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THE SUPERIOR COURT
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CASE NUMBER:

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pro hac vice application forthcomingAttorneys for Plaintiff Michael Cuenca
and the Putative Class***SUPERIOR COURT OF THE STATE OF CALIFORNIA****COUNTY OF ALAMEDA – UNLIMITED JURISDICTION**MICHAEL CUENCA, individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

KAISER PERMANENTE; and DOES 1
THROUGH 50, INCLUSIVE,

Defendants.

Case No.: _____

CLASS ACTION**COMPLAINT FOR DAMAGES**

- 1. Violation of California Equal Pay Act (“EPA”), as amended (Labor Code §§1197.5, 1194.5)**
- 2. Violation of Fair Employment and Housing Act (“FEHA,” Cal. Gov’t Code §12940 *et seq.*) – Race- and National Origin-Based Discrimination**

CLASS ACTION COMPLAINT

3. **Violation of FEHA (Cal. Gov't Code §12940 *et seq.*) – Failure to Prevent Race- and National Origin-Based Discrimination**
4. **Violation of FEHA (Cal. Gov't Code §12940 *et seq.*) – Retaliation (as to Plaintiff Cuenca)**
5. **Violation of EPA (Labor Code §§1197.5, 1194.5) – Retaliation (as to Plaintiff Cuenca)**
6. **Unlawful and/or Unfair Business Practices (Cal. Business & Professions Code §17200 *et seq.*)**
7. **Declaratory Judgment (C.C.P. §1060 *et seq.*)**

JURY TRIAL DEMANDED

1 Plaintiff Michael Cuenca, individually and on behalf of all others similarly situated, is informed
2 and believes, and therefore alleges, as follows:

3 **I. NATURE OF THIS ACTION**

4 1. Plaintiff Michael Cuenca brings this class action on behalf of himself and on behalf of a
5 class defined as all Hispanic/Latino,¹ non-physician workers employed by Defendant Kaiser
6 Permanente (“Kaiser” or “Defendant”) in California at any time during the time period beginning four
7 years prior to the filing of this complaint through the date of trial in this action (“Class Period”). These
8 employees share a community of interest and are similarly situated under California Code of Civil
9 Procedure § 382.

10 2. Throughout the Class Period and throughout California, Kaiser has discriminated against
11 its Hispanic/Latino employees by paying them less than Kaiser pays employees of other races and
12 national origins,² performing substantially similar work under similar working conditions, when viewed
13 as a composite of skill, effort, and responsibility, in violation of the California Equal Pay Act, Cal.
14 Labor Code § 1197.5, as amended. The disparity is especially severe as compared to white employees.
15 Kaiser’s failure to pay employees of varying races and national origins equal wages for performing
16 substantially similar work is not justified by any lawful reason.

17 3. Throughout the Class Period and throughout California, Kaiser has also discriminated
18 against its Hispanic/Latino employees through its hiring and promotions policies. As a result,
19 Hispanic/Latino employees are disproportionately hired for the lowest-paying jobs. Hispanic/Latino
20 employees are also drastically under-represented in positions of management and leadership. These
21 disparities are particularly pronounced comparing the percentages of white employees versus the
22 percentages of Hispanic/Latino employees in executive management. Furthermore, Hispanic/Latino
23 employees are the only racial/ethnic group other than “white” whose percentage of Kaiser’s workforce
24 is less than the corresponding percentage of California’s population as a whole. All other non-white
25

26 ¹ Allegations are based on Kaiser’s “Ethnic Group” designation system within the “My Profile” section
27 of the employee portal. The term “Hispanic/Latino” is the terminology Kaiser uses to classify
employees of Hispanic (including Spanish)/Latin American descent.

28 ² In this Complaint, the term “national origin” is used, consistent with California’s FEHA regulation, 2
C.C.R. §11027.1, which also encompasses “ethnicities,” a term used in the Equal Pay Act. Plaintiff
intends these terms to be interchangeable for purposes of this Complaint.

1 racial/ethnic groups (with the exception of Native Americans) are a higher percentage of Kaiser's
2 workforce than they are of California's population as a whole. Kaiser's discriminatory hiring and
3 promotions policies and/or practices against Hispanic/Latino employees are not justified by any lawful
4 reason.

5 4. At all relevant times, Kaiser has known or should have known of this pay disparity
6 between various races and national origins, yet Kaiser has taken no action to equalize pay for
7 substantially similar work. Kaiser's failure to pay Hispanic/Latino employees the same wage rates paid
8 to employees of other races and/or national origins for substantially similar work has been and is willful.

9 5. At all relevant times, Kaiser has likewise known or should have known of its hiring and
10 promotions disparities between various races and national origins, yet Kaiser has taken no action to
11 provide equal opportunity to employment. Kaiser's failure to do so has been and is willful.

12 6. As a result of Kaiser's discriminatory and unlawful pay and promotion policies and/or
13 practices, Plaintiff and Class Members have been denied fair wages for all work performed during the
14 Class Period and are entitled to wages due, interest thereon, and liquidated damages, plus interest. In
15 addition to damages, Plaintiff also seeks declaratory and injunctive relief enjoining Kaiser from
16 continuing to pay Hispanic/Latino employees less than employees of other races and/or national origins
17 for substantially similar work.

18 **II. JURISDICTION AND VENUE**

19 7. This Court has jurisdiction over this matter because Defendant is a corporation that
20 maintains its headquarters in California, is licensed to do business in California, regularly conducts
21 business in California, and committed and continues to commit the unlawful practices and acts alleged
22 herein in California.

23 8. Venue is proper in Alameda County, California, pursuant to California Government
24 Code § 12965(b), because Defendant is a corporation that maintains its headquarters in Alameda County
25 and because a substantial part of the unlawful practices and acts alleged herein occurred and continue
26 to occur in this County.

