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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

Wendell G. Moen, Jay Davis Donna Ventura, Robert Becker, Gregory M. Bianchini, Geores Buttner, 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 Preliminary Approval of Joint Stipulation of Class Action Settlement and Release

Date: 12/20/19
Time: 10:00 a.m.
Dept: 21
Judge: Hon. Winifred Y. Smith
Reservation No: R-2137016

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Pursuant to California Rules of Court 3.769(c), Petitioners Wendell G. Moen, Jay Davis, Donna Ventura, Gregory M. Bianchini, Alan Hindmarsh, Calvin Wood and Sharon Wood ("Petitioners" or "Class Representatives"),[1] submit this memorandum of points and authorities in support of their motion for preliminary approval of the Stipulation for Class Action Settlement and Release ("Settlement Agreement" or "Settlement") they reached on or around December 11, 2019 with The Regents of the University of California ("Respondents" or "The Regents").[2]

I. INTRODUCTION

The settlement before the Court is the culmination of nearly ten years of litigation to vindicate a contractual right to health care benefits during retirement. The Class consists of approximately 9,080 retirees (or spouses, dependents or heirs of retirees) who worked for the University of California for decades at its Lawrence Livermore National Laboratory; and had retired with their pensions and health care benefits intact. On October 1, 2007, the management of the Laboratory was transferred to a private entity, Lawrence Livermore National Security, LLC ("LLNS"). The Class continued to receive their University pension, but their University-sponsored health care benefits were terminated. LLNS began to provide retiree health benefits, but is not contractually bound to continue to do so and can terminate benefits at any time. Petitioners assert that LLNS coverage is less comprehensive, more costly and less secure.

The primary purpose of the litigation was to restore University-sponsored benefits; and secondarily to recover past monetary damages. Although the settlement does not restore University-sponsored benefits, it provides the Class with substantially enhanced benefits and ensures that University-sponsored benefits will be restored if LLNS terminates or materially alters the benefits it provides (which are supplemented by the settlement). The settlement provides a significant portion of past damages and ensures that enhanced benefits will be available for the next 20 years (or until only 1,000 Class Members are living, at which time remaining funds will be distributed).

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[1] Robert Becker and Geores Buttner have passed away. (See Decl. of Andrew Thomas Sinclair ("Sinclair Decl."), filed concurrently herewith, ¶ 3.)

[2] Capitalized words have the same definition as in the Settlement Agreement.

This goes a long way toward achieving the goals of the litigation. First, if LLNS coverage ceases entirely, or falls below specified levels, the impacted Class Members will be directly restored to University-sponsored coverage. Second, the settlement significantly increases Class Members' health care benefits: as explained by the health care benefit experts retained by the Class, those who are Medicare-eligible – 95% of the Class – will receive benefits reasonably comparable to those provided by the University. For the other 5% – approximately 350 Class Members who are not eligible for Medicare – more than half are better off or equal under the settlement compared to UC; and while a handful of these Class Members will pay more than under UC plans, their financial burden is still relatively small, and they will receive (on average) the most significant benefits under the settlement. Third, the settlement compensates those Class Members who incurred past damages.

The settlement provides that the University will pay $84,500,000, of which $20,000,000 will be used to reimburse Class Members for past damages, $60,000,000 (minus administrative costs) will be used to establish a trust to distribute funds going forward, $4,000,000 will be used for benefit counseling services, and $500,000 will be contributed toward administrative costs. If LLNS coverage ceases entirely, or falls below specified levels, University-sponsored coverage will be restored for impacted Class Members. If reinstatement occurs, the remaining money in the Settlement Fund, subject to approval of the Court, will be used to fund Class Members' University-sponsored health benefits.

The settlement has been obtained after years of hard-fought litigation that included two published appellate opinions and over a year of mediation. It delivers benefits that the aging class (diminishing daily) urgently needs. It is fair and reasonable and should be approved.

II. BACKGROUND AND PROCEDURAL SUMMARY

A. The Underlying Dispute

Petitioners and the Class Members are retirees (or spouses, dependents or heirs of retirees) of the University of California ("The Regents" or "University") who worked at the Lawrence Livermore National Laboratory ("LLNL" or "Laboratory"). (Third Amended Petition ("TAP") ¶ 126.) The Regents managed the Laboratory from 1952 to 2007 pursuant to a contract with the U.S. Department of Energy (and its predecessor agencies) which owns LLNL. (TAP ¶¶ 79, 117.) From 1961 to 2007, The

Regents provided University-sponsored group health plan coverage to employees and retirees who worked at the Laboratory. (TAP ¶¶ 80-82.) In 2007, the U.S. Department of Energy ("DOE") awarded the management contract to LLNS, a private-sector LLC. (TAP ¶ 117.) LLNS began managing the Laboratory on October 1, 2007. (TAP ¶ 75.)

All Class Members were employed at LLNL (or are spouses, dependents or heirs of employees), and retired on or before September 30, 2007 – that is, before the transition to LLNS. (TAP ¶ 126; Order re Class Certification, 10/30/14, pp. 1, 7.) After these employees retired, they and their spouses, dependents and heirs received University-sponsored group health plan coverage like all other eligible UC retirees. (TAP ¶¶ 82, 84.)

