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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

Wendell G. Moen, Jay Davis, Donna Ventura, Gregory M.  
Bianchini, Alan Hindmarsh, Cal Wood and Sharon Wood,  
on behalf of Themselves and Others Similarly Situated,

Petitioners,

v.

Regents of University of California, and Does, 1 through  
99, inclusive,

Respondents.

No. RG 10530492

**Memorandum of Points and  
Authorities in Support of  
Petitioners' Motion for Final  
Approval of Stipulation of Class  
Action Settlement and Release**

Date: April 10, 2020

Time: 10:00 a.m.

Dept: 21

Judge: Hon. Winifred Y. Smith

Reservation No: R-2151295

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1 Pursuant to California Rule of Court 3.769 and the parties’ Stipulation for Class Action  
2 Settlement and Release (“Settlement Agreement”), Petitioners Wendell G. Moen, Jay Davis, Donna  
3 Ventura, Gregory M. Bianchini, Alan Hindmarsh, Calvin Wood and Sharon Wood (“Petitioners” or  
4 “Class Representatives”), submit this memorandum in support of their motion for final approval.<sup>1</sup>

5 **I. INTRODUCTION**

6 This Court granted preliminary approval of the settlement on December 20, 2019. (*See* Order  
7 Granting Preliminary Approval of Stipulation of Class Action Settlement and Release (12/20/19);  
8 Order, Motion for Preliminary Approval of Class Settlement Granted (12/20/19).) Since then, notice  
9 of the proposed settlement was given in accordance with the procedures approved by the Court –  
10 which resulted in a notice program that was extremely successful in reaching Class Members. There  
11 was an outpouring of questions by Class Members. At the end of the day, not a single objection was  
12 received. The settlement is now before the Court for final approval. The settlement is fair, adequate  
13 and reasonable. The Court should grant final approval, clearing the way for benefits to the Class after  
14 a decade of litigation.

15 **II. THE ABSENCE OF ANY OBJECTIONS AFTER AN EXHAUSTIVE NOTICE**  
16 **PROCESS SHOWS OVERWHELMING SUPPORT FOR THE SETTLEMENT**

17 **A. The Notice Process Was Exhaustive and Extremely Successful**

18 A detailed report of the notice program is set forth in the Declaration of Blake Deady,  
19 President and General Counsel of Archer Systems, LLC (“Archer”), which was appointed Settlement  
20 Administrator by the Court on December 20, 2019 (Order Granting Preliminary Approval of Class  
21 Action Settlement and Release, ¶ 6.) The Deady Declaration shows that the notice requirements were  
22 successfully implemented.

23 Pursuant to Section VI.B.1 of the Settlement Agreement and Paragraph 8 of the Order Granting  
24 Preliminary Approval of Class Action Settlement and Release (12/20/19), Archer was required to

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26 <sup>1</sup> The Settlement Agreement is attached as Exhibit A to the Declaration of Andrew Thomas  
27 Sinclair filed December 11, 2019 (“Sinclair Decl. No. 1”). It is also attached to the [Proposed] Final  
28 Approval Order and Judgment filed herewith.

1 disseminate the Notice of Proposed Settlement of Class Action (“Notice”) to the Class Members via  
2 first class mail. Two rounds of direct mailing of the Notice of Proposed Settlement were made.  
3 (Deady Decl. ¶¶ 6-7.) Archer sent the Notice via first-class U.S. mail to 8,941 Class Members. (*Id.*)  
4 Only 708 of these were returned as undeliverable. (*Id.* ¶ 7) Via skip tracing, Archer located new  
5 addresses for these individuals, and re-mailed the Notice, after which only 60 were returned by the  
6 U.S. Mail, meaning that only 0.67% of the 8,941 Notices were undeliverable. (*Id.*)

7 This success is further reflected by other indicators. The Notice included a Class Member Data  
8 Form, along with a self-addressed, stamped return envelope, that Class Members were encouraged to  
9 return to Archer (except in the case of certain heirs of deceased Class Members, Class Members are  
10 not required to return the form to receive benefits). As of the date of the execution of this declaration,  
11 ARCHER has received 5,046 Class Member Data Forms that have been completed and returned, an  
12 outstanding response. (*Id.* ¶ 9.)

13 Further, Archer was required to create and maintain a unique toll-free telephone number that  
14 Class Members can call to request documents and information concerning the settlement. (Settlement  
15 Agreement § VIII.A.1(i)). Some 1,750 calls were received. (*Id.* ¶ 16.) Archer received more than 200  
16 inquiries via the unique settlement email address it created. (*Id.* ¶ 17.)