27 **III. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

28 9. On June 16, 2020, Plaintiff timely filed a charge of discrimination with the California

1 Department of Fair Employment and Housing (“DFEH”). Plaintiff requested, and the DFEH issued, an
2 immediate Right-to-Sue Notice. Accordingly, Plaintiff has timely exhausted his administrative
3 remedies. A true-and-correct copy of Plaintiff’s Right-to-Sue Notice is attached to this complaint as
4 **Exhibit A.**

5 10. On June 16, 2020, Plaintiff also filed a charge of discrimination with the Office of
6 Federal Contract Compliance Programs (“OFCCP”).

7 **III. PARTIES**

8 11. Plaintiff has been employed as a Business Analyst/Specialist for Kaiser Permanente’s
9 Human Resources People Analytics group since April 2015 at Kaiser’s headquarters in Oakland, CA.
10 Prior to that, from approximately May 2011 to April 2015, Plaintiff worked as a Project Manager
11 Consultant/Specialist for Kaiser’s National Diversity Department at Kaiser’s headquarters in Oakland,
12 CA. Plaintiff is, and at all relevant times herein was, an adult Hispanic male residing in California. From
13 at least the beginning of the class period to the present, Plaintiff and employees of other races and/or
14 national origins performed substantially similar work, when viewed as a composite of skill, effort, and
15 responsibility, and performed under similar working conditions. However, Kaiser has paid Plaintiff less
16 than employees of other races and/or national origins for substantially similar work.

17 12. Defendant Kaiser is a healthcare business. Kaiser’s headquarters are located at Kaiser
18 Plaza, 19th Floor, Oakland, CA 94612. Kaiser employs over 100,000 employees in Oakland and
19 throughout California. Kaiser is Plaintiff’s FEHA employer.

20 13. In addition to Defendant Kaiser, Plaintiff sues fictitious defendants Does 1-50, inclusive,
21 because their names, capacities, status, or facts showing them to be liable are not presently known.
22 Plaintiff is informed and believes, and thereon alleges, that each of the fictitiously named Defendants
23 is responsible in some manner for the occurrences herein alleged, and such Defendants caused
24 Plaintiff’s damages as herein alleged. Plaintiff will amend this complaint to show their true names and
25 capacities, together with appropriate charging language, when such information has been ascertained.

26 14. Plaintiff is informed, believes, and thereon alleges that each of the Defendants herein
27 was at all times relevant to this action the agent, employee, representative partner, and/or joint venture
28 of the remaining Defendants and was acting within the course and scope of the relationship. Plaintiff is

1 further informed, believes, and thereon alleges that each of the Defendants herein gave consent to,
2 ratified, and authorized the acts alleged herein to the remaining Defendants.

3 **V. FACTUAL ALLEGATIONS - CLASS**

4 **Kaiser has ignored Plaintiff Cuenca's reports of discrimination against Hispanic/Latino 5 employees in both pay and promotions**

6 15. On October 23, 2019, Plaintiff sent an email to then-CEO Bernard Tyson alerting him
7 to the lack of advancement opportunities for and pay discrimination against Hispanic/Latino employees.
8 Plaintiff attached a report to the email with data showing the extensive pay and promotion
9 discrimination against Hispanic/Latino employees. Plaintiff sent a follow up email to Tyson on October
10 25, 2019. Plaintiff received no response from Tyson to either email.

11 16. On October 25, 2019, Plaintiff received an email from Tod Trotter, Head of Human
12 Resources Compliance, stating that he would investigate the complaints to Tyson. Plaintiff was never
13 contacted about any such investigation.

14 17. On February 10, 2020, Plaintiff sent an email to Gregory Adams, the new CEO, alerting
15 him to the lack of advancement opportunities for and pay discrimination against Hispanic/Latino
16 employees. Plaintiff received no response.

17 18. On June 17, 2020, Plaintiff sent another email to Adams and Trotter, as well as Tom
18 Hanenburg, Interim Regional President of Kaiser Northern California; Richard Isaacs, CEO and
19 Executive Director of (Kaiser) Permanente Medical Group; Ron Copeland, Chief Equity, Inclusion, and
20 Diversity Officer; Christian Meisner, Chief Human Resources Officer; and Richele Thornburg,
21 Executive Vice President of People and Leadership Strategy for The Permanente Federation, attaching
22 an updated version of the report he had previously shared.

23 19. In his various communications with Kaiser's CEOs that reached HR, as outlined above,
24 Plaintiff emphasized that Hispanic/Latino employees are paid thousands or up to tens of thousands of
25 dollars a year less than non-Hispanic/Latino colleagues with similar tenure throughout the state.
26 Plaintiff also emphasized the concentration of Hispanic/Latino employees in Kaiser's lowest paying
27 jobs and the dearth of Hispanic employees in positions of management and leadership.

28 **Kaiser's uniform policies and practices of discrimination in pay and promotions**

1 20. Throughout the Class Period, Kaiser has maintained a general policy of discrimination
2 in hiring and promotions, based on common polices and/or practices. The result is that Hispanic/Latino
3 employees are the only non-white racial/ethnic group whose percentage of Kaiser's workforce is less
4 than the corresponding percentage of California's population as a whole. All other non-white
5 racial/ethnic groups (with the exception of Native Americans) are a higher percentage of Kaiser's
6 workforce than they are of California's population. Hispanic/Latino employees are only about 19% of
7 the Kaiser workforce, but about 40% of the state's population. While Kaiser has a centralized and
8 company-wide Affirmative Action Plan that it is required to submit to the Office of Federal Contract
9 Compliance Programs on an annual basis, its actual hiring and promotion policies and/or practices, and
10 resulting workforce numbers, demonstrate glaring disparities in hiring and promotions.