As part of the October 1, 2007 transition in Laboratory management, University-sponsored health care benefits were terminated and Class Members were moved to the LLNS Health and Welfare Benefit Plan for Retirees ("LLNS Plan"). (TAP ¶¶ 115, 118.) The LLNS Plan is a private-sector plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq*. Health and welfare benefits, including retiree health care benefits, are expressly not vested under ERISA and may be modified or terminated at any time. *See* 29 U.S.C. §§ 1051(1), 1081(a)(1); *M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926, 933 (2015). Consistent with ERISA, the Summary Plan Description for the LLNS Plan provides:

> LLNS, in its sole discretion, reserves the right to amend or terminate in writing at any time the Plan … and/or any Benefit Program. … This is a change from the status of benefits provided by the [University], which may have been subject to the 'vested rights doctrine' or similar doctrines, which limit certain benefit plan changes.

(*See* Declaration of Andrew Thomas Sinclair in Support of Motion for Summary Adjudication (filed 7/7/17), Exh. 31 [Summary Plan Description] at p. 1.) *See also Moen v. Regents of Univ. of Cal.*, 25 Cal.App.5th 845, 849 (2018).

Petitioners contend that the termination of University-sponsored benefits constituted impairment of their implied contractual right since the benefits were repeatedly promised, in over 100 benefit publications, over many decades. The Regents maintains that University-sponsored health benefits were offered to University employees and retirees as a matter of policy, not contract. The Regents further

maintains that it was reimbursed for sponsoring Laboratory health benefits as an allowable cost under its contract with the DOE, and that when DOE selected a new contractor, it was not obligated to continue providing UC benefits. The Regents also contend that there is no contractual obligation to sponsor health benefits for Laboratory retirees.

B. The Litigation

This action was filed on August 11, 2010 by Joe Requa, Wendell Moen, Jay Davis and Donna Ventura. On December 21, 2010, the Court sustained The Regents' demurrer with leave to amend. After a First Amended Petition was filed on January 24, 2011, a demurrer was sustained (on 5/26/11), and Petitioners appealed. On December 31, 2012, the Court of Appeal reversed, holding that the allegations of impairment of implied contract were sufficient to state a cause of action. *Requa v. Regents of Univ. of Cal.*, 213 Cal.App.4th 213, 226-228 (2012).

After remand, Petitioners filed a Second Amended Petition on October 15, 2013, adding class allegations and several more petitioners (Robert Becker, Gregory M. Bianchini, Geores Buttner, Alan Hindmarsh, Steve Hornstein, Calvin Wood and Sharon Wood) as class representatives. The Regents filed an Answer and Return on December 6, 2013.

On December 23, 2013, Joe Requa withdrew for medical reasons. The case proceeded as *Moen v. Regents of University of California*. Two of the named Petitioners, Robert Becker and Geores Buttner, have passed away, and Steve Hornstein withdrew for medical reasons. (Sinclair Decl. ¶ 3; Stip. and Order (11/25/19).)

Petitioners filed the operative Third Amended Petition ("TAP") on March 27, 2014. The Parties stipulated that the Answer to the Second Amended Petition filed on December 6, 2013 would constitute The Regents' Answer to the Third Amended Petition. (*See* Stipulation and Order for Leave to File Third Amended Petition and Response to Third Amended Petition (3/25/14).)

The Parties engaged in extensive discovery. In April 2014, The Regents took the depositions of all ten named Petitioners. The Regents demanded documents from Petitioners and produced thousands of pages of documents, reflecting relevant actions by The Regents dating back to the 1950s. (Sinclair Decl., ¶ 9.)

On October 30, 2014, the Court certified a class as to Petitioners' claim for breach of implied contract. The Court also appointed Petitioners to represent the Class and appointed Class Counsel.

In 2015, the Court adopted a bifurcated trial plan proposed by The Regents to decide five issues: (1) whether The Regents was authorized to enter into bilateral contracts governing employment relations, including group medical plans; (2) whether The Regents enacted legislation with language or circumstances accompanying its passage that clearly evinced an intent to create private contractual rights enforceable against The Regents; (3) whether the Parties' conduct implied an offer and acceptance of mutual promises creating a bilateral contract; (4) whether the terms of any such contract included the same health care coverage during retirement as other UC retirees; and (5) whether The Regents unreasonably impaired Petitioners' contractual rights in violation of Cal. Const., Art. I, § 9. *Moen*, 25 Cal.App.5th at 850.

The Court decided to hear Issues (1) and (2) in Phase I of the trial. The matter was submitted on September 11, 2015. On December 8, 2015, the Court ruled that (1) The Regents was legally authorized to enter into bilateral contracts governing the employment relations; and (2) The Regents enacted legislation with language or circumstances accompanying its passage that clearly evinced a legislative intent to create private rights of a contractual nature enforceable against The Regents. (Statement of Decision (12/08/15); *Moen*, 25 Cal.App.5th at 850-851.)

Trial for Phase II was initially set for June 24, 2016. However, before the trial, the Court ruled that Petitioners could not rely exclusively on a showing of non-economic injury but rather would need to show "actual economic damages" to prove impairment of contract as part of the trial. While Petitioners believed that this was incorrect (the ruling was later overturned by the Court of Appeal), Petitioners had no choice but to seek to delay Phase II so they could conduct discovery and develop a damages model. Extensive discovery from The Regents as well as from LLNS and its contractors (e.g., Hewitt Associates, Empyrean, One Exchange, Kaiser, Anthem Blue Cross, etc.) was conducted. Numerous experts were contacted, and several were hired as consultants. (Sinclair Decl. ¶ 10.) The process of conducting discovery and retaining experts took well over a year.

On July 7, 2017, the Parties made cross-motions for summary adjudication. The Court denied Petitioners' motion on October 27, 2017 and denied The Regents' motion on November 27, 2017.