17 Pursuant to Section VI.B.1(ii) of the Settlement Agreement and Paragraph 11 of the Order  
18 Granting Preliminary Approval of Class Action Settlement and Release, Archer created an Internet  
19 Website with information and documents regarding the settlement. It has received more than 2,350  
20 page views from 714 users. (*Id.* ¶ 19.)

21 Additionally, some 90 individuals contacted Class Counsel, who provided information about  
22 the settlement. (*See* Decl. of Andrew Thomas Sinclair in Support of Motion for Final Approval of  
23 Stipulation of Class Action Settlement and Release, and Motion for Attorneys’ Fees (“Sinclair Decl.  
24 No. 2”), filed concurrently herewith, ¶ 80.)

25 The outreach methods provide ample assurance that Class Members received adequate notice  
26 of the terms of the settlement and a full explanation of the benefits it provides.  
27  
28

1           **B.     The Lack of Objections Shows Extraordinary Support for the Settlement**

2           In determining whether final approval is appropriate, the Court considers any objections or  
3 responses from Class Members received after notice. Cal. Rules of Court, Rule 3.769(f); Order  
4 Granting Preliminary Approval of Class Action Settlement and Release (12/20/19), ¶ 10. The subject  
5 matter of the litigation – health insurance – is a core concern of retirees. If Class Members believed  
6 the settlement fell short, they would have objected. Here, not a single Class Member objected.  
7 (Deady Decl. ¶ 20.) The lack of any objection demonstrates that the settlement is fair and adequate  
8 and that the Class supports it. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250-51 (2001)  
9 (20 objections out of 2.4 million class members shows support for the settlement); *7-Eleven Owners*  
10 *for Fair Franchising v. Southland Corp.*, 85 Cal. 4th 1135, 1152-53 (2000) (support shown by 9  
11 objections out of 5,454 noticed class members).

12           **III.    FINAL APPROVAL OF THE SETTLEMENT IS WARRANTED.**

13           **A.     The Settlement Terms**

14           The settlement before the Court is the culmination of nearly ten years of litigation to vindicate  
15 a contractual right to health insurance in retirement. The Class consists of approximately 9,000  
16 individuals who worked for the University of California for decades at its Lawrence Livermore  
17 National Laboratory (“LLNL”) who retired with their UC pensions and health insurance intact. In  
18 2007, the management of the laboratory was transferred from UC to a private entity, Lawrence  
19 Livermore National Security, LLC (“LLNS”). The retirees continued to receive their UC pension, but  
20 their UC retiree health care was terminated. Retiree health benefits were transferred to LLNS, but the  
21 benefits provided could be terminated at any time and were less comprehensive and more costly.

22           A detailed and thorough description of the litigation accompanies this motion. (Sinclair Decl.  
23 No. 2 ¶¶ 8-85.) The primary purpose of the litigation was to provide Class Members with security that  
24 they will receive health care benefits during retirement. A secondary purpose was to recover damages.  
25 A detailed description of the terms set forth in the Settlement Agreement is presented in the  
26 declarations filed in support of preliminary approval on December 11, 2019, the Sinclair Declaration  
27 No. 1 (12/11/19) and the Declaration of Allan Phillips (12/11/19) (“Phillips Decl.”). The basic terms  
28

1 are reiterated in the summary that follows, which shows that the settlement accomplishes the main  
2 objectives of the litigation.

3 **1. Security: Reinstatement of UC Benefits under Certain Conditions**

4 The Settlement is not designed to build a benefits system from scratch. Class Members will  
5 continue to have access to health care benefits through the LLNS Plan. To address the insecurity of  
6 the LLNS Plan being subject to termination at any time, *Moen v. Regents of Univ. of Cal.*, 25 Cal.  
7 App. 5th 845, 849 (2018), the settlement includes “backstop/reinstatement” provisions requiring the  
8 Regents to reinstate University-sponsored benefits if LLNS fails to provide retiree health care benefits  
9 or makes a material change in the benefits. (Settlement Agreement §§ V.C, V.D). This protection will  
10 remain in place until December 31, 2040 (or earlier if there is a final distribution). (*Id.*)

11 Class Members must be offered benefits that are comparable to what they are now offered for  
12 the next seven years. (Settlement Agreement § V.D.1.) After that, for years 8 through 20, Medicare-  
13 eligible Class Members must receive the same benefits as people who retired from LLNS between  
14 2008 and 2019 and are in the LLNS Plan; that is, LLNS cannot reduce the benefits it provides Class  
15 Members without reducing the benefits to its own retirees. (*Id.* § V.D.2.) Non-Medicare-eligible  
16 Class Members are given the additional protection that the LLNS per-member contribution cannot  
17 drop below the year seven contribution. (*Id.*) This provides increased security for the Class Members.