11 21. In addition, for those Hispanic/Latino employees who *are* hired and/or promoted,
12 Hispanic/Latino employees are disproportionately relegated to Kaiser's lowest-pay jobs and
13 disproportionately excluded from the highest-paying executive management jobs. Even within the same
14 jobs, Hispanic/Latino employees are disproportionately hired at lower grades with lower pay. These
15 hiring policies and/or practices further exacerbate the pay gap between Hispanic/Latino employees and
16 employees of other races and/or national origins.

17 22. Kaiser has maintained such policies and/or practices of systemic discrimination against
18 Hispanic/Latino employees across the organization, resulting in drastic disparities with respect to hiring,
19 pay, and promotions.

20 23. Throughout the Class Period, Kaiser's corporate headquarters has maintained
21 responsibility for hiring, setting wages, and assigning the location of employment across all of its
22 California offices. Likewise, Kaiser's central administrative officers, based in its Oakland headquarters,
23 have maintained centralized control over employees' terms and conditions of employment, including,
24 without limitation, job and location assignment, performance management and evaluation, career
25 progression, promotion, and compensation policies, practices, and procedures.

26 24. Throughout the Class Period, Kaiser's compensation policies and practices have been
27 and continue to be centrally determined and uniformly applied to all Kaiser's employees. Throughout
28 the Class Period, Kaiser has maintained and continues to maintain a centrally determined and uniformly

1 applied set of policies and/or practices for determining employees' wage rates throughout California,
2 including centralized policies and/or practices for setting employees' initial pay and other centralized
3 policies and/or practices concerning employee compensation, including but not necessarily limited to
4 policies/practices as to bonuses. These policies include, but are not limited to, uniform performance
5 evaluation systems that affect both pay and promotions. Upon information and belief, these systems
6 have resulted in lower ratings for Hispanic/Latino employees, and therefore, ultimately, less pay.
7 Defendant's performance evaluations systems are thus one of the policies contributing to systematic
8 discrimination against Hispanic/Latino employees.

9 25. Every job code at Kaiser has a specific pay range that is uniform throughout the state of
10 California and which determines initial pay. Bonuses are also determined through a centralized and
11 uniform process, using a standard formula for groups of employees, designed and controlled by Kaiser's
12 central administrative officers based in its Oakland headquarters.

13 26. From the beginning of the Class Period through the present, Kaiser has paid Hispanic
14 and/or Latino employees less than employees of other races and/or national origins for substantially
15 similar work, when viewed as a composite of skill, effort, and responsibility, and performed under
16 similar working conditions.

17 27. Throughout the Class Period, Kaiser has maintained and continues to maintain a
18 centrally determined and uniformly applied policy and/or practice throughout California of not
19 adjusting employees' wage rates to ensure that it does not pay its Hispanic and/or Latino employees
20 less than its employees of other races and/or national origins for substantially similar work.

21 28. Kaiser is required to maintain records of the wages and wage rates, job classifications,
22 and other terms and conditions of employment of all of its employees throughout California.
23 Furthermore, Kaiser tracks how much each employee makes in comparison to others of the same job
24 code, known as the "compa-ratio." Based upon this information, and Plaintiff's repeated complaints,
25 Kaiser therefore knew or should have known that it paid Hispanic/Latino employees in the Covered
26 Positions less than it paid its counterparts of other races and/or national origins for performing
27 substantially similar work. Yet Kaiser took no steps to eliminate its unlawful and discriminatory pay
28 practices at any time during the Class Period.

1 **VI. FACTUAL ALLEGATIONS – PLAINTIFF CUENCA**

2 29. Plaintiff is the only Hispanic/Latino member of his four-person demographic data
3 analysis team. He is the lowest-paid member of his team, despite having the same job code as two of
4 the three other members of his team, and despite his being more experienced than all three other
5 members of his team.

6 30. In 2015, in a mid-year performance review, Plaintiff received a negative rating in the
7 communications behavior criteria, which was based on what he alleged to be racial/national origin bias
8 on the part of his manager. His manager accused Plaintiff of being “mean” and “aggressive” towards a
9 co-worker, playing into racist stereotypes about Hispanic men. After Plaintiff reported his allegations
10 to Human Resources, the accusation was removed from the performance review and Plaintiff’s rating
11 in that criteria increased.

12 31. Since that time, Plaintiff has applied to dozens of positions for which he is qualified and
13 which would constitute a promotion for Plaintiff, including numerous positions in Kaiser’s corporate
14 communications department. He has been turned down for every position, even as some positions
15 remain unfilled or are cancelled.

16 32. For example, Plaintiff applied for an open position as Communications Manager in the
17 office of the Chief of Staff of Information Technology. Plaintiff also reached out directly to the hiring
18 manager who stated that an interview was forthcoming. Plaintiff was also contacted by the recruiter,
19 who stated that there were actually eight open positions in the same category and in the same
20 department. The recruiter assured Plaintiff that, due to his background and experience in technology
21 communications, Plaintiff would surely be selected for one of the eight open positions.

22 33. Plaintiff interviewed for the position on December 17, 2018. However, Plaintiff never
23 heard back from the hiring manager or the recruiter, even despite his outreach efforts, which included
24 an email to the hiring manager on February 13, 2019.

25 34. Upon information and belief, others were hired for the open positions in 2019 to which
26 Plaintiff had applied and some positions remained open.

27 35. After a member of Plaintiff’s team resigned in November 2018, Plaintiff’s manager
28 received approval to hire a replacement in spring 2019. Plaintiff’s manager then worked with his own

1 manager to create a new analyst position that was more senior (with higher compensation) than the
2 position being vacated. This position would have been a promotion for Plaintiff. Plaintiff was informed
3 that this position was more technology-oriented than the position that was vacated. Plaintiff has
4 extensive experience in information technology and demographic data analysis.