The Regents filed a motion to decertify the Class on August 23, 2017. The Court granted the motion. Petitioners appealed. On August 1, 2018, the Court of Appeal reversed the decertification order. *Moen*, 25 Cal.App.5th at 864.

On November 2, 2018, Petitioners submitted a Revised Trial Plan (Including Damages). Trial was then scheduled for February 11, 2019, but was continued to May 6, 2019. While the Parties continued to participate in the negotiations and mediation sessions described below, discovery was completed, and expert discovery of Petitioners' experts was begun. (Sinclair Decl. ¶ 10.) The Parties filed motions in limine on April 16, 2019 and began exchanging trial exhibits. After the Parties reached preliminary agreement on the principal settlement terms on April 26, 2019, the Court held off setting a trial date, as the Parties continued negotiations.

C. The Class – Definition, Composition, and Prior Notices

The Court certified a class as to Petitioners' claim for breach of implied contract. Notice was provided to the following:

> All University of California Retirees who worked at Lawrence Livermore National Laboratory (LLNL), who were eligible for University of California-sponsored group health plan coverage when they retired, and who retired prior to October 1, 2007 and received University-sponsored group health plan coverage after retiring until November 30, 2007 in connection with transfer of LLNL's management to Lawrence Livermore National Security (LLNS), *and*
>
> Spouses, surviving spouses, or dependents, who were eligible for University-sponsored group health plan coverage as a consequence of a University of California employee's retirement after working at LLNL, or death while working at Lawrence LLNL, and who received University-sponsored group health plan coverage until November 30, 2007 in connection with transfer of LLNL's management to Lawrence Livermore National Security (LLNS).

(Renewed Ex Parte Application for Approval of Notice of Pendency of Class Action and Petitioners' Statement regarding Class Notice (12/2/14), Exh. A; *see also* Application Re: Other Ex Parte Granted (12/3/14); Sinclair Decl. ¶ 40.) The notice explained that the judgment on the certified claim for breach of implied contract will bind all members who do not request exclusion and provided instructions on how

to opt-out of the action. (Sinclair Decl. ¶ 40.) The notice was mailed to 4,535 putative class members on January 21, 2015. (*Id.*) There were 152 opt-outs leaving 4,383 Class Members. (*Id.*)

In 2016, Petitioners discovered that some Class Members were not included on this class list. (Sinclair Decl. ¶ 41.) The Court subsequently ordered that a complete class list be produced that included these Class Members; and that a second round of notice be sent to these additional Class Members. (*Id.*; *see* Order (2/22/17), pp. 1, 4; Order Re Supplementary Notice of Pendency of Class Action and Petitioners' Statement Re Class Notice in Support Thereof (5/25/17); *see also* Stipulation re Notice to Updated Class List (5/24/17), Exh. A.)

The second notice was mailed on August 8, 2017. (Sinclair Decl. ¶ 41.) There were 50 opt-outs, leaving 4,773 additional Class Members.[3] (*Id.*) This notice also explained that the judgment will bind all members who do not request exclusion. (*Id.*)

The current Class List contains approximately 9,080 retirees, spouses, surviving spouses, dependents and heirs that fall within the Class definition. (Sinclair Decl. ¶¶ 39, 42.) The individuals who opted out have been removed from the list. (*Id.* ¶¶ 40-42.) Based on the available data, the current average age of the Class Members is approximately 78. (Declaration of Allan Phillips ("Phillips Decl."), filed concurrently herewith, ¶ 5.)

The Class contains a large number of deceased Class Members. Approximately 2,080 are deceased and approximately 25 Class Members are passing away each month. (Phillips Decl. ¶¶ 5, 11.) As shown below, the Settlement Agreement takes account of the special circumstances of deceased Class Members.

All living Class Members currently are offered benefits through the LLNS Plan. There are currently approximately 6,650 Class Members who are eligible for Medicare at age 65 and approximately 350 who are not eligible for Medicare. (Phillips Decl. ¶¶ 7, 11.)

[3] At this point, there appeared to be 9,156 Class Members (4,383 + 4,773 = 9,156). Thereafter, both sides worked to eliminate duplicates and correct minor errors. As a result, the Parties agreed that, as of August 17, 2017, there were 9,080 Class Members (excluding opt-outs). (Sinclair Decl. ¶ 42.) The Parties continue to update this list.

The Settlement Agreement recognizes the unusual situation faced by the non-Medicare eligible Class Members. Until approximately 1976, the rules for Social Security allowed certain employees to opt-out of coverage. (Phillips Decl. ¶ 9.) As a result, approximately 350 Class Members are not eligible for Social Security or for Medicare. (*Id.* ¶¶ 7, 9.) These Class Members suffered significantly larger past damages and cost significantly more to insure going forward. (*Id.* at ¶ 9.) Although this is a relatively small group, they are particularly vulnerable because they cannot fall back on Medicare as a safety net. (*Id.*) The Settlement Agreement takes account of the special situation of these Class Members and provides protection for them to address their circumstances.

III. SETTLEMENT AGREEMENT

A. Mediation and Settlement Efforts

The Settlement Agreement was reached after arm's-length settlement negotiations among and between Class Counsel, Class Representatives, The Regents, and The Regents' Counsel. (Sinclair Decl. ¶ 4.) Intense, prolonged and hard-fought negotiations preceded the settlement.

