

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED JURISDICTION**

MICHAEL CUENCA, on behalf of themselves
and all others similarly situated,

Plaintiff,

v.

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

Defendants.

Case No. RG20065123

**DECLARATION OF KELLY M. DERMODY
IN SUPPORT OF UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS SETTLEMENT**

Complaint Filed: June 17, 2020
Trial Date: None
Department: 19
Reservation #: R-2257806
Hearing Date: May 17, 2021 3:00pm

I, Kelly M. Dermody, hereby declare as follows:

1. I make this Declaration based on personal knowledge. If called and sworn as a witness, I would testify competently as to the facts in this Declaration.

2. I am an attorney admitted to practice law in the State of California and I represent Plaintiff in this action against Defendants Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, The Permanente Medical Group, Inc., and Southern California Permanente Medical Group (collectively, "Kaiser" or "Defendants").

3. In my capacity as Plaintiff's Counsel, I make this declaration in support of Plaintiff's request that the Court: (1) conditionally certify the Class for settlement purposes; and (2) preliminarily approve the Joint Stipulation of Settlement and Release (hereafter, the "Settlement").

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

4. My firm, Lieff, Cabraser, Heimann & Bernstein LLP ("LCHB"), began investigating claims on behalf of a potential class of African American and Latinx Kaiser employees in May 2019, joining an on-going investigation by Felicia Medina and Medina Orthwein LLP. At the time we joined the investigation, Ms. Medina informed me that Medina Orthwein had been engaged in a robust class

1 investigation involving Black and Latinx employees. As part of that investigation, I am advised that
2 Medina Orthwein spoke with numerous current and former employees about their experiences of alleged
3 race and national origin discrimination at Kaiser. In November 2018 and March 2019 respectively,
4 Medina Orthwein filed administrative complaints with the Equal Employment Opportunity Commission
5 and the California Labor and Workforce Development Agency on behalf of Black and Latinx employees
6 alleging systemic discrimination.

7 5. Over the course of the approximately 15 months that my firm was engaged in a systemic
8 discrimination investigation, we (along with the Medina Orthwein firm) conducted an extensive pre-
9 filing investigation and engaged in substantial informal data, document, and witness discovery with
10 Defendants. Following extensive negotiations, we obtained multiple rounds of class-wide data and
11 retained an expert, Alex Vekker, Ph.D., to conduct a statistical analysis of pay and promotion disparities
12 across the proposed Class and to determine the scope and scale of potential Class exposure and risk.
13 The class data production included 72 variables that reflected Class Members' compensation and
14 various job attributes, such as: job history, personnel actions, performance review ratings, job families,
15 functions, departments, manager levels, EEO category, and salary grade. The expert ran multiple
16 sophisticated multivariate regression analyses to isolate the effect of race or national origin on base pay
17 and incentive compensation, and to demonstrate potential class-wide exposure.

18 6. Defendants' document production included hundreds of pages of challenged policies in
19 this action, including, but not limited to, manuals, guidelines, handbooks, tools, and training materials
20 concerning compensation, job analysis, promotions, career progressions and management development,
21 performance reviews, discrimination complaint processes and investigations, workforce surveys, and
22 personnel action changes. After reviewing these policies, LCHB and Medina Orthwein conducted in-
23 depth interviews with four Kaiser managers regarding the Company's compensation policies, promotion
24 policies, and performance reviews.

25 7. In approximately September and December 2019, LCHB and Medina Orthwein met with
26 Defendants under the supervision of David Rotman, a highly regarded mediator with more than 25 years
27 of experience handling complex class and collective action negotiations. Although our investigation had
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1 included practices applicable to both African American and Latinx employees, we focused our
2 discussions solely on resolving an African American class. During these meetings, we nevertheless
3 discussed the parameters of a settlement with business practice changes that would, in our view, address
4 questions raised broadly raised in the investigation. While the parties made good progress on
5 discussions about resolving the claims of an African American class, finalizing settlement details was
6 delayed between February and October 2020 due to the COVID-19 pandemic.

7 8. In early November 2020, LCHB and Medina Orthwein reached out to Plaintiff's counsel
8 Bryan Schwartz Law and Nichols Kaster to coordinate information and learnings in our respective
9 matters against Kaiser. With permission of Kaiser, we also shared the confidential information we
10 discovered in our prosecution of our investigation and why the interventions proposed in a settlement
11 would be well tailored to questions that arose. Through this process, Felicia Medina and I spoke and
12 exchanged ideas in writing on numerous occasions with Bryan Schwartz, Matthew Helland, and Jennifer
13 Reisch, and ultimately agreed that we could bring an even more formidable team together for the benefit
14 of Plaintiff and the Class by combining our efforts in this case.