18 **2. Settlement Fund**

19 The Regents will pay \$80,000,000 to the Settlement Administrator over the next seven years to  
20 create the Settlement Fund. (Settlement Agreement § V.A.1-3, Schedule A.) The Regents will make a  
21 further payment of \$4,000,000 to cover the cost of benefits counseling services; and will pay \$500,000  
22 toward administrative costs. (*Id.* § V.B.) The settlement is generally designed to be a “checks-  
23 mailed” settlement – subject to safeguards to verify the identity of heirs of deceased Class Members.

24 **a) Initial \$1,000 Payment**

25 All Class Members (both living and deceased) will receive an Initial \$1,000 Payment shortly  
26 after the settlement is approved by the Court. (Settlement Agreement § V.A.3, 12, Schedule A.)  
27 There are approximately 9,000 Class Members, so this will cost approximately \$9 million. (Sinclair  
28



1 Decl. No. 2 ¶ 92.) This payment, made after years of litigation, will provide immediate relief to Class  
2 Members without a costly claims procedure. Providing this relief in timely fashion is critical because  
3 the average age of the Class Members is approximately 78, and other benefits, including Supplemental  
4 Payments, cannot be distributed until a number of administrative tasks are completed, such as  
5 establishing the VEBA. (See Sinclair Decl. No. 1 ¶¶ 3, 14-17.) The Initial \$1,000 Payment also  
6 compensates for the long delay in resolving the case, and accounts for damages not otherwise covered  
7 in the settlement. (Settlement Agreement § V.A.3; Schedule A.)

8 **b) Past Damages Payments**

9 In addition to the Initial \$1,000 Payment, past damages will be paid to eligible Class Members  
10 and/or their heirs (“Past Damages Payments”). (Settlement Agreement § V.A.3, 5, Schedules A & B  
11 thereto.) The amount of the Settlement Funds available for past damages will not exceed \$20 million,  
12 inclusive of the Initial \$1,000 Payment, leaving approximately \$11,000,000 for Past Damages  
13 Payments. This will leave sufficient funds to address the primary concern of the litigation: securing  
14 adequate future health care benefits for the Class Members. (Sinclair Decl. No. 2 ¶¶ 88, 90-92.)

15 Past Damages Payments will compensate Class Members who suffered damage as a result of  
16 the difference in premium costs between LLNS and UC benefits. (See Phillips Decl. ¶ 21.) In  
17 particular, these payments will go to two groups who suffered significant actual damage: (1) Class  
18 Members who are living and not eligible for Medicare, and (2) Class Members who are living and  
19 Medicare-eligible and elected Kaiser Senior Advantage. (Id. ¶¶ 22-23.) A third group is also eligible  
20 for such payments: Class Members who died between October 15, 2010 and the Effective Date of the  
21 settlement. (Settlement Agreement, Schedule B; Phillips Decl. ¶ 24.) This group is entitled to such  
22 payments because they, unlike the other Class Members, will not receive the annual Supplemental  
23 Payments. (Settlement Agreement § V.A.7; see also Phillips Decl. ¶ 24.) Remaining Class Members  
24 will be compensated by the Initial \$1,000 Payment. (Phillips Decl. ¶ 14.)

25 Past Damages Payments will be calculated according to the formulas in Schedule B to the  
26 Settlement Agreement. (Settlement Agreement § V.A.10, Schedule B.) Explanations of relevant data  
27 are set forth in the Phillips Declaration and will be calculated based on a Class Member’s  
28

1 circumstances and plan selection each year. (*Id.* § V.A.3, 10, Schedule B; Phillips Decl. ¶ 25-38.)  
2 After calculating past damages for eligible Class Members, the Settlement Administrator will  
3 determine the Member’s *pro rata* share, if any, of the \$11,000,000 available for Past Damages  
4 Payments. (*Id.*) It is not possible to specify a given Class Member’s Past Damages Payment until the  
5 relevant data is obtained. However, based on current data, on average, this would result in payments  
6 of \$24,000 per non-Medicare eligible Class Member, \$11,000 per Kaiser Senior Advantage Class  
7 Member, and \$2,400 per deceased Class Member. (Phillips Decl. ¶ 38.) The actual amount a given  
8 Class Member will receive will depend on their individual circumstances.