On August 20, 2018, the Court ordered a mandatory settlement conference with Judge Patrick Zika, who met with the parties on September 7, 2018, and October 12, 2018. (*Id.* at ¶ 5.) Judge Zika could not devote more time and suggested the Parties retain a private mediator. (*Id.*)

In November 2018, the Parties agreed on the Honorable Maria-Elena James (Ret.), and a working group convened to exchange information. The Parties have since engaged in 13 in-person mediation sessions and have participated in numerous telephone conferences with Judge James. (*Id.* ¶ 6 & Exh. B thereto.) The Parties have provided to Judge James and exchanged between themselves substantial amounts of information. (*Id.* ¶ 6.)

In a mediation session on April 1, 2019, Judge James made a Mediator's Proposal to resolve the case for $80,000,000 (conveyed in writing on April 3, 2019). (*Id.* ¶ 7.) On April 26, 2019, the Parties preliminarily accepted the Mediator's Proposal, subject to several conditions by The Regents. (*Id.*) The Parties continued to negotiate the terms of the Settlement with Judge James' assistance and eventually reached agreement on the substantive details of the merits of the settlement. (*Id.*) The Regents agreed to pay an additional $4,000,000 to fund benefit counseling services and agreed to contribute $500,000

toward administrative costs. (*Id.* ¶¶ 25, 27.) Thereafter, the Parties accepted a mediator's proposal regarding attorneys' fees and costs. (*Id.* ¶ 7.)

After the Board of The Regents of the University of California approved the Settlement, the Parties executed the final agreement and stipulation on December 11, 2019. (*Id.* ¶¶ 4, 8 & Exh. A thereto.)

B. Settlement Terms

The basic terms of the Settlement are the following:

1. Security for Class Members: Reinstatement of UC Benefits under Certain Conditions

The Settlement is not designed to build a benefits system from scratch. Class Members will continue to have access to health care benefits through the LLNS Plan. The LLNS Plan, however, is subject to termination *at any time*. *Moen*, 25 Cal.App.5th at 849. The settlement provides security against termination or a material change in the LLNS benefits. This is done through a "backstop/reinstatement" provision requiring The Regents to reinstate University-sponsored benefits if LLNS (or a successor contractor) fails to provide retiree health care benefits or makes a material change in the benefits as defined in the Settlement Agreement. (Settlement §§ V.C, V.D; Sinclair Decl. ¶ 13.) This protection will remain in place until December 31, 2040 (or earlier if there is a final distribution, pursuant to § V.A.14).

To avoid triggering the reinstatement provisions, Class Members must be offered benefits that are comparable to what they are offered for the next seven years. (Settlement § V.D.1.) After that, for years eight through 20, Medicare-eligible Class Members must receive the same benefits as LLNS retirees who retired between 2008 and 2019 and who are in the LLNS Plan (or in a health plan offered by a Successor Contractor); that is, LLNS cannot reduce the benefits it provides Class Members without reducing the benefits to its own retirees. (*Id.* § V.D.2.) Non-Medicare-eligible Class Members are given the additional protection that the LLNS per-member contribution cannot drop below the year seven contribution. (*Id.*) This provides increased security for the Class Members. (Sinclair Decl. ¶ 13.)

2. Settlement Fund

The Regents will pay $80,000,000 to the Settlement Administrator over the next seven years to create the Settlement Fund. (Settlement § V.A.1-3; Schedule A.) In addition, The Regents will make a further payment of $4,000,000 to cover the cost of benefits counseling services; and will pay $500,000 toward administrative costs. (Settlement § V.B.) As shown below, the Settlement Agreement is generally designed to be a checks-mailed settlement. However, in certain instances, information must be provided by Class Members. For example, to guard against fraud, the Settlement Administrator must verify the identity of the heirs of deceased Class Members before checks are mailed to them. (Settlement § V.A.12.) Additionally, while eligible living Class Members will receive benefits regardless of whether they communicate with the Settlement Administrator, Class Members are strongly encouraged to return a data information form attached to the Notice of Settlement, to ensure that they receive the full benefits they are entitled to. *See* Declaration of Scott H. Freeman ("Freeman Decl."). filed concurrently herewith, Exh. 2 [Proposed Notice of Settlement].)

a. Past Damages

Initial $1,000 Payment: All Class Members (both living and deceased) will receive a payment of $1,000 shortly after the settlement is approved by the Court ("Initial $1,000 Payment"). (Settlement § V.A.3, 12; Schedule A.) There are approximately 9,080 Class Members, so this will cost approximately $9,080,000. (Phillips Decl. ¶ 19.) This payment is meant to provide immediate relief to Class Members after ten years of litigation without a costly claims procedure. Providing this minimal relief as soon as possible is critical given the average age of the Class Members is 78 (*id.* ¶ 5); and the fact that other benefits, including Supplemental Payments, cannot be distributed until several months' worth of administrative tasks are completed, such as obtaining data regarding Class Members' plan selections and establishing the VEBA. (Sinclair Decl. ¶ 20.)

