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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DONNA LOUIE; VALERIE STRINGER;  
MARK STEELE; DAN ROYSE; JULIE  
TEAGUE; JERAHMEEL CAPISTRANO,  
  
Plaintiff,  
  
vs.  
  
KAISER FOUNDATION HEALTH PLAN,  
INC.; DOES 1 THROUGH 10,  
  
Defendant.

CASE NO. 08cv0795 IEG RBB  
**ORDER (1) PRELIMINARILY  
CERTIFYING CLASS FOR  
SETTLEMENT PURPOSES; (2)  
PRELIMINARILY APPROVING  
SETTLEMENT; (3) APPOINTING  
CLASS COUNSEL; AND, (4)  
APPROVING CLASS NOTICE  
PROGRAM**

Presently before the Court is a joint motion by defendant Kaiser Foundation Health Plan ("Kaiser") and a class of Kaiser's former employees represented by plaintiffs Donna Louie, Valerie Stringer, Mark Steele, Dan Royse, Julie Teague, and Jerahmeel Capistrano (collectively, "Plaintiffs") seeking (1) preliminary certification for settlement purposes, (2) preliminary approval of the settlement, (3) appointment of class counsel, and (4) approval of the class notice program.

**BACKGROUND**

**I. Factual Background**

Plaintiffs, and the putative class members, worked for Kaiser as Product Specialists, Business Application Coordinators ("BACs"), and Site Support Specialists on the Kaiser Permanente HealthConnect computer system. Kaiser installed the Health Connect system as part of a procedure

1 called "GoLive," which ensured Kaiser facilities used a common software system.

2 During GoLive, Kaiser intermittently deployed Plaintiffs to facilities in California. During  
3 deployments, Plaintiffs frequently missed meal breaks, worked more than eight hours per day, and  
4 worked more than forty hours per week. Often, Kaiser required the Plaintiffs to work five to six  
5 workdays per week, extending up to thirteen hours per day. Kaiser also required Plaintiffs to  
6 participate in "Technical Dress Rehearsals," which Kaiser scheduled during meal periods, early in the  
7 morning, or late in the evening to minimize interference with hospital staff. This caused Plaintiffs'  
8 workday to exceed eight hours, for which they did not receive overtime compensation.

9 Furthermore, Kaiser required plaintiffs employed as Site Support Specialists to periodically  
10 remain "on-call" for seven consecutive days. During their on-call week, Kaiser required Plaintiffs to  
11 remain available twenty-four hours per day and to respond to technical support calls within thirty  
12 minutes. The Plaintiffs did not receive overtime compensation for the time spent "on-call."

13 Since October 4, 2003, Kaiser has not compensated Plaintiffs for overtime or missed breaks,  
14 claiming Plaintiffs are exempt from overtime under state and federal law because they are "executive,  
15 administrative, or professional" employees. Plaintiffs dispute this classification. In total, the proposed  
16 class is comprised of 619 Product Specialists and BACs and 151 Site Support Specialists. The total  
17 claim for withheld overtime and missed meal or rest breaks is approximately \$6,016,568.39.

## 18 **II. Procedural Background**

19 Although the Plaintiffs filed this settlement agreement for approval in this case, it is actually  
20 the settlement of three related class actions.

21 In May 2008, Donna Louie filed this action. (Doc. No. 1.) Kaiser allegedly misclassified a  
22 class of Site Specialists as exempt from overtime under California and federal law. Plaintiffs initiated  
23 similar suits on behalf of Product Specialists and BACs in California state court and in the Northern  
24 District of California. Valerie Stringer v. Kaiser Permanente, et al., Case No. RG 07349734 (Cal.  
25 October 4, 2007); Mark Steele, et al. v. Kaiser Found. Health Plan, Inc., Case No. 3:07-cv-05743  
26 (N.D. Cal. November, 13 2007). In order to coordinate all lawsuits for the purposes of requesting  
27 Court approval of the settlement, the parties agreed to dismiss the Stringer and Steele actions. Louie  
28 then filed the First Amended Complaint, incorporating the Stringer and Steele plaintiffs. (Doc. No. 3.)