5 36. Plaintiff applied for the position on April 22, 2019.

6 37. Plaintiff's manager never acknowledged Plaintiff's candidacy for the position. Plaintiff's
7 manager provided updates on the search for a candidate in meetings where Plaintiff was in attendance
8 but did not acknowledge Plaintiff's application. Plaintiff's manager later announced that the position
9 criteria had changed and a more technology-oriented candidate would no longer be sought out.

10 38. On September 26, 2019, Plaintiff was informed that the position had been filled. The
11 candidate who was selected was an internal program manager with less data analytics and HR analytics
12 experience. Plaintiff was and is more qualified for the position as it was advertised.

13 39. On July 15, 2019, Plaintiff filed an internal EEO complaint alleging pay discrimination,
14 retaliation, and discrimination in hiring/promotions including race/national origin discrimination. On
15 December 5, 2019, Plaintiff received an update on the status of his complaint, rejecting the pay
16 discrimination issue. On March 2, 2020, Plaintiff was informed that the investigation had concluded
17 and that Kaiser rejected his complaint. Plaintiff filed an internal administrative appeal on March 20,
18 2020. On May 5, 2020, Plaintiff received acknowledgment of his internal appeal. On June 9, 2020,
19 Plaintiff was informed that his appeal was rejected.

20 VII. CLASS ALLEGATIONS

21 A. Class Definition

22 40. Plaintiff brings this action pursuant to California Code of Civil Procedure § 382 on
23 behalf of himself and on behalf of the following proposed class ("Class"):

24 all non-physician workers who self-identify as Hispanic/Latino in Defendant
25 Kaiser Permanente's ("Kaiser" or "Defendant") internal classification system in
26 California at any time during the time period beginning four years prior to the filing
of this complaint through the date of trial in this action ("Class Period")

27 41. This action is brought, and may properly be maintained, as a class action under § 382
28 because there is a well-defined community of interest in the litigation, and the proposed class is easily

ascertainable based upon Kaiser's employee profile system which tracks employees' race/ethnic group.

B. Numerosity and Impracticability of Joinder

42. The proposed Class is numerous and ascertainable. Plaintiff is informed and believes, and on that basis alleges, that the proposed class consists of tens of thousands of Hispanic/Latino employees located across California, and therefore joinder of all individual Class Members would be impractical.

C. Community of Interest

43. There is a well-defined community of interest because common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Those common questions of law and fact include, but are not limited to:

a. Whether Kaiser has had a systemic policy and/or practice of paying its Hispanic/Latino employees less than what is paid to its employees of other races and/or national origins performing substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar conditions;

b. Whether Kaiser's systemic policy and/or practice of paying its Hispanic/Latino employees less than that paid to their counterparts of other races and/or national origins violates the California Equal Pay Act, as amended, Cal. Labor Code § 1197.5;

c. Whether Kaiser's systemic policy and/or practice of paying its Hispanic/Latino employees less than that paid to their counterparts of other races and/or national origins violates the Fair Employment and Housing Act (FEHA), Cal. Gov't. Code § 12940(a);

d. Whether Kaiser's systemic policy and/or practice of paying its Hispanic/Latino employees less than that paid to employees of other races and/or national origins was willful;

e. Whether Kaiser's performance evaluation systems lead to lower overall compensation and fewer promotions for Hispanic/Latino employees as compared to employees of other races and/or national origins;

f. Whether Kaiser has a systemic policy and/or practice of disproportionately hiring Hispanic/Latino employees for lower-level and lower-grade positions as compared to employees of other races and/or national origins, leading to overall lower compensation;

g. Whether Kaiser has had a systemic policy and/or practice of disproportionately excluding Hispanic/Latino employees from management and leadership positions as compared to employees of other races and/or national origins, leading to lower overall compensation;

h. Whether Kaiser's systemic policy and/or practice of disproportionately hiring Hispanic/Latino employees for lower-level and lower-grade positions as compared to employees of other races and/or national origins violates the Fair Employment and Housing Act (FEHA), Cal. Gov't. Code § 12940(a); and

i. Whether Kaiser's systemic policy and/or practice of excluding Hispanic/Latino employees from management and leadership positions as compared to employees of other races and/or national origins violates the Fair Employment and Housing Act (FEHA), Cal. Gov't. Code § 12940(a).

D. Typicality of Claims and Relief Sought

44. The claims of Plaintiff are typical of the claims of the proposed class. Plaintiff, like the members of the proposed class, is a Hispanic/Latino non-physician and worked for Kaiser in California during the Class Period. On information and belief, Plaintiff, like the members of the proposed class, has been paid less than employees of other races and/or national origins for substantially similar work, and has been denied opportunities for advancement in a manner that is disproportionate as compared to employees of other race and/or national origins. The relief sought by the Plaintiff herein is also typical of the relief sought on behalf of the proposed class.

E. Adequacy of Representation

45. Plaintiff is able to fairly and adequately protect the interests of all members of the class because it is in Plaintiff's best interest to prosecute the claims alleged herein to obtain full compensation due to the members of the class, and to obtain injunctive relief to protect the Class from further discrimination going forward. Plaintiff's interests align with those of Class Members.

46. Plaintiffs have selected counsel who have the requisite resources and ability to prosecute this case as a class action and are experienced labor and employment attorneys who have successfully litigated class actions and other cases involving similar issues.

47. This suit is properly maintained as a class action under C.C.P. § 382 because Kaiser has implemented an unlawful scheme that is generally applicable to the Class, making it appropriate to issue

1 final injunctive relief and corresponding declaratory relief with respect to the Class as a whole. This
2 suit is also properly maintained as a class action because the common questions of law and fact
3 predominate over any questions affecting only individual members of the class. For all these and other
4 reasons, a class action is superior to other available methods for the fair and efficient adjudication of
5 the controversy set forth herein.