15 9. Kaiser estimates the implementation of the programmatic relief will entail at least \$2
16 million in internal costs and put racial equity front and center within the company. In addition, Kaiser's
17 culture change training program, Belong@KP, will cost an additional \$7 million over the three years of
18 the Settlement monitoring period.

19 **COUNSEL'S BACKGROUND AND ADEQUACY**

20 **LCHB**

21 10. I am Managing Partner of the San Francisco office of Lieff Cabraser Heimann &
22 Bernstein LLP ("LCHB").

23 11. LCHB is an international law firm with offices in San Francisco, New York, Nashville,
24 and Munich. LCHB's practice focuses on complex and class action litigation involving civil rights,
25 employment, sexual abuse and gender violence, whistleblower, consumer, digital privacy, financial and
26 securities fraud, antitrust, mass tort, and product liability matters.

27 12. In addition to this case, LCHB has prosecuted numerous significant and/or
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groundbreaking civil and human rights cases over the last 25 years, including *Scholl v. Mnuchin*, Case No. 3:20-cv-5309-PJH (LCHB represented approximately 2 million incarcerated Americans in case arising from challenge to IRS and Treasury conduct in misapplying CARES Act eligibility requirements that resulted in over \$1.5 billion in funds to class members); *Cruz v. U.S., Estados Unidos Mexicanos, Wells Fargo Bank, et al.*, No. 01-0892-CRB (N.D. Cal.) (LCHB represented Mexican workers and laborers, known as “Braceros”, who worked on American farms and industries hurt by employee shortages during World War II but were never paid a portion of their earned wages); *In re Holocaust Victim Assets Litig.*, Nos. 96 Civ. 4849 (ERK) (MDG), 99 Civ. 5161 and 97 Civ. 461 (E.D. N.Y.) (LCHB represented Holocaust survivors and their heirs against Swiss banks in case resulting in \$1.25 billion for the theft of assets of Jews and other minority groups persecuted by the Nazi Regime during the Second World War era); *In re: Cincinnati Radiation Litigation*, Case No. C-1-94-126 (S.D. Ohio) (LCHB represented hundreds of African American “charity patients” who believed they were receiving cancer treatments but unbeknownst to them were given full body radiation in undisclosed Defense Department experiments to mimic what soldiers in a nuclear battlefield might receive); *Craft v. Vanderbilt University*, Civ. No. 3-94-0090 (M.D. Tenn.) (LCHB represented class of over 800 pregnant women and their children who were subject to an undisclosed experiment by which they received radioactive iron isotopes while receiving prenatal care); *Blood Factor VIII And Factor IX Litigation*, MDL No. 986 (N.D. Ill.) (LCHB represented over 1,500 hemophiliacs worldwide who contracted HIV and/or Hepatitis C (HCV) and Americans with hemophilia who contracted HCV, from contaminated blood factor products produced by American drug companies and knowingly dumped on the market); *Jane Doe et al. v. George Tyndall and the University of Southern California*, Case No. 2:18-cv-05010 (C.D. Cal.) (LCHB represented class of women in securing \$215 million settlement for the sexual abuse and harassment to which they were subjected by USC gynecologist George Tyndall, M.D., while they were students); *Satchell v. FedEx Express*, No. C 03-2659 SI; C 03-2878 SI (N.D. Cal.) (LCHB represented class of African American and Latino employees who secured \$54.9 million settlement of race discrimination claims); *Gonzalez v. Abercrombie & Fitch Stores*, No. C03-2817 SI (N.D. Cal.) (LCHB and represented class of Latino, African American, Asian American, and female applicants and