9 **c) Supplemental Payments to Class Members - the VEBA**

10 The remaining funds (\$60,000,000) will be directed to benefits going forward by establishing a  
11 Voluntary Employees’ Beneficiary Association (“VEBA”). (Settlement Agreement § V.A.3, 4,  
12 Schedule A.) All living Class Members are eligible for the annual Supplemental Payment, unless they  
13 do not participate in a LLNS plan. (*Id.* § V.A.7, 8.)

14 The assets in the VEBA will be managed for the benefit of the Class Members and used to pay  
15 for health care costs of the Class Members and administrative expenses of the VEBA. (*Id.* § V.A.4 (i),  
16 (iv).) The VEBA will be administered by a VEBA Trustee, who is required to administer the VEBA  
17 in the interest of the Class Members. (*Id.* at §§ III.A.37; V.A.3; V.A.4(i).) The VEBA Trustee will be  
18 selected, with Court approval, by the Settlement Administrator. (*Id.* at § III.A.37.)

19 The initial Supplemental Payments will be based on the formulas in Schedule C to the  
20 Settlement Agreement. Each year thereafter, the Settlement Administrator and VEBA Trustee will use  
21 their discretion and professional judgment to determine the amount of the Supplemental Payments and  
22 the formulas used, consistent with the goal of maximizing Supplemental Payments to Class Members  
23 for the next 20 years.<sup>2</sup> (*Id.* §§ V.A.3, 6, 7, Schedule C.) They are authorized to depart from the initial  
24 methodology to account for changes in plan expenses, economic conditions, the VEBA’s financial  
25 status, and other relevant considerations. After 20 years, or when only 1,000 Class Members are still  
26

27 <sup>2</sup> Petitioners plan to establish an advisory group to work with and advise the Settlement  
28 Administrator and the VEBA Trustee.

1 living, the Trustee will terminate the VEBA Trust and distribute any remaining funds to the living  
2 Class Members. (*Id.* § V.A.14.)

3 The Supplemental Payments will be calculated for each Class Member depending on their  
4 particular circumstances. (*Id.* § V.A.7 & Schedule C.) Schedule C provides examples (based on 2019  
5 models) of how the Supplemental Payments would be applied. A full explanation and analysis of  
6 these formulas and payments is set forth in the Phillips Declaration. (Phillips Decl. ¶¶ 39-45.)

7 Exhibit 1 to Schedule C shows how a member of each type of plan would be awarded a  
8 Supplemental Payment based on the initial methodology and 2019 data. (*Id.* ¶ 45.) Approximately  
9 95% of the Class Members select their benefits through Via Benefits or are in Kaiser Senior  
10 Advantage. (*Id.* ¶¶ 58, 60.) The expert analysis shows that for these Class Members, with annual  
11 Supplemental Payments delivered from the VEBA (in the amount of \$550 or \$558 per year) in  
12 addition to the benefits provided by the LLNS Plan, the settlement provides coverage that is  
13 reasonably comparable to University-sponsored benefits. (*Id.* ¶ 61.) The remaining living Class  
14 Members consist of those who are Non-Medicare eligible (approximately 5% of the living Class  
15 Members). (*Id.* ¶ 62.) Based on the initial methodology and 2019 data, these Non-Medicare eligible  
16 Class Members would receive Supplemental Payments between \$2,009 and \$6,705 per year, and more  
17 than half of them would be better off or equal under the settlement compared to the University-  
18 sponsored benefits. (*Id.*) While a handful of Non-Medicare eligible Class Members under Kaiser  
19 (approximately 133 people) will pay more than under University-sponsored plans, they will receive a  
20 significantly larger amount of past damages on average, and a significant Supplement Payment going  
21 forward. (*Id.* ¶ 63) Additionally, the remaining financial burden on these Non-Medicare eligible  
22 Class Members under Kaiser is relatively small and within the target contemplated by the settlement  
23 for Non-Medicare eligible class members (10% of the cost of the plan). (*Id.*)

24 If a Class Member changes health care plans, the Supplemental Payment the following year is  
25 determined based on the new plan. (Settlement Agreement § V.A.9.) This allows Class Members to  
26 use the Supplemental Payment to choose the plan that is best for that Class Member.

1 An actuarial analysis based on the initial Supplemental Payment formulas and current data is  
2 attached to the Settlement Agreement at Exhibit 2 to Schedule C. This analysis anticipates the VEBA  
3 lasting for 20 years and having approximately \$1,483,661 left for final distribution to the living Class  
4 Members at the time of dissolution. (Phillips Decl. ¶ 46.)