The Initial $1,000 Payment is also made to compensate for the long delay and to account for damages not otherwise covered in the settlement. (Settlement § V.A.3 & Schedule A; Sinclair Decl. ¶ 20.) For example, even those with little or no monetary loss suffered the insecurity of knowing the LLNS benefits could be terminated at any time – a substantial impairment of the peace of mind provided

by UC benefits. (Sinclair Decl. ¶¶ 13, 20.) And all Class Members endured nearly ten years of litigation during which many Class Members may have selected lower-end plans based on the limited HRA they received. (Phillips Decl. ¶ 17; *see also* Sinclair Decl. ¶ 20.) Practically speaking, it would be difficult or impossible to measure these damages for the Class Members, given that it would not be possible to determine retrospectively which plan a Class Member would have selected with a more generous HRA; and even if a plan could be identified an accurate determination of the damages would still require a highly complex claims procedure requiring years' worth of records – all of which would consume funds that could otherwise just be available to the Class Members. (*See* Phillips Decl. ¶ 17; Sinclair Decl. ¶ 20.) The time and expense would also involve significant delay, depriving Class Members of relief, while they continued to pass away at the rate of 25 per month. (Phillips Decl. ¶ 5.) Making this distribution will also assist the Settlement Administrator in obtaining accurate contact information needed to distribute the other benefits. (*See, e.g.*, Freeman Decl. ¶ 9(b), (n), (o).)

Additional Past Damages Payments: In addition to the Initial $1,000 Payment, past damages will be paid to eligible Class Members and/or their heirs ("Past Damages Payments"). (Settlement § V.A.3, 5; Schedules A & B attached thereto.) The amount of the Settlement Funds available for past damages shall not exceed $20,000,000, inclusive of the Initial $1,000 Payment (approximately $9,080,000) and the additional Past Damages Payment described herein (approximately $10,920,000). (Settlement, Schedules A, B; Phillips Decl. ¶ 20.) Past Damages Payments are capped at this amount in order to leave sufficient funds to address the primary concern of the litigation: securing adequate future health care benefits for the Class Members. (Sinclair Decl. ¶ 19.) Past Damages Payments are generally intended to provide compensation for Class Members who suffered damage measured by the difference in premium payments between the LLNS benefits and UC benefits.[4] (Settlement, Schedule B; Phillips Decl. ¶ 21; Sinclair Decl. ¶ 20.)

There are two groups of Class Members who suffered a disproportionate amount of such damages: (1) Class Members who are living, are 65 or older, and not eligible for Medicare

[4] This is the damages theory that Petitioners asserted in their Trial Plan, and that their experts were prepared to testify regarding.

(approximately 300), and (2) Class Members who are living and Medicare-eligible and elected Kaiser Senior Advantage (approximately 1,950) which did not include reimbursement for Part B (as UC Kaiser did) between October 15, 2010 to the Effective Date. (Phillips Decl. ¶¶ 11, 21-23.) Most of the past damages (as measured by the difference in premiums) are attributable to these two groups. (*Id.* ¶ 15.) The Class Members who were not eligible for Medicare suffered per capita damages of approximately $24,000, ranging from $6,900 to $65,900. (*Id.* ¶ 22.) The Kaiser Senior Advantage Class Members suffered average per capita damages of approximately $11,000, ranging from $4,000 to $23,000. (*Id.* ¶ 23.) Both of these groups are eligible to receive Past Damages Payments.

A third group of Class Members is also eligible to receive such payments: Class Members who died between October 15, 2010 and the Effective Date of the Settlement Agreement. (Settlement, Schedule B; Phillips Decl. ¶ 24.) Past Damage Payments are being made available to the heirs of deceased Class Members because deceased Class Members are the one group that will not receive the annual Supplemental Payments (which are described below and constitute the bulk of the financial benefits). (Settlement § V.A.7; *see also* Sinclair Decl. ¶ 23.) Based on data currently available, on average, these Class Members suffered damages of approximately $2,400 per year, ranging from $0 to $27,000. (Phillips Decl. ¶ 24.)

The remaining Class Members – who constitute approximately half of the Class – are living and Medicare-eligible. (Phillips Decl. ¶¶ 7, 11; *see also* Settlement, Schedule B.) They select health care and prescription coverage plans through Via Benefits. (Phillips Decl. ¶¶ 11, 14.) For these Class Members, past damages (if any) will be largely or entirely remedied by the Initial $1,000 Payment. (*Id.* ¶¶ 14, 20.) Thus, they will not be eligible for additional Past Damages Payments. (*Id.*)

Past damages have been calculated based on Class Members' circumstances and plan selection each year. (Settlement § V.A.3, 10 & Schedule B.) By returning the Class Member Data Form attached to the Notice of Settlement, Class Members can provide additional or corrected information that is used for the Past Damages Payments calculation. (*See* Freeman Decl., Exh. 2 & Attachment A thereto [Class Member Data Form].)

Past damages will be calculated according to the formulas in Schedule B to the Settlement Agreement. (Settlement § V.A.10 & Schedule B.) Explanations and summaries of these formulas are set forth in the concurrently filed declaration of Allan Phillips. (*See* Phillips Decl. ¶¶ 22-30.) After calculating the past damages for each eligible Class Member, the Settlement Administrator will determine the Class Member's pro rata share, if any, of the approximate $10,920,000 available for Past Damages Payments. (Settlement, Schedule B; Phillips Decl. ¶¶ 20, 38; Sinclair Decl. ¶ 24.) It is impossible to estimate a given Class Member's Past Damages Payments until the relevant data is obtained. (Phillips Decl. ¶ 38.) However, based on current information, the eligible Class Members will recover on average approximately $10,000 per non-Medicare eligible Class Member, $5,000 per Kaiser Senior Advantage Class Member, and $1,600 per deceased Class Member. (*Id.*)[5] This constitutes a recovery of between approximately 42% and 64% of the damages incurred. (*Id.*)

b. Supplemental Payments to Class Members - The VEBA

To help supplement future health insurance costs for the Class Members, the remaining funds, $60,000,000, will be used to set up, administer, and provide annual supplemental payments to the Class Members through a Voluntary Employees' Beneficiary Association ("VEBA"). (Settlement §§ V.A.3, 4; Schedule A.) All living Class Members are eligible for the annual Supplemental Payment, except Class Members who do not elect to participate in a LLNS plan. (Settlement §§ V.A.7, 8; Phillips Decl. ¶ 39.)