1 Plaintiffs allege Kaiser violated state and federal law by failing to pay overtime wages and not  
2 providing meal or rest breaks for the Product Specialists, Business Application Coordinators, or Site  
3 Specialists. Plaintiffs allege Kaiser misclassified members of the putative class as exempt under  
4 California Labor Code § 515.5 and industrial Welfare commission Wage Order 4-2001. Furthermore,  
5 Plaintiffs allege Kaiser improperly classified class members as exempt under federal law. Fair Labor  
6 Standards Act, 29 U.S.C. § 213 (2000); 29 C.F.R. 541. Both the federal and state laws exempt  
7 employees who work in an "executive, administrative, or professional" capacity.

8 Plaintiffs now move for (1) certification of the settlement class, (2) preliminary approval of  
9 the settlement, (3) appointment of class counsel, and (4) approval of the class notice program.

### 10 **III. The Proposed Settlement**

11 Counsel for the parties agreed to a settlement which includes all persons employed by Kaiser  
12 as (a) Product Specialists; (b) Business Application Coordinators ("BAC"); and (c) Site Support  
13 Specialists within the state of California during the period from October 4, 2003 through the date of  
14 the preliminary approval of the Settlement. The parties submitted to mediation before Anthony A.  
15 Piazza, a mediator of wage and hour class actions. (Decl. Blumenthal ¶5; Decl. Qualls.) As a result  
16 of the daylong negotiation, the parties reached a settlement. Id.

17 Kaiser agrees to pay \$5.4 million to discharge all claims in this action on a claims-made basis  
18 ("Gross Fund Value"), without a reversion to Kaiser except for payment of taxes. (Decl. Blumenthal  
19 ¶3.) Before the \$5.4 million is distributed to class members, the Claim Administrator will first pay  
20 Class Counsel's attorneys' fees and costs, incentive awards for the class representatives, PAGA  
21 payments, cost of class notice, and claims administration, leaving a Net Fund Value.

22 Each participating Settlement Class Member will be entitled to a share of the Net Fund Value.  
23 The class will be broken into two subclasses: BAC/Product Specialist Subclass and Site Support  
24 Specialist Subclass. The BAC/Product Specialist Subclass shall be allocated 59.36% of the Net fund  
25 value and the Support Specialist Subclass shall be allocated 40.74%. The Claims Administrator will  
26 determine each class member's share of the net fund by dividing the number of qualifying work weeks  
27 attributable to the class member by the total weeks worked by all members of the subclass.

28 Kaiser will additionally pay any required employer payroll taxes owing on the portion of the

1 Gross Fund Value allocated to the wages. The Settlement provides for a claims process requiring  
2 Kaiser to pay each timely and validly submitted claim.

3 The settlement further provides for attorneys' fees totaling 25% of the Gross Fund Value  
4 (\$1,350,000). Counsel will also recoup up to \$100,000 for reasonable litigation costs.

5 Each class representative will receive an incentive award of \$25,000 per named plaintiff in  
6 addition to their individual claim to the Net Fund Value.

7 The settlement allocates \$50,000 for costs of the Claim Administrator and \$33,333.33 to pay  
8 the PAGA Settlement. Kaiser will deposit \$5.4 million in an interest-bearing account within 15 days  
9 of the preliminary approval and payment to class members will begin 15 days after final approval.

10 The parties agreed to the designation of the following firms as class counsel for the settlement  
11 class: Qualls & Workman; Sanford, Whittles & Heisler, LLP; Law Offices of Grant E. Morris;  
12 Blumethal & Nordrehaug; and United Employees Law Group.

### 13 **DISCUSSION**

14 When evaluating a motion for preliminary approval of a settlement for a class action, the Court  
15 must first, determine whether a class exists and second, assess whether the settlement is  
16 "fundamentally fair, adequate, and reasonable." Stanton v. Boeing Company, 327 F.3d 938, 952 (9th  
17 Cir. 2003). The Court addresses the class certification, then examines the settlement agreement, and  
18 finally turns to the questions of class counsel and class notice.