6 **VIII. CAUSES OF ACTION**

7 **FIRST CAUSE OF ACTION**

8 **Violation of the California Equal Pay Act, as amended Cal. Labor Code §§1197.5, 1194.5 (Brought by Plaintiff Cuenca on Behalf of Himself and the Class)**

9 48. Plaintiff hereby alleges and incorporates by reference all allegations in each and every
10 preceding paragraph as if fully set forth herein.

11 49. Kaiser willfully violated California Labor Code § 1197.5 by intentionally, knowingly,
12 and deliberately paying Hispanic and/or Latino employees less than employees of other races and/or
13 national origins for substantially similar work throughout the Class Period.

14 50. As a result of Kaiser's conduct, violation of California Labor Code § 1197.5, and/or
15 willful, knowing, and intentional discrimination, Plaintiff and Class Members have suffered and will
16 continue to suffer harm, including but not limited to lost earnings, lost benefits, and other financial loss,
17 as well as non-economic damages.

18 51. Plaintiff and Class Members are therefore entitled to all legal and equitable remedies
19 available, including an injunction under Labor Code § 1194.5, attorney's fees under Labor Code §
20 1197.5 and Cal. CCP §1021.5, and lost wages, interest, and liquidated damages.

21 **SECOND CAUSE OF ACTION**

22 **Race- and National Origin-Based Discrimination in Violation of FEHA (California Government Code § 12940, *et seq.*) (Brought by Plaintiff Cuenca on Behalf of Himself and the Class)**

23 52. Plaintiff hereby re-alleges and incorporates by reference all allegations in each and every
24 preceding paragraph as if fully set forth herein.

25 53. In relevant part, California Government Code §12940(a) provides that it shall be
26 unlawful for an employer to discriminate against an employee in the terms and conditions of his
27 employment because of his race and/or national origin.

28 54. California's regulations (2 C.C.R. Section 11027.1) define the term national origin

1 broadly to include “the individual’s or an ancestor’s actual or perceived characteristics” including:

- 2 • Physical, cultural, or linguistic characteristics associated with a national origin group;
- 3 • Marriage to or association with persons of a national origin group;
- 4 • Tribal affiliation;
- 5 • Membership in or association with an organization identified with or seeking to promote
- 6 the interests of a national origin group;
- 7 • Attendance or participation in schools, churches, temples, mosques, or other religious
- 8 institutions generally used by persons of a national origin group;
- 9 • A name that is associated with a national origin group; and
- 10 • “National origin groups” including ethnic groups, geographic places of origin, and
- 11 countries that are not presently in existence (*i.e.*, a geographic location or country, a
- 12 formerly existing country, or a region that is not a country but that is associated with an
- 13 ethnic group).

14 67. Plaintiff Cuenca and the putative Class Members are Hispanic/Latino and are thus

15 members of a protected class.

16 68. Kaiser is an employer as defined by FEHA. Plaintiff and the putative Class Members

17 were and are employees of Defendant, under the terms of the FEHA.

18 69. As set forth above, Defendant discriminated against Plaintiff Cuenca and the Class

19 Members because of their race and national origin in pay and promotions. Plaintiff complained to

20 Defendant regarding the discrimination, but Defendant allowed the discrimination to continue.

21 70. As a direct, legal, and proximate result of the discrimination, Plaintiff and the putative

22 Class Members have suffered damages, including lost wages and other economic damages, emotional

23 distress, and punitive damages, in an amount to be proven at trial.

24 71. By reason of the conduct of Defendant, Plaintiff has necessarily retained attorneys to

25 prosecute the action on behalf of himself and the class. Pursuant to California Government Code §

26 12965(b), as a result of Defendant’s discrimination, Plaintiff and the class are entitled to recover

27 damages for economic harm, attorneys’ fees, costs, and expert witness fees. Plaintiff and the class are

28 also entitled to attorneys’ fees pursuant to California Code of Civil Procedure § 1021.5.

72. Defendant’s actions were ratified by managing agents, and were willful, malicious,

1 fraudulent, and oppressive, and were committed with wrongful intent to harm Plaintiff and the Class
2 Members in conscious disregard of their rights. Plaintiff and the Class Members are therefore entitled
3 to recover punitive damages from Defendant in an amount according to proof at trial.

4 73. Plaintiff timely exhausted administrative remedies and obtained a right to sue.

5 **THIRD CAUSE OF ACTION**

6 **Failure to Prevent Race- and National Origin-Based Discrimination in Violation of FEHA**
7 **(California Government Code § 12940(k))**
8 **(Brought by Plaintiff Cuenca on Behalf of Himself and the Class)**

9 74. Plaintiff hereby re-alleges and incorporates by reference all allegations in each and every
10 preceding paragraph as if fully set forth herein.

11 75. California Government Code § 12940(k) provides that it shall be an unlawful
12 employment practice for an employer to fail to take all reasonable steps necessary to prevent
13 discrimination, harassment, and retaliation from occurring in the workplace.

14 76. Plaintiff and the putative Class Members are Hispanic/Latino and are thus members of
15 a protected class.

16 77. Kaiser is an employer as defined by FEHA.

17 78. Plaintiff and the putative Class Members were and are employees of Defendant, under
18 the terms of the FEHA.

19 79. Defendant failed to provide Plaintiff and the Class Members with protections required
20 under California Government Code § 12940(k) by not taking immediate and sufficient action to correct
21 the discriminatory conduct directed at Hispanic/Latino employees, even after being alerted repeatedly
22 to the discrimination by Plaintiff.

23 80. As a direct, legal, and proximate result of the discrimination, Plaintiff and the putative
24 Class Members have suffered damages, including lost wages and other economic damages, emotional
25 distress, and punitive damages in an amount to be proven at trial.