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

The initial Supplemental Payments will be calculated based on the formulas in Schedule C. (Settlement § V.A.7 & Schedule C.) Each year thereafter, the Settlement Administrator and the VEBA

[5] As set forth in Schedule B, this includes taking the Initial $1,000 Payment into account.

Trustee will use their discretion and professional judgment to determine the amount of the Supplemental Payments and the formulas used to calculate them consistent with the goal of maximizing payments for health care coverage for Class Members for the next 20 years.[6] (*Id.* §§ V.A.3, 6, 7 & Schedule C.) That is, they are authorized to depart from the initial methodology to account for changes in plan expenses, economic conditions, the VEBA's financial status, and other relevant considerations. (*Id.*) After 20 years, or when only 1,000 Class Members are still living, the Trustee shall terminate the VEBA Trust and distribute any remaining funds to the living Class Members. (*Id.* § V.A.14.)

The Supplemental Payments will be calculated for each Class Member depending on their particular circumstances. (Settlement § V.A.7 & Schedule C.) Schedule C provides examples (based on 2019 models) of how the Supplemental Payments would be applied. Explanations and summaries of these formulas and the payments that would result for Class Members are set forth in the declaration of Allan Phillips. (*See* Phillips Decl. ¶¶ 41-45.)

Exhibit 1 to Schedule C provides a chart showing how a member of each type of plan utilized by the Class Members would be awarded a Supplemental Payment based on the initial methodology and 2019 data. A few typical examples are as follows.

The single largest group of Class Members, consisting of approximately 4,700 people, are those who are Medicare-eligible and select their coverage through a "portal" known as Via Benefits. (Phillips Decl. ¶¶ 8, 11.) After Class Members select from one of many health care and prescription plans offered by multiple providers through Via Benefits, an HRA of $2,450 is provided by the LLNS Plan, and the Class Member is required to pay any remaining balance (if any). (*Id.* ¶¶ 12, 41.) The Regents provides a higher benefit for their out-of-state retirees who receive benefits through Via Benefits, $3,000. (*Id.* ¶ 41.) The initial Supplemental Payment to the Via Benefits Class Members is the amount of this differential, or $550.[7] (*Id.*)

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[6] Petitioners plan to establish an advisory board to work with and advise the Settlement Administrator and the VEBA Trustee.

[7] The Settlement Agreement also identifies an alternative model for calculating a premium differential, based on mapping a plan offered through the Via Benefits portal.

The next largest group consists of Class Members who are Medicare-eligible and enrolled in Kaiser Senior Advantage, approximately 1,950 people. (Phillips Decl. ¶ 11.) For Class Members who are not enrolled in Via Benefits, including the Kaiser Senior Advantage group, the Supplemental Payments are designed so they will be responsible for a percentage of the total cost (e.g., 10% or 20%).[8] (Phillips Decl. ¶¶ 42, 44.) The Supplemental Payment for the Kaiser Senior Advantage Class Members will be calculated initially so that they will be responsible for 20% of the total cost of their plan choice plus $1,028, which reflects the 2019 Medicare Part B reimbursement provided by the University-sponsored Kaiser plan. (*Id.* ¶ 60.) This results in a Supplemental Payment of $558.16. (*Id.* ¶ 42.)

Accordingly, all Class Members who are eligible for Medicare (95% of living Class Members or 6,650 people) will get nearly the same Supplemental Payment ($550 as Class Members who go through Via Benefits, $558 for Kaiser Senior Advantage members). (*Id.* ¶ 43.)

The remaining Class Members (approximately 350) are not Medicare-eligible. (*Id.* ¶¶ 11, 44.) The Supplemental Payment will be calculated so these Class Members are responsible for 10% of the total cost of their plan. (Settlement, Schedule C; Phillips Decl. ¶ 44.) Such Class Members are protected at this level to reflect the fact that they are generally subject to substantially higher premiums than other Class Members. (Phillips Decl. ¶¶ 9, 44.) For such Class Members, the Supplemental Payment would be between $2,009 and $6,705, depending on their particular plan. (*Id.* ¶¶ 44, 62; Settlement, Schedule C and Exh. 1 thereto.)

If a Class Member changes his/her health insurance plan, the Supplemental Payment the following year will be determined based on the changed status. (Settlement § V.A.9.) This means that a Class Member can use the Supplemental Payment as a tool in considering which health insurance plan is best.

An actuarial analysis based on the initial Supplemental Payment formulas and current data is attached to the Settlement Agreement at Exhibit 2 to Schedule C. (Phillips Decl. ¶ 46.) This actuarial analysis anticipates the VEBA lasting for 20 years and having approximately $1,483,000 left over for

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[8] Again, the VEBA Trustee may alter these formulas from year to year to ensure that the VEBA remains equitable and solvent. (Settlement § V.A.7(i) & Schedule C.)

final distribution to the living Class Members at the time of dissolution. (Settlement, Schedule C at Exh. 2; Phillips Decl. ¶¶ 46-47.)

c. Final Distribution

The Supplemental Payments are intended to continue until December 31, 2040; or until the Settlement Administrator and the VEBA Trustee estimate in good faith that 1,000 or fewer Class Members are still living. (Settlement § V.A.14.) At that time, after any remaining Administration Costs are paid, the funds remaining in the VEBA Trust, if any, will be returned to the Qualified Settlement Fund for distribution to the Class Members who are living consistent with the terms of the Settlement Agreement. (*Id.*) The VEBA Trust will then be closed and terminate.