5 **d) Final Distribution**

6 The Supplemental Payments are intended to continue until December 31, 2040; or until the  
7 Settlement Administrator and the VEBA Trustee estimate that 1,000 Class Members are still living.  
8 (Settlement Agreement § V.A.14.) At that time, after Administrative Costs are paid, remaining funds  
9 in the VEBA Trust (if any) will be returned to the QSF for distribution to the Class Members who are  
10 living pursuant to the Settlement Agreement. (*Id.*) The VEBA will then be terminated.

11 **3. Dispute Resolution**

12 If a Class Member believes the Settlement Administrator has failed to pay the correct amount,  
13 the person may submit a written Request for Review to the Settlement Administrator. (*Id.* § V.A.13.)  
14 The Settlement Administrator, after requesting appropriate documentation, must provide the Class  
15 Member an explanation in writing as to why the request is being granted or denied. (*Id.*)

16 **4. Taxability of Benefits**

17 The Settlement Agreement takes account of taxability issues. Petitioners have structured the  
18 Supplemental Payments to fall within IRC § 501(c)(9) so as not to be taxable. (Settlement Agreement  
19 § V.A.16; Sinclair Decl. No. 1 ¶ 4.) In contrast, the Initial \$1,000 Payment and Past Damages  
20 Payment will likely be deemed taxable and the Settlement Administrator will provide 1099 forms to  
21 individual Class Members. (*Id.*)

22 **5. Benefits Counseling Services**

23 To support the best use of the Supplemental Payments, benefit counseling services will be  
24 made available to the Class Members to help with their selection, acquisition and utilization of health  
25 insurance (“Benefit Counseling Services”). (Settlement Agreement §§ V.B; III.A.6.) In addition to  
26 the \$80 million Settlement Fund, The Regents will pay \$4,000,000 for Benefit Counseling Services,  
27 provided by a third party to be hired by the Settlement Administrator. (*Id.*)

1                   **6.       Administrative Costs**

2                   Implementing the settlement will involve substantial administrative costs. (*See* Sinclair Decl.  
3 No. 1 ¶ 26; Settlement Agreement § III.A.2.) The Regents agreed to contribute \$500,000 for these  
4 costs; remaining costs will come out of the Settlement Fund. (Sinclair Decl. No. 1 ¶¶ 27, 29;  
5 Settlement Agreement § V.B.)

6                   **7.       Court Monitoring**

7                   The settlement provides for monitoring and reporting to the Court throughout the life of the  
8 settlement. (Settlement Agreement § V.E.) The Parties have proposed Hon. Maria-Elena James to  
9 serve as Court Monitor for three years. (*Id.* § III.A.10; Sinclair Decl. No. 1 ¶ 28.) The Court Monitor  
10 will provide annual reports to the Court regarding the status of the benefits provided by LLNS and the  
11 Class Members’ receipt of benefits. (Settlement Agreement § V.E.) The cost of the Court Monitor is  
12 to be borne equally by the parties. (*Id.*) Starting in year four, the Settlement Administrator will take  
13 over the role of providing an annual report to the Court, the cost of which shall come out of the  
14 Settlement Fund. (*Id.* § V.E.3-4)

15                   **8.       Released Claims**

16                   The releases are properly tied to the claims in the Third Amended Petition. Class Members  
17 will release the right to sue for any claim of entitlement to post-retirement healthcare insurance  
18 benefits against the Regents, LLNS, NNSA and the U.S. Department of Energy predicated on the  
19 allegations in the Third Amended Petition. (*See* Settlement Agreement §§ III.A.30, IX.A, B, D.)  
20 Certain claims that are not predicated on the Third Amended Petition, such as claims to enforce  
21 pension rights, are expressly excluded. Petitioners, but not the remaining Class Members, also waive  
22 protections under California Civil Code § 1542. (*Id.* § IX.E.)

23                   **9.       Attorney Fees**

24                   After the foregoing provisions of the settlement had been agreed upon, the parties accepted the  
25 mediator’s proposal of an award not to exceed \$12,000,000. The Court’s approval of the agreed fee  
26 award is sought by separate motion.

1           **B.       The Settlement Is Fair, Adequate and Reasonable**

2           To determine whether the terms are “fair, adequate and reasonable,” courts consider the  
3 following factors:

4           the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of  
5 further litigation, the risk of maintaining class action status through trial, the amount  
6 offered in settlement, the extent of discovery completed and the stage of the  
7 proceedings, the experience and views of counsel, the presence of a governmental  
8 participant, and the reaction of the class members to the proposed settlement.

8 *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801, 1803 (1996) (citing *Officers for Justice v. Civil*  
9 *Serv. Comm’n of Cty. and Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982)).