#### 19 **I. Class Certification**

20 The parties seek, under Federal Rule of Civil Procedure 23(b)(3), to certify a class they define  
21 in the settlement agreement:

22 All persons who, at any time between October 4, 2003 and preliminary  
23 approval of the settlement, worked for Kaiser Foundation Health Plan,  
24 Inc. in California in connection with KP HealthConnect in the positions  
of Product Specialist, Business Application Coordinator ("BAC") or  
Site Support Specialist.

25 (Decl. of Norman B. Blumenthal, Exhibit A at 3.) The parties divide the class into two subclasses:  
26 one subclass of BACs and Product Specialists and a second subclass of Site Support Specialists.

27 A plaintiff seeking Rule 23(b)(3) certification must first satisfy the prerequisites of Rule 23(a).  
28 If subsection (a) is satisfied, Plaintiffs must then fulfil the Rule 23(b)(3) requirements. The general

1 requirements of Rule 23(a) as well as the more specific requirements of Rule 23(b)(3) are addressed  
2 in turn.

3 **A. Rule 23(a) Requirements**

4 Rule 23(a) establishes four prerequisites for class action litigation: (1) numerosity, (2)  
5 commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. P. 23(a); see Stanton  
6 v. Boeing Company, 327 F.3d 938, 953 (9th Cir. 2003).

7 *1. Numerosity*

8 The numerosity prerequisite is met if "the class is so numerous that joinder of all members is  
9 impracticable." Fed. R. Civ. P. 23(a)(1). There are 619 BAC/Product Specialists and 151 Site  
10 Support Specialists involved in this litigation. They are far too numerous be joined as plaintiffs in this  
11 lawsuit. The proposed class satisfies the numerosity requirement.

12 *2. Commonality*

13 The commonality requirement is met if "there are questions of law or fact common to the  
14 class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is construed "permissively." Hanlon  
15 v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). All questions of law need not be common,  
16 but rather "the existence of shared legal issues with divergent factual predicates is sufficient." Id.

17 The Plaintiffs have satisfied the commonality requirement. Kaiser's alleged misclassification  
18 of BAC/Product Specialists and Site Support Specialists as "exempt" is the basis for the claims of both  
19 the named plaintiffs and the proposed class. This misclassification is uniform across the class and  
20 satisfies the commonality requirement.

21 *3. Typicality*

22 Typicality requires the members of the class have the same or similar claims as the named  
23 plaintiffs. Fed. R. Civ. P. 23(a)(3). However, it is "not necessary that all class members suffer the  
24 same injury." Lozano v. AT&T Wireless Services, Inc., 504 F.3d 718, 734 (9th Cir. 2007).

25 In the instant case, Plaintiffs satisfy the typicality requirement. The claims of both the named  
26 plaintiffs and the members of the class arise from Kaiser's conduct, involve similar work performed  
27 in connection with the HealthConnect computer systems, and originate from the same legal theories.  
28 Furthermore, each subclass is represented by a plaintiff who is a member of the subclass.

1 4. *Adequate Representation*

2 This Circuit finds representation adequate if (1) the plaintiffs "do not have conflicts of interest  
3 with the proposed class" and (2) "[p]laintiffs are represented by qualified and competent counsel."  
4 Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1185 (9th Cir. 2007). The heart of this requirement is the  
5 concern over settlement allocation decisions. Hanlon, 150 F.3d at 1020 .

6 In this case, there appears to be no allocation issue and counsel is qualified and competent.  
7 The allocation is reasonable because the distribution is based on the salary of the positions and the  
8 average number of hours worked. Class counsel has extensive experience in more than two hundred  
9 class action matters, including many wage and hour class actions. (Decl. Blumenthal, ¶ 31; Decl.  
10 Qualls, ¶ 13.) The Plaintiffs have satisfied the Rule 23(a) requirements.

11 **B. Rule 23(b)(3) Requirements**

12 Rule 23(b)(3) requires (1) finding common issues of law or fact predominate over individual  
13 issues and (2) finding class action is the superior method to fairly and efficiently adjudicate the  
14 controversy. These requirements can be labeled the "predominance" and "superiority" requirements.

15 *I. Predominance*

16 Federal regulations apply the exemption to employees "primarily engaged in duties which meet  
17 the test of exemption." 29 C.F.R. 541.402. The issue is whether an individual inquiry is necessary  
18 to determine whether each plaintiff was "primarily engaged" in any duty meeting an exemption.