employees in securing \$50 million settlement for race and gender discrimination; co-counsel included the Mexican American Legal Defense and Education Fund, Asian Pacific American Legal Center, and NAACP Legal Defense and Educational Fund, Inc.); *Catholic Healthcare West Cases*, JCCP No. 4453 (Cal. Supr. Ct.) (LCHB represented economically-vulnerable uninsured patients in securing \$423 million settlement for being charged for treatment and services at rates far higher than the rates charged to patients with private insurance or on Medicare); *City of Philadelphia v. Wells Fargo & Co., et al.*, Case No. 2:17-CV-02203-AB (E.D. Pa.) (LCHB represented Philadelphia in race discrimination litigation under the Fair Housing Act, resulting in cash settlement and grants to low-income lending, mortgage foreclosure prevention, and land care); *Trotter v. Perdue Farms*, No. C 99-893-RRM (JJF) (MPT) (D. Del.) (LCHB represented economically-vulnerable class of chicken processing employees who were forced to work without pay while putting on, taking off, and cleaning protective and sanitary equipment); *Vedachalam v. Tata Consultancy Services*, C 06-0963 CW (N.D. Cal.) (LCHB represented over 12,000 Indian foreign nationals sent to work in the U.S. but forced to sign over their federal and state tax refund checks to Tata).

13. LCHB's Employment Practice Group, which prosecutes race and gender discrimination and other civil rights litigation, has received multiple national accolades. For 2013, U.S. News and Best Lawyers selected LCHB as a national "Law Firm of the Year" in the category of Employment Law – Individuals. U.S. News and Best Lawyers ranked firms nationally in 80 different practice areas based on extensive client feedback and evaluations from 70,000 lawyers nationwide. Only one law firm in the U.S. in each practice area receives the "Law Firm of the Year" designation. In 2015, the Recorder named LCHB's Employment Practice Group as a Litigation Department of the Year in the category of California Labor and Employment Law. The Litigation Department of the Year awards recognize "California litigation practices that deliver standout results on their clients' most critical matters." The Recorder editors consider the degree of difficulty, dollar value and importance of each matter to the client; the depth and breadth of the practice; and the use of innovative approaches. Benchmark Plaintiff, a guide to the nation's leading plaintiffs' firms, has given LCHB's Employment Practice Group a Tier 1 national ranking, its highest rating. The Legal 500 guide to the U.S. legal profession has also recognized

1 LCHB as having one of the leading plaintiffs' employment practices in the nation.

2 14. Through the process described above, we are Settlement Class Counsel in the case,
3 *Stewart v. Kaiser Foundation Health Plan*, filed in San Francisco Superior Court on April 22, 2021.

4 15. Brief backgrounds of the key personnel staffing this litigation from my firm are set forth
5 below.

6 a. **Kelly M. Dermody**

7 i. I am the Managing Partner of LCHB's San Francisco office. I am a
8 member of LCHB's Employment Practice Group and have litigated plaintiff-side employment and civil
9 rights class actions for over twenty-six years. I am an AV-Preeminent rated attorney.

10 ii. In 2020, I was elected to be Chair-Elect of the American Bar
11 Association's Labor and Employment Law Section, after serving in Section leadership roles as co-chair
12 of its Equal Employment Opportunity Committee and its Diversity in the Legal Profession Committee,
13 and completing an eight-year term on its Governing Council. In 2015, the College of Labor and
14 Employment Lawyers named me a Fellow. In 2012, I served as the president of the Bar Association of
15 San Francisco, and president of its non-profit charitable organization, the Justice & Diversity Center
16 (serving San Francisco's vulnerable unhoused, those at risk of eviction, undocumented residents, and
17 racially diverse students in the academic pipeline, among others).

18 iii. I have received several notable awards from Bar and community groups.
19 In 2019, I received the American Bar Association's "Margaret Brent Women Lawyers of Achievement
20 Award," which honors outstanding women lawyers who have achieved professional excellence in their
21 area of specialty. Also, I received the "Judge Learned Hand Award" from the American Jewish
22 Committee (2019); "Gender Justice Honoree" from Equal Rights Advocates (2017); "Distinguished
23 Jurisprudence Award" from the Anti-Defamation League (2014); "Dolores Huerta Adelita Award" from
24 California Rural Assistance (2013); "Women of Achievement Award" from Legal Momentum (formerly
25 the NOW Legal Defense & Education Fund) (2011); "Florence K. Murray Award" from the National
26 Association of Women Judges (2010); "Community Service Award" from Bay Area Lawyers for
27 Individual Freedom (2008); "Community Justice Award" from Centro Legal de la Raza (2008); "Award
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of Merit” from the Bar Association of San Francisco (2007); and “Living the Dream Partner” from the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area (2005).