10           A presumption of fairness arises “where: (1) the settlement is reached through arm’s-length  
11 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act  
12 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is  
13 small.” *Dunk*, 48 Cal.App.4th at 1802. Accordingly, “[i]f the proposed settlement appears to be the  
14 product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not  
15 improperly grant preferential treatment to class representatives or segments of the class, and falls  
16 within the range of possible approval, then the court should direct that the notice be given to the class  
17 members of a formal fairness hearing ....” *In re Tableware Antitrust Litigation*, 484 F.Supp.2d 1078,  
18 1079 (N.D. Cal. 2007) (quoting *Manual for Complex Litigation, Second*, § 30.44 (1985) (internal  
19 quotation marks omitted)).

20           The Court independently reviews the settlement to ensure it is fair, adequate, and reasonable,  
21 after being “provided with basic information about the nature and magnitude of the claims in question  
22 and the basis for concluding that the consideration being paid for the release of those claims represents  
23 a reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 133 (2008);  
24 *Clark v. Am. Residential Services, LLC*, 175 Cal.App.4th 785, 799 (2009). Thus, the “factual record  
25 before the ... court must be sufficiently developed,” and the initial presumption of fairness “must then  
26 withstand the test of the plaintiffs’ likelihood of success.” *Kullar*, 168 Cal.App.4th at 130 (internal  
27 quotation marks omitted). This settlement meets all relevant criteria for approval.

1                   **1.       The Settlement Is Presumptively Fair Because It Is the Result of Non-**  
2                   **Collusive, Arms-Length, Informed Negotiations by Experienced Counsel**  
3                   **with the Assistance of Hon. Maria-Elena James (Ret.)**

4                   A settlement is presumptively reasonable and fair where it is “reached through arm’s-length  
5 bargaining,” where “investigation and discovery are sufficient to allow counsel and the court to act  
6 intelligently”; and where “counsel is experienced in similar litigation.” *Dunk*, 48 Cal.App.4th at 1802;  
7 *see also Kullar*, 168 Cal.App.4th at 128. Further, “The court undoubtedly should give considerable  
8 weight to the competency and integrity of counsel and the involvement of a neutral mediator in  
9 assuring itself that a settlement agreement represents an arm’s length transaction entered without self-  
10 dealing or other potential misconduct.” *Kullar*, 168 Cal.App.4th at 129.

11                  Here, the settlement was reached through two court-ordered settlement conferences with Judge  
12 Zika and 13 in-person mediations sessions with Judge James since September 7, 2018. (Sinclair Decl. No.  
13 2 ¶ 56; Settlement Agreement § II.D.) There were hard-fought, arm’s-length negotiations regarding the  
14 amount of the settlement, benefit counselors, administrative costs, and attorney’s fees and costs. (Sinclair  
15 Decl. No. 2 ¶ 57.) The Parties did not have any agreement regarding attorney’s fees until they had reached  
16 agreement on all other material terms. (*Id.* ¶ 96; *see also* Sinclair Decl. No. 1 ¶ 33.)

17                  An extraordinary amount of investigation and discovery was required, including the depositions of  
18 ten Petitioners; production of tens of thousands of pages of records by the University stretching back to at  
19 least 1952; and numerous subpoenas to LLNS and its service providers. A full trial was competed with  
20 regard to Phase I (Sinclair Decl. No. 2 ¶¶ 13, 22, 31-34.) After the Court ruled that economic loss was  
21 required to prove impairment, almost two years of intense discovery ensued, as well as a motion to compel  
22 the Regents to produce a complete class list. Counsel consulted a number of experts and several were  
23 hired for Phase II.

24                  The proceedings came to a halt when the Court decertified the Class on November 21, 2017. But  
25 the Court of Appeal expedited Petitioners’ appeal and issued a decision in near record time on August 1,  
26 2018, reversing the order. This was the *second* favorable decision from the Court of Appeal in this case.  
27 Both decisions were published and have provided significant guidance for this case as well as other  
28 pending cases. Indeed, it is hard to imagine a case that has been more thoroughly litigated and mediated.