19 Predominance requires more than proof of common issues of law or fact. The common  
20 questions must "'present a significant aspect of the case [that] can be resolved for all members of the  
21 class in a single adjudication.'" Hanlon, 150 F.3d at 1022 (citation omitted).

22 In similar cases, common claims predominate when plaintiffs allege "(a) company-wide  
23 policies governing how employees spend time, or (b) uniformity in work duties and experiences that  
24 diminish the need for individualized inquiry." Vinole v. Countrywide Home Loans, Inc., 246 F.R.D.  
25 637, 640 (S.D. Cal. 2007). For example, an individualized inquiry was unnecessary when plaintiffs  
26 challenged a policy classifying all employees of a given title as exempt. Krzesniak v. Cendant Corp.,  
27 2007 U.S. Dist. LEXIS 47518 (N.D. Cal. June 20, 2007). Similarly, common claims predominated  
28 when a defendant's compensation and exemption policy was uniform among the class. In re Wells

1 Fargo Home Mortg. Overtime Pay Litig., 2007 U.S. Dist. LEXIS 77525 (N.D. Cal. October 17, 2007).

2 Here, the Plaintiffs had uniformity in work duties and experiences that diminish the need for  
3 an individualized inquiry. Members of the putative class had the same job titles, work duties, work  
4 experiences, and Kaiser uniformly applied the exemption to members of the class. Therefore,  
5 common questions predominate.

6 2. *Superiority Requirement*

7 The Court must also determine "a class action is superior to other available methods for the  
8 fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The method is superior  
9 if "litigation of common issues will reduce litigation costs and promote greater efficiency." Valentino  
10 v. Carter-Wallace, Inc., 97 F.3d 1227, 1234.

11 Since all of the claims involve a relatively insubstantial amount of money, a class action is the  
12 superior method of adjudication.

13 **C. Conclusion**

14 For the foregoing reasons, the Court **GRANTS** preliminary certification to the class for the  
15 purposes of settlement.

16 **II. The Settlement**

17 **A. Legal Standard**

18 Federal Rule of Civil Procedure 23(e)(1) requires the Court to determine whether a settlement  
19 is "fair, reasonable, and adequate." To make this determination, the Court considers certain factors:  
20 "(1) the strength of the plaintiff's case and the risk, expense, complexity, and likely duration of further  
21 litigation; (2) the risk of maintaining class action status throughout trial; (3) the amount offered in  
22 settlement; (4) the extent of discovery completed, and the stage of the proceedings; (5) the experience  
23 and views of counsel." Stanton, 327 F.3d at 959 (quoting Molski v. Gleich, 318 F.3d 937, 953 (9th  
24 Cir. 2003). In addition, the settlement may not be the product of collusion among the negotiating  
25 parties. In re Mego Financial Corp. Securities Litigation, 213 F.3d 454, 458 (9th Cir. 2000).

26 **B. Analysis**

27 Since the reaction of class members cannot be evaluated until the hearing for final approval  
28 of the settlement, the Court only addresses the other factors.

1 *I. The Strength of the Plaintiffs' Case and the Risk, Expense, Complexity, and Likely Duration*  
2 *of Further Litigation*

3 Plaintiffs found two primary weaknesses in their case. First, they were uncertain whether the  
4 court would find the administrative exemption, as defined in two federal regulations, bars recovery.  
5 Specifically, the exemption includes "system analysts and computer programmers" if their primary  
6 duty includes planning or organizing "activities required to develop systems to solve complex . . .  
7 problems of the employer or customer." 29 C.F.R. § 541.402. Furthermore, the exemption also  
8 includes "computer network, internet and database administration." 29 C.F.R. § 541.201(a)(b).

9 Additionally, Plaintiffs feared two federal decisions might persuade the Court to find Plaintiffs  
10 exempt. In Bagwell v. Florida Broadband, the court found a network operation engineer exempt  
11 because of his primary duty to develop, improve, and ensure the reliability of a network. 2005 WL  
12 1962562 (S.D. Fla. 2005). In Koppinger v. American Interiors, Inc., the court found a plaintiff exempt  
13 because of his responsibility to maintain the company's computers. 295 F. Supp. 2d 797 (N.D. Ohio  
14 2003).