26 81. By reason of the conduct of Defendant, Plaintiff has necessarily retained attorneys to
27 prosecute the action on behalf of himself and the class. Pursuant to California Government Code §
28 12965(b), as a result of Defendant's discrimination, Plaintiff and the class are entitled to recover
damages for economic harm, attorneys' fees, costs, and expert witness fees. Plaintiff and the class are
also entitled to attorneys' fees pursuant to California Code of Civil Procedure § 1021.5.

1 82. Defendant's actions were ratified by managing agents, and were willful, malicious,
2 fraudulent, and oppressive, and were committed with wrongful intent to harm Plaintiff and the Class
3 Members in conscious disregard of their rights. Plaintiff and the Class Members are therefore entitled
4 to recover punitive damages from Defendant in an amount according to proof at trial.

5 83. Plaintiff timely exhausted administrative remedies and obtained a right to sue.

6 **FOURTH CAUSE OF ACTION**
7 **Retaliation in Violation of FEHA**
8 **(California Government Code § 12940(h))**
9 **(Brought by Plaintiff on Behalf of Himself)**

10 85. Plaintiff hereby re-alleges and incorporates by reference all allegations in each and every
11 preceding paragraph as if fully set forth herein.

12 86. California Government Code § 12940(h) provides that it shall be an unlawful
13 employment practice for an employer to discriminate against any person because the person has
14 opposed any practices forbidden under FEHA.

15 87. Plaintiff repeatedly opposed Kaiser's discrimination against Hispanic/Latino employees.

16 88. Kaiser is an employer as defined by FEHA.

17 89. Plaintiff is an employee of Defendant, under the terms of the FEHA.

18 90. Defendant retaliated against Plaintiff when he was denied promotions and performance
19 evaluations commensurate with his experience and qualifications and true performance, after his
20 known, protected activities.

21 91. As a direct, legal, and proximate result of the discrimination, Plaintiff has suffered
22 damages, including lost wages and other economic damages, emotional distress, and punitive damages
23 in an amount to be proven at trial.

24 92. By reason of the conduct of Defendant, Plaintiff has necessarily retained attorneys to
25 prosecute the action on behalf of himself and the class. Pursuant to California Government Code §
26 12965(b), as a result of Defendant's discrimination, Plaintiff is entitled to recover damages for
27 economic harm, attorneys' fees, costs, and expert witness fees.

28 93. Defendant's actions were ratified by managing agents, and were willful, malicious,
fraudulent, and oppressive, and were committed with wrongful intent to harm Plaintiff in conscious

1 disregard of his rights. Plaintiff and the Class Members are therefore entitled to recover punitive
2 damages from Defendant in an amount according to proof at trial.

3 94. Plaintiff timely exhausted administrative remedies and obtained a right to sue.

4 **FIFTH CAUSE OF ACTION**
5 **Retaliation in Violation of EPA**
6 **(as amended Cal. Labor Code §§1197.5, 1194.5)**
7 **(Brought by Plaintiff on Behalf of Himself)**

8 95. Plaintiff hereby re-alleges and incorporates by reference all allegations in each and every
9 preceding paragraph as if fully set forth herein.

10 96. California Labor Code § 1197.5(k) provides that it shall be an unlawful employment
11 practice for an employer to retaliate against or otherwise discriminate against an employee because of
12 any action taken by an employee to invoke or assist in any manner the enforcement of the Equal Pay
13 Act.

14 97. Kaiser is an employer as defined by the EPA. Labor Code § 1197.5(l).

15 98. Plaintiff is an employee of Defendant.

16 99. Defendant retaliated against Plaintiff when he was removed from consideration for an
17 open position after filing an internal EEO complaint raising equal pay and other discrimination claims.

18 100. As a direct, legal, and proximate result of the discrimination, Plaintiff has suffered
19 damages, including lost wages and other economic damages, emotional distress, and punitive damages
20 in an amount to be proven at trial.

21 101. Plaintiff is therefore entitled to all legal and equitable remedies available, including an
22 injunction under Labor Code § 1194.5, attorney's fees under Labor Code § 1197.5 and Cal. CCP
23 §1021.5, and lost wages, interest, and liquidated damages.

24 **SIXTH CAUSE OF ACTION**
25 **Unlawful and / or Unfair Business Practices,**
26 **Cal. Business & Professions Code § 17200 *et seq.***
27 **(Brought by Plaintiff Cuenca on Behalf of Himself and the Class)**

28 102. Plaintiff hereby re-alleges and incorporates by reference all allegations in each and every
preceding paragraph as if fully set forth herein.

103. Kaiser's policies and/or practices of paying Hispanic/Latino employees less than
employees of other races and/or national origins for substantially similar work performed constitutes a

1 business practice because Kaiser's acts and omissions, as alleged herein, violate the California Equal
2 Pay Act, as amended, Labor Code § 1197.5, and therefore constitute an unlawful business practice
3 prohibited by Business & Professions Code § 17200 *et seq.* Kaiser's business practice of paying
4 Hispanic/Latino employees less than employees of other races and/or national origins for substantially
5 similar work causes harm to Plaintiff and Class Members that outweighs any reason Kaiser may have
6 for doing so. Kaiser's business practice as alleged herein is also racist, immoral, unethical, oppressive,
7 unscrupulous, and offensive to the established public policies of ensuring employees of all races and/or
8 national origins are paid equally for performing equal and substantially similar work, as reflected in the
9 California Equal Pay Act, Cal. Labor Code § 1197.5, and ensuring Hispanic/Latino employees are not
10 discriminated against in the workplace, as reflected in the California Fair Employment and Housing
11 Act, Cal. Gov't Code §12940.