iv. I have also received recognition for my work by various legal publications, including, being named an “Employment Law Trailblazer” by the National Law Journal (2019); and “Lawyer of the Year for Labor and Employment Litigation” in the San Francisco Bay Area by Best Lawyers (2017). In 2016, the Recorder honored me with their “Giant Slayer” award for my work leading In re: High-Tech Employee Antitrust Litigation (referenced in paragraph 7, above). I was also selected for inclusion by peers in The Best Lawyers in America in the fields of “Employment Law-Individuals” and “Litigation-Labor and Employment” (2010-2020); and repeatedly named to the Daily Journal’s lists of “Top 100 Lawyers in California,” “Top California Women Litigator,” and “Top 75 Labor and Employment Attorneys in California.” I have been named a Northern California Super Lawyer every year since 2004, including being named a “Top 50 Female Lawyer,” a “Top 100 Lawyer,” and a “Top 10 Northern California Lawyer.”

b. Jallé H. Dafa

i. Jallé Dafa is an Associate in LCHB’s San Francisco office and has also participated in numerous complex class action cases. See, e.g., Scholl v. Mnuchin, Case No. 3:20-cv-5309-PJH (described above); In re California Bail Bond Antitrust Litig., 3:19-cv-00717-JST (N.D. Cal.) (representing vulnerable purchasers of bail bonds); Deslandes v. McDonald’s USA, LLC, et al., No. 1:17-cv-04857 (N.D. Ill.) (representing putative nationwide class of McDonald’s restaurant workers challenging alleged wage suppression scheme); Conrad v. Jimmy John’s Franchise, LLC, et al., No. 18-cv-133-MJR-RJD (S.D. Ill.) (same re: Jimmy John’s restaurants); In re: Papa John’s Emp. & Franchisee Emp. Antitrust Litig., No. 3:18-c-00825-JHM-RSE (W.D. Ky.) (same re: Papa John’s restaurants); Binotti v. Duke, 1:20-cv-00470 (M.D.N.C.) (representing Duke faculty challenging the University’s alleged policy to limit faculty mobility and suppress wages).

ii. Ms. Dafa previously worked at the Oakland, California, civil rights firm Siegel & Yee, where she represented plaintiffs in employment discrimination, whistleblower retaliation, Title IX, and police misconduct matters, including at trial. Ms. Dafa also previously worked as a

consultant to ColorOfChange.org, providing strategic support to its campaign regarding divestment from the private prison industry.

iii. Prior to LCHB, Ms. Dafa served as a law clerk to the Honorable Jacqueline S. Corley in the Northern District of California, and to the Honorable Mary M. Schroeder of the Ninth Circuit Court of Appeals. Ms. Dafa remains actively involved in the Black alumni community of Berkeley Law School, and mentors Black law students applying to federal clerkships.

Medina Orthwein

16. The Medina Orthwein firm has provided me with the following information:

a. **Felicia Medina** is a Founding Partner of Medina Orthwein LLP (“Medina Orthwein”) a national, queer and woman of color owned civil rights law firm headquartered in Oakland, CA. She cofounded the firm in 2017 with Founding Partner Jennifer Orthwein, who specializes in legal and policy issues related to transgender and gender variant people in custody and Partner Kevin Love Hubbard, who has served as counsel in numerous individual, collective, and class actions throughout the United States. The Medina Orthwein firm has generated millions of dollars in recoveries to clients and resulted in substantial and long-lasting programmatic changes at major corporations across the country.

b. Ms. Medina has been honored as a 2020 Super Lawyer; 2015-2019 SuperLawyers Rising Star; 2018 San Francisco Business Times OUTstanding Voices recipient; 2018 Minority Bar Coalition Unity Award Recipient; 2017 Daily Journal Leading Labor and Employment Attorney in California; 2016 National LGBT Bar Association Best LGBT Lawyer Under 40; 2015 National Diversity Council Most Powerful and Influential Woman; 2015 Law360 Rising Star; and 2014 Law360 Minority Power Broker. She is the past co-chair of the board of directors for the National Center for Lesbian Rights (NCLR), and is a board member of Public Justice, the Foundation for Advocacy Inclusion and Resources (FAIR), and the Chicana Latina Foundation (CLF), and a former board member of the Bar Association of San Francisco’s Justice and Diversity Center (JDC), Legal Aid at Work (LAAW), and Bay Area Lawyers for Individual Freedom (BALIF).