15 Second, Plaintiffs worried the class would not be certified due to a predominance problem.  
16 In Dunbar v. Albertson's, the California Court of Appeal affirmed a denial of certification, finding the  
17 application of the executive exemption required an individual inquiry for each class member. 141 Cal.  
18 App. 4th 1422, 1431-32 (2006).

19 Based on these considerations and the issue with predominance already noted, this factor  
20 weighs in favor of preliminarily approving the settlement.

21 *2. The Amount Offered in Settlement*

22 In Glass v. UBS Financial Services, the court recently approved a settlement of an action for  
23 unpaid overtime wages constituting approximately 25 to 35% of the estimated actual loss. 2007 U.S.  
24 Dist. LEXIS 8476 (N.D. Cal. January 27, 2007).

25 Here, the claims against Kaiser totaled \$6,016,568.39. The settlement payment of \$5,400,000  
26 constitutes 89.75% of the subject claims. Even after deducting PAGA payments, attorneys' fees and  
27 costs, and class representative incentive awards the Net Fund Value is still \$3,725,000 or 62% of full  
28 recovery. This factor weighs toward finding the settlement is fair, reasonable, and adequate.

1 3. *The Extent of Discovery Completed and the Stage of the Proceedings*

2 Class Counsel has not completed extensive formal discovery in this proceeding. However,  
3 "[i]n the context of class action settlements, 'formal discovery is not a necessary ticket to the  
4 bargaining table' where the parties have sufficient information to make an informed decision about  
5 settlement." Linney v. Cellular Alaska Partnership, 151 F.3d 1234, 1239 (9th Cir. 1998)(quoting In  
6 re Chicken Antitrust Litig., 669 F.2d 223, 241 (5th Cir. 1982).

7 Class counsel has conducted extensive informal discovery and has sufficient information to  
8 make an informed decision about settlement. Class counsel served interrogatories, inspection  
9 demands, and notices of depositions to Kaiser. (Decl. Qualls, ¶¶ 3-8, 10.) Kaiser provided records  
10 and data in response to Plaintiffs' discovery requests; including, data regarding periods of  
11 employment, pay rates, work schedules, and work weeks. Id. Plaintiffs had sufficient time to examine  
12 the records and submitted the records to a class action damage analysis expert for review. Class  
13 counsels' extensive investigation, discovery, and research weighs in favor of preliminary settlement  
14 approval.

15 4. *Experience and Views of Counsel*

16 As previously noted, class counsel has extensive experience in over two hundred class action  
17 matters, including many wage and hour class actions. (Decl. Blumenthal, ¶ 31; Decl. Qualls, ¶ 13.)  
18 Counsel believes the settlement is fair and adequate, which weighs in favor of preliminary approval.

19 5. *Collusion Between the Parties*

20 The collusion inquiry addresses the possibility the agreement is the result of either overt  
21 misconduct by the negotiators or improper incentives of certain class members at the expense of other  
22 members of the class. Stanton, 327 F.3d at 960. Because there is no evidence of overt misconduct,  
23 the Court's inquiry focuses on the aspects of the settlement that lend themselves to self-interested  
24 action. Id. The aspects of the settlement susceptible to self-interested misconduct are the distribution  
25 between the two subclasses, the Class Representative incentive awards, and attorneys' fees.

26 The distribution between the two subclasses does not appear to be the result of collusion  
27 between the parties. The class is divided into two subclasses with the Site Support Specialist subclass  
28 receiving 40.74% of the settlement and the BAC/Product Specialist subclass receiving 59.26%. This

1 distribution balances the larger number of workweeks allocable towards the BAC/Product Specialist  
2 subclass with the greater amount of overtime worked by the members of the Site Support Specialists.  
3 This reasonable balancing indicates an absence of collusion between the negotiating parties.