3. Dispute Resolution

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

4. Taxability of Benefits

The Settlement Agreement takes account of taxability issues. Petitioners have structured the Supplemental Payments to fall within IRC § 501(c)(9) so as not to be taxable. (*See* Sinclair Decl. ¶ 14; *see also* Settlement § V.A.16.) In contrast, the Initial $1,000 Payment and Past Damages Payment will likely be deemed taxable and the Settlement Administrator will provide 1099 forms to individual Class Members. (*See* Sinclair Decl. ¶ 21; Freeman Decl. ¶ 9(n), (q); *see also* Settlement § V.A.16.) Neither Class Counsel nor The Regents' Counsel can ensure that the IRS will grant tax exempt status to the VEBA. Nothing contained in the Settlement Agreement or these preliminary approval papers constitutes legal advice regarding the tax consequences of the funds distributed under the Settlement Agreement.

5. Benefits Counseling Services

To support the best use of the Supplemental Payments, benefit counseling services will be made available to the Class Members to help with their selection, acquisition and utilization of health insurance ("Benefits Counseling Services"). (Settlement §§ V.B, III.A.6; Sinclair Decl. ¶ 25.) In addition to the

$80,000,000 Settlement Fund, The Regents will pay $4,000,000 for Benefits Counseling Services. (Settlement §§ V.B, III.A.6; Sinclair Decl. ¶ 25.) The Settlement Administrator will select the third party to provide the Benefits Counseling Services. (Settlement §§ V.B, III.A.6.)

6. Administrative Costs

Delivering the settlement benefits will involve a variety of administrative costs. First, there are the typical administrative costs associated with the Settlement Administrator's providing notice of the settlement to the Class, incorporating Class Member information into the Class Member Database, providing skip tracing for Class Members who cannot be located, mailing checks to Class Members, etc. (Settlement § VIII.A; Freeman Decl. ¶ 9.) These costs are heightened here, given that a substantial number of Class Members have died and the Settlement Administrator must obtain adequate verification of deceased Class Members' heirs or successors-in-interest before mailing checks to them. (*See* Settlement § V.A.12; Sinclair Decl. ¶ 26.) The Regents have agreed to contribute $500,000 for these costs; the remaining costs will come out of the Settlement Fund. (Settlement §§ VIII.A.2, V.B; Sinclair Decl. ¶ 27.)

In addition to the initial notice and set up costs, the Settlement requires the Settlement Administrator to distribute past damages, to manage and oversee the distribution of benefits for the next 20 years, to hire a VEBA Trustee to invest the VEBA funds, to deliver reports to the Court, etc. (Freeman Decl. ¶10.) Petitioners have budgeted $500,000 per year to cover administrative costs, which will come out of the Settlement Fund. (Settlement § VIII.A.2 & Schedule C, Exh. 2; *see also* Sinclair Decl. ¶ 27.) In addition, The Regents' contribution of $4,000,000 for benefit counseling services will create additional efficiencies, since for example benefits counselors' communication with Class Members should facilitate the gathering of information needed for administration. (Phillips Decl. ¶ 46; Sinclair Decl. ¶ 27.)

7. Court Monitoring

To facilitate successful implementation, the settlement provides for monitoring and reporting to the Court throughout the life of the settlement. (Settlement § V.E; Sinclair Decl. ¶¶ 28-29.) The Parties have proposed Hon. Maria-Elena James to serve as Court Monitor for three years. (Settlement §§ V.E,

III.A.10; Sinclair Decl. ¶ 28.) The Court Monitor will provide annual reports to the Court regarding the status of the benefits provided by LLNS and the Class Members' receipt of benefits under the settlement. (Settlement § V.E.) The cost of the Court Monitor shall be borne equally by Petitioners and The Regents. (*Id.*)

Starting in year four after the Settlement Agreement becomes effective, the Settlement Administrator will take over the role of providing an annual report to the Court, the cost of which shall come out of the Settlement Fund. (Settlement § V.E.3-4; Sinclair Decl. ¶ 29.)

8. Released Claims

The releases are properly tied to the claims in the Third Amended Petition. (Sinclair Decl. ¶ 30.) Class Members will release the right to sue for any claim predicated on the allegations in the Third Amended Petition, arising under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, or other claims relating to the provision or failure to provide health benefits, the level of health benefits coverage and/or the cost of health benefits. (Settlement § III.A.30; Sinclair Decl. ¶ 30.) Certain claims that are not predicated on the Third Amended Petition, such as claims to enforce pension rights, are expressly excluded. (*Id.*) Petitioners, but not the remaining Class Members, also waive protections under California Civil Code § 1542. (*Id.*)

IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS APPROPRIATE

The settlement of a class action requires court approval. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1800 (1996), *as modified* (Sept. 30, 1996). This involves a two-step process. *See* California Rules of Court, Rule 3.769; *Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1118 (2009). First, the Court conducts a preliminary review of the settlement, the proposed notice to class members, and the proposal to certify a settlement class. Cal. Rules of Court, Rule 3.769(c), (d). After notice has been sent, and class members have been given an opportunity to respond, the court holds a hearing and conducts a final review of the fairness of the proposed settlement. Cal. Rules of Court, Rule 3.769(g).