1 Class Counsel, who have represented Petitioners since 2010 and were appointed to represent the  
2 Class in 2014, are experienced and qualified to evaluate the Class claims, the defenses asserted, the risks of  
3 trial, and the benefits of settlement. (Sinclair Decl. No. 2 ¶¶ 10, 66, 87-95; Declaration of Dov M.  
4 Grunschlag (“Grunschlag Decl.”) ¶¶ 2-3; Declaration of Kathleen V. Fisher (“Fisher Decl.”) ¶¶ 2-3;  
5 Declaration of John Stember (“Stember Decl.”) ¶¶ 1-3.) Class Counsel have decades of experience  
6 litigating cases related to public benefits, retiree rights, and employment rights, including in class action  
7 formats and in other cases involving UC. (Sinclair Decl. No. 2 ¶¶ 2, 10, 20.) “The [trial] court may and  
8 undoubtedly should continue to place reliance on the competence and integrity of counsel ....” *Kullar*,  
9 168 Cal.App.4th at 133. Here, Class Counsel endorses the settlement as an excellent result for the  
10 Class. (Sinclair Decl. No. 2 ¶¶ 87-95.) Petitioners were appointed class representatives, were  
11 qualified to evaluate the risks and benefits of settling and did so at numerous in-person meetings.  
12 (Sinclair Decl. No. 2 ¶¶ 57, 71.)

13 Accordingly, the Court may rely on the presumption that the settlement is reasonable and fair.

14 **2. *Kullar* Analysis: The Settlement Provides Reasonable Compensation for**  
15 **Class Members in Light of Significant Litigation Risks**

16 Even though fairness may be presumed, the Court should “independently and objectively  
17 analyze the evidence and circumstances before it in order to determine whether the settlement is in the  
18 best interests of those whose claims will be extinguished.” *Kullar*, 168 Cal.App.4th at 130 (quoting 4  
19 Newberg on Class Actions, *supra*, § 11.41 at p. 90; other citations omitted). The most important  
20 factor is the amount of the settlement compared to what could be achieved at trial when viewed in  
21 light of the risks of going forward. *See Kullar*, 168 Cal. App. 4th at 130. Here, the settlement will  
22 provide Petitioners and the Class with substantial benefits for their claims.

23 **a) The Reinstatement Provisions Address the Concern that LLNS**  
24 **Could Stop Providing Retiree Health Benefits**

25 The Petition for Writ of Mandate sought restoration of University-sponsored benefits in large  
26 part because of Class Members’ concern that LLNS could stop sponsoring retiree health benefits. The  
27  
28



1 settlement’s backstop/reinstatement provisions address these concerns by ensuring that Class Members  
2 must either be provided adequate benefits from LLNS or be returned to UC plans.

3 The settlement provides that if LLNS terminates or materially changes health care benefits,  
4 Class Members will be reinstated to University-sponsored benefits. This restores the security of  
5 benefits provided to other UC retirees and satisfies the comparability test under *Kullar*.

6 **b) The Settlement Enhances Class Members’ Benefits**

7 Because the Petition for Writ of Mandate sought restoration of University-sponsored benefits,  
8 it is appropriate to compare health care coverage under the settlement with health care through UC.  
9 Here, too, the settlement provides substantial benefits to the Class. Petitioners’ experts have  
10 determined that, with annual supplemental payments delivered from the VEBA for both Medicare-  
11 eligible retirees and those not eligible for Medicare, the settlement will provide benefits that are  
12 roughly comparable to UC benefits. (Sinclair Decl. No. 2 ¶ 91; Phillips Decl. ¶¶ 48-63.)

13 In addition to funds that will allow Class Members to supplement the health care benefits  
14 provided by LLNS, the settlement provides for \$4,000,000 to provide counseling services. (Settlement  
15 Agreement § V.B.) This benefit is particularly important for an aging population faced with complex  
16 health care choices. For example, Via Benefits offers coverage through approximately 300 health care  
17 and 380 prescription plans. (Sinclair Decl. No. 1 ¶ 25; Phillips Decl. ¶ 8.) Benefit counselors will be  
18 instrumental in assisting Class Members to make informed decisions. (Sinclair Decl. No. 1 ¶ 25.)

19 **c) Past Damages**

20 In addition to restoring UC-sponsored benefits, the Third Amended Petition asks for  
21 “restitution and/or damages ... with interest at the legal rate...” (Third Amended Petition, Prayer, ¶ 3.)  
22 It is therefore appropriate to compare past damages under the settlement with what the Court could  
23 award if Petitioners prevail at trial. *Kullar*, 168 Cal.App.4th at 130. As explained above, all Class  
24 Members (living and deceased – or their heirs) will receive the Initial \$1,000 Payment. This will  
25 cover a substantial portion of past damages for most Class Members. (Phillips Decl. ¶¶ 15, 21.) Three  
26 other groups of Class Members will then be eligible for further Past Damages Payments (non-  
27  
28

1 Medicare eligible Class Members, Kaiser Senior Advantage Class Members, and deceased Class  
2 Members.) (*Id.* ¶¶ 22-24.)