4 The \$25,000 incentive award for each Class Representative also does not to appear to be the  
5 result of collusion. The Court evaluates incentive awards using "relevant factors includ[ing] the  
6 actions the plaintiff has taken to protect the interests of the class, the degree to which the class has  
7 benefitted from those actions, ... [and] the amount of time and effort the plaintiff expended in  
8 pursuing the litigation ...." Stanton, 327 F.3d 938, 977 (9th Cir. 2003) (quoting Cook v. Niedert, 142  
9 F.3d 1004, 1016 (7th Cir. 1998). Furthermore, a recent Northern District of California approved a  
10 \$25,000 incentive award in a similar case. Glass, 2007 U.S. Dist. LEXIS 8476. In this case, Plaintiffs  
11 have protected the interests of the class and exerted considerable time and effort by maintaining three  
12 separate lawsuits, conducting extensive informal discovery, hiring experts to analyze discovered data,  
13 and engaging in day-long settlement negotiations with a respected mediator. The class has benefitted  
14 from these actions by receiving a settlement constituting almost ninety percent of the original claim.  
15 For these reasons, the incentive award does not appear to be the result of collusion.

16 Finally, the attorneys' fees also do not appear to be the result of collusion. Plaintiffs may  
17 simultaneously negotiate the merits and attorneys' fees. Stanton, 327 F.3d at 971. In wage and hour  
18 cases "[t]wenty-five percent is considered a benchmark for attorneys' fees in common fund cases."  
19 Hopson v. Hanesbrands Inc., 2008 WL 3385452 at \*3. (N.D. Cal. 2008) (citing Hanlon, 150 F.3d at  
20 1029). Given this benchmark, these fees seem reasonable and not the result of collusion.

### 21 **C. Conclusion**

22 For the foregoing reasons, the Court **GRANTS** preliminary approval of the settlement.

### 23 **III. Appointing Class Counsel**

24 Traditionally, the choice of counsel has been left to the parties, whether they sue in their  
25 individual capacities or as class representatives. In re Cavanaugh, 306 F.3d 726, 734 (9th Cir. 2002).

26 Plaintiffs' counsel appear to be competent to represent the class in the instant case. All firms  
27 involved have extensive experience in class action and wage and hours litigation. As a result, the  
28 court **GRANTS** Plaintiffs' motion to appoint the following firms as class counsel: Qualls &

1 Workman; Sanford, Whittles & Heisler, LLP; Law Offices of Grant E. Morris; Blumethal &  
2 Nordrehaug; and United Employees Law Group. See 15 U.S.C. § 78u-4(a)(3)(B)(v).

3 **IV. Class Notice**

4 The class notice must (1) be "reasonably calculated to apprise interested parties of the  
5 pendency of the action and afford them an opportunity to present their objections" and (2) must satisfy  
6 the content requirements of Rule 23(c)(2)(B). Mullane v. Central Hanover Bank & Trust Co., 339  
7 U.S. 306, 314 (1950). Under Federal Rule of Civil Procedure 23(c)(2)(B), the notice must state:

8 (i) the nature of the action; (ii) the definition of the class certified; (iii)  
9 the class claims, issues or defenses; (iv) that a class member may enter  
10 an appearance through an attorney if the member so desires; (v) that the  
11 court will exclude from the class any member who requests exclusion;  
12 (vi) the time and manner for requesting exclusion; and (vii) the binding  
13 effect of a class judgment on members.

14 Here, the proposed method of notice is reasonable. The Claims Administrator will mail  
15 individual Notices to the members of the settlement class via first-class regular U.S. mail using the  
16 most current mailing address information available from Kaiser's payroll records. Additionally, the  
17 Claims Administrator will reasonably update any out-of-date records of which she is aware.

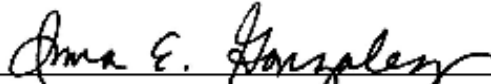
18 The content of the notice is also adequate. The notice includes all necessary information about  
19 the litigation. Accordingly, the Court **GRANTS** approval of the proposed class notice.

20 **CONCLUSION**

21 The Court **GRANTS** the parties' motion for (1) preliminary certification of the class for  
22 settlement purposes; (2) preliminary approval of the settlement; (3) appointment of class counsel; and  
23 (4) approval of class notice program.

24 **IT IS SO ORDERED.**

25 **DATED: October 6, 2008**

26   
27 **IRMA E. GONZALEZ, Chief Judge**  
28 **United States District Court**