12 104. Kaiser's policies and/or practices of disproportionately excluding Hispanic/Latino
13 employees from management and leadership positions as compared to employees of other races and/or
14 national origins constitutes a business practice because Kaiser's acts and omissions, as alleged herein,
15 violate the California Fair Employment and Housing Act, Cal. Gov't Code §12940, and therefore
16 constitute an unlawful business practice prohibited by Business & Professions Code § 17200 *et seq.*
17 Kaiser's discriminatory business practice regarding promotions causes harm to Plaintiff and Class
18 Members that outweighs any reason Kaiser may have for doing so. Kaiser's business practice as alleged
19 herein is also racist, immoral, unethical, oppressive, unscrupulous, and offensive to the established
20 public policies of ensuring Hispanic/Latino employees are not discriminated against in the workplace,
21 as reflected in the California Fair Employment and Housing Act, Cal. Gov't Code §12940.

22 105. As a result of its unlawful and/or unfair business practices, Kaiser has reaped and
23 continues to reap unfair and illegal profits at the expense of Plaintiffs and Class Members. Accordingly,
24 Kaiser should be disgorged of its illegal profits, and Plaintiffs and Class Members are entitled to
25 restitution with interest of such ill-gotten profits in an amount according to proof at the time of trial.

26 106. Kaiser's unlawful and/or unfair business practices entitle Plaintiffs and Class Members
27 to preliminary and permanent injunctive relief and other equitable relief available under law, including
28 attorneys' fees pursuant to California Code of Civil Procedure § 1021.5.

1 **SEVENTH CAUSE OF ACTION**

2 **Declaratory Judgment Cal C.C.P. § 1060 *et seq.***
3 **(Brought by Plaintiff on Behalf of Himself and the Class)**

4 107. Plaintiff hereby re-alleges and incorporates by reference all allegations in each and
5 every preceding paragraph as if fully set forth herein.

6 108. An actual controversy has arisen and now exists between the parties relating to the legal
7 rights and duties of the parties as set forth above, for which Plaintiff desires a declaration of rights and
8 other relief available pursuant to the California Declaratory Judgment Act, C.C.P. § 1060 *et seq.*

9 109. A declaratory judgment is necessary and proper in that Plaintiff contends that Kaiser has
10 committed and continues to commit the violations set forth above and, on information and belief, Kaiser
11 will deny that it has done so and/or will continue to commit such acts. Given the necessity of a
12 declaratory judgment, Plaintiff is also entitled to attorneys' fees pursuant to California Code of Civil
13 Procedure § 1021.5.

14 **IX. PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff, on behalf of himself, the proposed Class, and all others similarly situated,
16 requests judgment and the following specific relief against Defendant:

17 A. Certification of the Class as a class action under Code of Civil Procedure § 382, and
18 designation of Plaintiff Michael Cuenca as representative of the Class and his counsel of record as
19 Class Counsel;

20 B. All wages due pursuant to California Labor Code § 1197.5(h) in an amount to be
21 ascertained at trial;

22 C. For liquidated damages pursuant to California Labor Code § 1197.5(h);

23 D. For prejudgment interest on unpaid wages at a rate of 10% per annum pursuant to
24 California Labor Code § 1197.5(h) and California Civil Code §§ 3287-3288, and/or any other
25 applicable provision providing for prejudgment interest;

26 E. For declaratory relief against Defendant finding Kaiser's employment policies,
27 practices and/or procedures challenged herein are illegal and in violation of the rights of Plaintiff and
28 members of the Class under California Government Code § 12940;

1 F. For restitution of all monies due to Plaintiff and Class Members, as well as
2 disgorgement of Kaiser's profits from its unlawful and/or unfair business practices;

3 G. For back pay, front pay, injunctive relief, and emotional distress damages arising from
4 the discrimination against the class of Hispanic/Latino employees described above;

5 H. For an award of exemplary and punitive damages in an amount commensurate with
6 Defendant's ability to pay and to deter future conduct;

7 I. For preliminary and permanent injunctive relief under, *inter alia*, California Labor Code
8 § 1194.5, enjoining Kaiser from violating California Labor Code § 1197.5 by paying its
9 Hispanic/Latino employees less than that paid to their counterparts of other races and/or national
10 origins for substantially similar work and by disproportionately relegating Hispanic/Latino employees
11 to the lowest-paying and lowest grade jobs while disproportionately excluding Hispanic/Latino
12 employees from leadership and management positions, and from engaging in the unfair and unlawful
13 business practices complained of herein;

14 J. For reasonable attorneys' fees and costs pursuant to California Labor Code §§ 1197.5(h)
15 and 2699(g)(1), California C.C.P. § 1021.5, California Government Code § 12965(b), and/or any other
16 applicable provision providing for attorneys' fees and costs; and

17 K. For such further relief that the Court may deem just and proper.

18 **X. DEMAND FOR JURY TRIAL**

19 Pursuant to Code of Civil Procedure section 631, Plaintiff, individually, and on behalf of others
20 similarly situated, demands a trial by jury.

21
22 DATED: June 17, 2020

**BRYAN SCHWARTZ LAW
NICHOLS KASTER, PLLP**

By:

/s/ Bryan J. Schwartz

Bryan J. Schwartz (SBN 209903)

Natasha T. Baker (SBN 319381)

Matthew C. Helland (SBN 250451)

Robert L. Schug (SBN 249640)

Neil D. Pederson (MN Bar No. 0397628)*

**pro hac vice* application forthcoming

Attorneys for Plaintiff and the Putative Class

EXHIBIT A



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

KEVIN KISH, DIRECTOR

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
(800) 884-1684 (Voice) | (800) 700-2320 (TTY) | California's Relay Service at 711
<http://www.dfeh.ca.gov> | Email: contact.center@dfeh.ca.gov

June 16, 2020

RE: **Notice of Filing of Discrimination Complaint**
DFEH Matter Number: 202006-10437116
Right to Sue: Cuenca and a Class of Hispanic/Latino Employees / Kaiser
Permanente

To All Respondent(s):

Enclosed is a copy of a complaint of discrimination that has been filed with the Department of Fair Employment and Housing (DFEH) in accordance with Government Code section 12960. This constitutes service of the complaint pursuant to Government Code section 12962. The complainant has requested an authorization to file a lawsuit. This case is not being investigated by DFEH and is being closed immediately. A copy of the Notice of Case Closure and Right to Sue is enclosed for your records.