3 This is a “reasonable compromise, given the magnitude and apparent merit of the claims being  
4 released, discounted by the risks and expenses of attempting to establish and collect on those claims by  
5 pursuing the litigation.” *Kullar*, 168 Cal.App.4th at 129.

6 The claim for monetary damages was always secondary, compared to restoring the security of  
7 University-sponsored health care benefits. (*See* Third Amended Petition, Prayer ¶¶ 2-3; Sinclair Decl.  
8 No. 2 ¶¶ 12, 18.) Accordingly, the parties structured the settlement such that most of the settlement  
9 funds are allocated towards better health care benefits for living Class Members going forward. (*See*  
10 Settlement Agreement, Schedule A; Sinclair Decl. No. 2 ¶¶ 87-89.)

11 **d) Risks of Going to Trial**

12 The risks of going to trial also justify the settlement. *See Kullar*, at 129. First, the losing party  
13 would appeal, likely leading to years of delay. With 25 Class Members passing away each month, the  
14 interest of the Class is a prompt and fair settlement. Second, although Petitioners prevailed in Phase I,  
15 the findings were sure to be tested on appeal. Third, three issues remained for Phase II (whether the  
16 parties’ conduct manifested an offer and acceptance of mutual promises, whether the contract required  
17 that the Class be in the same pool as other UC retirees, and whether the contract was  
18 unconstitutionally impaired). *Moen*, at 850. Fourth, the Court would have to agree that a Peremptory  
19 Writ was appropriate for Class Members who were still living; and that the Writ could direct the  
20 Regents to pay past damages. These risks support approval of the highly favorable settlement. *Kullar*,  
21 168 Cal.App.4th at 129-130.

22 **3. No Preferential Treatment**

23 There is no improper preferential treatment for Petitioners or any subgroup. Class representatives  
24 do not seek any reward for their service. The allocation of the Settlement Funds among the Class  
25 Members is reasonable and fair. *See Edwards v. Nat’l Milk Producers Fed’n*, No. 11-CV-04766-JSW,  
26 2017 WL 3623734, at \*8 (N.D. Cal. Jun. 26, 2017). The Initial \$1,000 Payment will ensure  
27 immediate, wide-spread relief without a cumbersome, time-consuming and expensive claims process.  
28

1 *See id.*; *see also* Dept. 21 Guidelines for Preliminary Approval of Class Action Settlement, ¶ 2  
2 (preference for checks-mailed process over claims-made process). Additional Past Damages  
3 Payments will be divided among the groups that suffered the greatest actual damages\}. *See Edwards*,  
4 2017 WL 3623734 at \*8 (“A plan of allocation that reimburses class members based on the extent of  
5 their injuries is generally reasonable.”). Deceased Class Members will also be eligible for Past  
6 Damages Payments as a matter of fairness, since they will not, like all other Class Members, receive  
7 the annual Supplemental Payments. Further, the allocation between Past Damages (capped at \$20  
8 million) and Supplemental Payments (approximately \$60 million, minus administrative costs) reflects  
9 both the purposes of the litigation and the relative strength of the claims at issue. *See id.* In providing  
10 different relief to subsections of the class, the settlement properly tailors the relief to the harm  
11 suffered. *See In re: Cathode Ray Tube (Crt) Antitrust Litig.*, No. 07-CV-05944-JST, 2016 WL  
12 721680, at \*21 (N.D. Cal. Jan. 28, 2016); *see also In re Oracle Sec. Litig.*, No. 90-CV-00931-VRW,  
13 1994 WL 502054, at \*1 (N.D. Cal. June 18, 1994).

#### 14 **IV. CONCLUSION**

15 Based on the foregoing, Petitioners respectfully request that the Court grant this motion for  
16 final approval of the Settlement Agreement resolving this action and enter the [Proposed] Final  
17 Approval Order and Judgment submitted herewith.

18 In its Dept. 21 Guidelines for Final Approval of Class Action Settlement, ¶ 7, the Court  
19 requests that the parties suggest a date for a Compliance Hearing, which Petitioners suggest be set on  
20 or around December 11, 2020. At this time, the parties will be in a position to report about the latest  
21 open enrollment period, the contracting with the benefit counselors, the setting up of the VEBA, the  
22 delivery of the Initial \$1000 Payment, the status of Past Damages Payments, and other key initial  
23 elements of the settlement.

24  
25 DATE: March 17, 2020

26 

27 Andrew Thomas Sinclair  
28 Attorney for Petitioners and Class