c. Since January 2009, Ms. Medina has obtained over 15 class settlements in Title VII and wage and hour matters throughout the United States and is currently serving as lead counsel in

several class, collective, and individual matters. Notably, for purposes of the instant Motion, she has obtained pre-suit class settlements in discrimination class actions on three separate occasions. *See Branner et al. v. Covenant Services Worldwide, LLC et al.*, No. 20-CIV-03164 (Cal. Super. Ct., San Mateo, 2020); *Chen v. Western Digital*, No. 8:19-cv-00909 (C.D. Cal, 2019); *Pan, et al. v. Qualcomm Incorporated, et al.*, No. 3:16-cv-01885 (S.D. Cal, 2016). As a general matter, pre-suit class settlements, although rare, provide more immediate relief than litigation. In this case in particular, which involves allegations of systemic anti-Black illegal racism and race discrimination, the non-monetary relief the Stewart Plaintiffs brokered will immediately improve the environment for thousands of Black Kaiser employees.

d. Earlier in her career, Ms. Medina was counsel in *Velez v. Novartis Pharmaceuticals Corp.*, No. 04-cv-9194 (S.D.N.Y., 2007), which resulted in the largest verdict in a Title VII discrimination class action in United States history. At the final fairness hearing in *Velez*, the judge commented that the firm had achieved an “extraordinary” result: “This was a well-prepared case. It was a brilliantly tried case by plaintiff’s counsel...and it yielded a one-of-a-kind result, and that has led to a one-of-a-kind settlement.”

e. Additionally, in *Armstrong, et al. v. Whirlpool Corporation*, No. 08-6376 (6th Cir., 2010), Ms. Medina successfully argued an appeal before the Sixth Circuit in a race discrimination and hostile work environment case. Furthermore, in *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233 (Cal. 2016), she won a reversal of the trial court’s 2012 order dismissing Sandquist’s claims with prejudice. The defendants appealed, and in July 2016, the Supreme Court of California sided with her team after oral arguments were presented.

f. Ms. Medina serves or has served as Lead or Co-Lead Counsel in the following employment class and collective actions: *Branner et al. v. Covenant Services Worldwide, LLC et al.*, No. 20-CIV-03164 (Cal. Super. Ct., San Mateo, 2020); *McNaulty et al. v. AC Transit*, No. RG18933966 (Cal. Super. Ct., Alameda, 2018); *Chen v. Western Digital Corporation et al.*, No. 8:19-cv-00909 (C.D. Cal., 2020); *Pan et al. v. Qualcomm Incorporated et al.*, No. 3:16-cv-01885 (S.D. Cal., 2016); *Ha et al. v. Google Inc. et al.*, No. 1:16-cv-290847 (Cal. Super. Ct., Santa Clara, 2016); *Fretter et al. v. Boston*

1 *Scientific Neuromodulation Corp.*, No. 2:15-cv-01988 (C.D. Cal., 2015); *Dickerson et al. v. Novartis*
2 *Corp. et al.*, No. 1:15-cv-01980, (S.D.N.Y., 2015); *Wellens et al v. Daiichi Sankyo, Inc.*, No. 3:13-cv-
3 00581 (N.D. Cal., 2013) (This case is believed to be the first post *Dukes v. Walmart* case to be
4 conditionally certified under the EPA in the Ninth circuit); *Peterson et al. v. Alaska Communications*
5 *Systems Group Inc.*, No. 3:12-cv-00090 (D. Alaska, 2012); and *Sandquist et al. v. Lebo Automotive et*
6 *al.*, No. BC476523 (Cal. Super. Ct., Los Angeles, 2012). Other notable class action experience includes
7 but is not limited to: *Kassman et al., v. KPMG LLP*, No. 11-cv-3743 (S.D.N.Y., 2018); *Luque et al. v.*
8 *AT&T Corp.*, No. 3:09-cv-5885 (N.D. Cal., 2012); *Lawson v. BellSouth Telecommunications*, No. 1:09-
9 cv-03528 (N.D. Ga., 2011); *Moore v. Publicis Groupe et al.*, No. 1:2011-cv-01279 (S.D.N.Y., 2012);
10 *Fretter et al. v. Boston Scientific* No. 2:15-cv-01988 (C.D. Cal., 2015).

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13 I declare under penalty of perjury under the laws of the State of California that the foregoing is
14 true and correct. Executed on this 22nd day of April, 2021, in San Francisco, California.

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17 Kelly M. Dermody
18 LIEFF CABRASER HEIMANN &
19 BERNSTEIN, LLP

20 *Attorney for Plaintiff*
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