Please refer to the attached complaint for a list of all respondent(s) and their contact information.

No response to DFEH is requested or required.

Sincerely,

Department of Fair Employment and Housing



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
(800) 884-1684 (Voice) | (800) 700-2320 (TTY) | California's Relay Service at 711
<http://www.dfeh.ca.gov> | Email: contact.center@dfeh.ca.gov

June 16, 2020

Michael Cuenca and a Class of Hispanic/Latino Employees
Bryan Schwartz Law, 180 Grand Ave, Suite 1380
Oakland, California 94612

RE: **Notice of Case Closure and Right to Sue**
DFEH Matter Number: 202006-10437116
Right to Sue: Cuenca and a Class of Hispanic/Latino Employees / Kaiser
Permanente

Dear Michael Cuenca and a Class of Hispanic/Latino Employees,

This letter informs you that the above-referenced complaint was filed with the Department of Fair Employment and Housing (DFEH) has been closed effective June 16, 2020 because an immediate Right to Sue notice was requested. DFEH will take no further action on the complaint.

This letter is also your Right to Sue notice. According to Government Code section 12965, subdivision (b), a civil action may be brought under the provisions of the Fair Employment and Housing Act against the person, employer, labor organization or employment agency named in the above-referenced complaint. The civil action must be filed within one year from the date of this letter.

To obtain a federal Right to Sue notice, you must contact the U.S. Equal Employment Opportunity Commission (EEOC) to file a complaint within 30 days of receipt of this DFEH Notice of Case Closure or within 300 days of the alleged discriminatory act, whichever is earlier.

Sincerely,

Department of Fair Employment and Housing

1 **COMPLAINT OF EMPLOYMENT DISCRIMINATION**
2 **BEFORE THE STATE OF CALIFORNIA**
3 **DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING**
4 **Under the California Fair Employment and Housing Act**
5 **(Gov. Code, § 12900 et seq.)**

6 **In the Matter of the Complaint of**

7 Michael Cuenca and a Class of Hispanic/Latino
8 Employees

DFEH No. 202006-10437116

9 Complainant,

10 vs.

11 Kaiser Permanente
12 1 Kaiser Plaza, 19th Floor
13 Oakland, California 94612

14 Respondents

15 1. Respondent **Kaiser Permanente** is an **employer** subject to suit under the
16 California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).

17 2. Complainant **Michael Cuenca and a Class of Hispanic/Latino Employees**,
18 resides in the City of **Oakland** State of **California**.

19 3. Complainant alleges that on or about **June 16, 2020**, respondent took the
20 following adverse actions:

21 **Complainant was discriminated against** because of complainant's race, national
22 origin (includes language restrictions) and as a result of the discrimination was
23 denied hire or promotion, denied equal pay, other.

24 **Complainant experienced retaliation** because complainant reported or resisted
25 any form of discrimination or harassment and as a result was denied hire or
26 promotion, denied equal pay, other.

27 **Additional Complaint Details:** This is a class equal pay and hiring/promotions case
28 on behalf of all non-physician Hispanic/Latino workers at Kaiser. As a result of
Kaiser's policies and/or practices, Hispanic/Latino workers at Kaiser have been
discriminated against on the basis of their race and/or national origin in terms of pay,
hiring, and promotions. This case also includes Mr. Cuenca's individual case alleging

1 retaliation, discriminatory evaluations, denied hire, denied promotions, and denied
2 equal pay.

3 Upon information and belief, Mike Cuenca and similarly-situated Hispanic/Latino
4 Kaiser employees in California were and are paid less than employees of other
5 races and/or national origins for substantially similar work under similar working
6 conditions, when viewed as a composite of skill, effort, and responsibility under
7 California's Equal Pay Act. Hispanic/Latino employees are also discriminated against
8 in terms of hiring and promotions. Hispanic/Latino employees are the non-white only
9 racial and/or national origin group whose percentage of Kaiser's workforce is less
10 than the corresponding percentage of California's population as a whole. All other
11 non-white racial/ethnic groups (with the exception of Native Americans) are a higher
12 percentage of Kaiser's workforce than they are of California's population as a whole.
13 Hispanic/Latino employees are further relegated into the lowest-paying jobs and
14 disproportionately excluded from positions of management and leadership.

15 As a result of these disparities in pay, hiring, and promotions, Kaiser has
16 discriminated against Hispanic/Latino workers because of their race and/or national
17 origin.

18 Mike Cuenca is the only Hispanic and lowest-paid member of his team. After a
19 negative performance rating in 2015 based on what Mr. Cuenca alleged to be racist
20 stereotyping, which he successfully challenged, Mr. Cuenca was denied
21 advancement opportunities. Despite applying for dozens of internal positions for
22 which he was qualified, Mr. Cuenca was never extended a job offer.

23 A near-complete copy of the complaint that counsel intends to file soon is attached
24 to this request for a Right to Sue notice.

1 VERIFICATION

2 I, **Natasha Baker**, am the **Attorney** in the above-entitled complaint. I have read the
3 foregoing complaint and know the contents thereof. The matters alleged are based
4 on information and belief, which I believe to be true.

5 On June 16, 2020, I declare under penalty of perjury under the laws of the State of
6 California that the foregoing is true and correct.

7 **Oakland, CA**
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