout the entire day. At the end of the day, after his independent review of the facts in this case, Mr. Piazza 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 Mr. Piazza's expertise as a mediator and the uncertainties and cost of the years of litigation the parties faced if the mediators' nonnegotiable proposal was not accepted. (Blumenthal Decl. at ¶7.) Most importantly, Plaintiff and Class Counsel believe that this settlement is fair, reasonable and adequate. By reason of the settlement, Kaiser agreed to make a payment of Five Million, Four Hundred Thousand Dollars ($ 5.4 million) in full discharge of all claims asserted in this action, without a reversion to Kaiser except for payment of taxes, as

payment in full of all claims arising from the events described in the 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 end of June 2008, 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 October 6, 2008, this Court preliminarily approved the class settlement as fair, reasonable and adequate, and ordered that notice of the proposed settlement be disseminated to the members of the Class. Notice of the settlement providing class members with an opportunity to opt out or object was then mailed by October 27, 2008 to the 793 employees who comprise the Class. (Blumenthal Decl at ¶7.) In response to the notice, not one Class Member has objected to the proposed settlement. Plaintiff and Class Counsel believe that this settlement is fair, reasonable and adequate. (Blumenthal Decl at ¶3(d) and ¶4).

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); Declaration of Workman at ¶13.)

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

After dissemination of the class notice to the 793 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 seven class members have opted out of 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 712 BAC employees in the Class, there are Five Hundred and Fifty Three (553) claims submitted representing 77.67% of the BAC employees, resulting in a total of 31,642 weeks claimed which represents 83.32% of the total workweeks for BAC employees. (Declaration of Hitomi at ¶20). Of the total 159 SSS employees in the Class, there are One Hundred and Thirty Seven (137) claims submitted representing 86.16% of the SSS employees, resulting in a total of 9,306 weeks claimed which represents 91.04% of the total workweeks for SSS employees. (Declaration of Hitomi at ¶21).

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.

6. The Amount Offered in Settlement

The Settlement in this case of $5.4 million represents a substantial benefit for the Class. The calculations estimates for the amount due for the nonpayment of wages were calculated by CADA, Plaintiffs' damage expert. For the BAC employees, the overtime hourly rate used was the rate of $35.33. The number of workweeks involved was 42,505 for the Class Period. Each one (1) hour per workweek of unpaid overtime for the BACs equals $1,501,489.13 for the Class Period, each missed meal break per work week for the BACs equals $1,000,992.75, and each missed rest break per work week for the BACs equals $1,000,992.75. As a result, the Kaiser was subject to claims at a rate of $3,503,474.63 for the combination of one unpaid hour of overtime, one missed meal break, and one missed rest break per workweek for the BACs. (Decl of Blumenthal at ¶8(d); Decl of Workman at ¶¶ 4-6).

For the SSS employees, the overtime hourly rate used was the rate of $50.76. The number of workweeks involved was 9,283 for the Class Period. The SSS Class Members worked additional unpaid overtime as a result of their on-call responsibilities, which was not required of the BAC employees. Accordingly, CADA calculated that every four (4) hours per workweek of unpaid overtime for the SSSs equals $1,884,820.32, each missed meal break per work week for the SSSs equals $314,136.72, and each missed rest break per workweek for the SSSs equals $314,136.72. As a result, the Kaiser was subject to claims at a rate of $2,513,093.76 for the SSSs. (Decl of Blumenthal at ¶8(d); Decl of Workman at ¶¶ 4-6).

Consequently, Kaiser was subject to total claims of $6,016,568.39 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 solid proof. The settlement of $5,400,000, before deductions, represents 89.75% of the estimated value of the claims, and after deduction of the PAGA payment of $25,000, the attorneys' fees and costs payment of $1,450,000, the claims administration payment of $50,000, and the Class Representatives' incentive awards of

$150,000, the Net Fund Value will equal $3,725,000, which is nearly 62% of the estimated value, assuming these amounts could be proven at trial. This recovery is well in excess of 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 nearly the same recovery as would have been sought at trial and a larger recovery than obtained in similar litigation. (Blumenthal Decl at ¶8(d); Workman Decl at ¶¶ 4-6.)

V. CONCLUSION

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

Dated: January 5, 2009

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