To determine whether the terms are "fair, adequate and reasonable," courts consider factors including the following:

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

Dunk, 48 Cal.App.4th at 1801, 1803 (citing *Officers for Justice v. Civil Service Commission of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982)).

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

The court independently reviews the settlement to ensure it is fair, adequate, and reasonable. To make this determination, the court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 133 (2008); *Clark v. Am. Residential Services, LLC*, 175 Cal.App.4th 785, 799 (2009). Thus, the "factual record before the … court must be sufficiently developed," and the initial presumption of fairness "must then withstand the test of the plaintiffs' likelihood of success." *Kullar*, 168 Cal.App.4th at 130 (internal quotation marks omitted).

Here, the relevant factors strongly favor preliminary approval.

A. The Settlement is Presumptively Fair Because it is the Result of Non-Collusive, Arms-Length, Informed Negotiations by Experienced Counsel with the Assistance of Hon. Maria-Elena James

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

Here, the settlement was reached through the Parties' participation in two court-ordered settlement conferences with Judge Zika and 13 in-person mediation sessions with Judge James since September 7, 2018. (Sinclair Decl. ¶¶ 5-6 & Exh. B.) There were hard-fought, arm's-length negotiations regarding the amount of the settlement, benefit counselors, administrative costs, and attorney's fees and costs. (*Id.*) The Parties did not negotiate attorney's fees until they had reached agreement on all other material terms. (*Id.* ¶¶ 7, 33.)

There was an extraordinary amount of investigation and discovery during nearly ten years of litigation. This included the depositions of all Petitioners; production of tens of thousands of pages of records by the University stretching back to at least 1952; and numerous subpoenas to LLNS and its service providers. A full trial was competed with regard to Phase I (see above). Thereafter, the Court ruled that economic loss was required to establish liability and well over a year of intense discovery ensued, as well as a motion to compel The Regents to produce a complete class list. Numerous experts were consulted and a number were hired for Phase II. The proceedings came to a halt when the Court decertified the Class on November 21, 2017. But the Court of Appeal expedited Petitioners' appeal and issued a decision in near record time on August 1, 2018, reversing the order. This was the second favorable decision from the Court of Appeal in this case. Both decisions were published and have provided significant guidance for this case as well as other pending cases. Indeed, it is hard to imagine a case that has been more thoroughly litigated and mediated.

Class Counsel, who have represented Petitioners since 2010 and were appointed to represent the Class in 2014, are experienced and qualified to evaluate the Class claims, the defenses asserted, the risks of trial, and the benefits of settlement. (Sinclair Decl. ¶¶ 35-37.) Class Counsel have decades of experience litigating cases related to public benefits, retiree rights, and employment rights, including in class action formats and in other cases involving UC. (*Id.*) "The [trial] court may and undoubtedly should continue to place reliance on the competence and integrity of counsel ...." *Kullar*, 168 Cal.App.4th at 133. Here, Class Counsel endorses the settlement as an excellent result for the Class. (Sinclair Decl. ¶ 38.) Further, Petitioners were appointed class representative and are qualified to evaluate the risks and benefits of settling. (*See* Order (10/30/14) [certifying class and appointing class representatives] at 7.)

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

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

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

1. The Backstop Provisions Address the Concern that LLNS Could Stop Providing Retiree Health Benefits

The settlement's backstop/reinstatement provisions address Class Members' concern that LLNS could stop sponsoring retiree health benefits. The settlement provides that if LLNS terminates or materially changes health care benefits, Class Members will be reinstated to University-sponsored benefits. (Settlement §§ V.C, V.D; Sinclair Decl. ¶13.) Thus, the security of benefits provided to other UC retirees is restored to a significant extent, even though actual reinstatement is not required so long as

adequate LLNS benefits are maintained. The security restored to the Class through the settlement satisfies the comparability test under *Kullar*. For years one through seven, Class Members are offered benefits that are comparable to what they are currently offered. (Settlement § V.D.1.) For years eight through 20, LLNS is allowed to reduce benefits for Medicare-eligible Class Members, but only if it also reduces the same benefits for LLNS retirees who retired between 2008 and 2019 who are in the LLNS Plan (or in a health plan offered by a Successor Contractor). (Settlement § V.D.2.) This requirement substantially reduces the likelihood of benefits being reduced.

The Petitioners sought a Peremptory Writ to address concerns about the security of their employer-sponsored benefits. (Sinclair Decl. ¶ 13.) The settlement addresses those concerns by ensuring that Class Members must either be provided adequate benefits from LLNS or be returned to University-sponsored plans.

2. The Settlement Enhances Class Members' Benefits

The Petition for Writ of Mandate sought restoration of University-sponsored benefits. (*See* TAP, Prayer ¶ 2.) Thus, it is appropriate to compare health care coverage under the settlement with health care through UC. *Kullar*, 168 Cal.App.4th at 130. Petitioners' expert has performed a comprehensive analysis which shows that, with annual Supplemental Payments delivered from the VEBA in addition to benefits from the LLNS Plan, 95% of the Class – constituting the Medicare-eligible Class Members – will receive reasonably comparable benefits to what they would receive under UC. (Phillips Decl. ¶¶ 48-61; Sinclair Decl. ¶¶ 17, 38.) For the remaining Class Members – approximately 350 people who are not eligible for Medicare – more than half are better off or equal under the Settlement compared to UC. (Phillips Decl. ¶¶ 62-63.) The remaining Class Members – approximately 133 non-Medicare-eligible people under Kaiser – will have higher premium payments than under UC, but the premium amount ($2,047 per year) will be substantially lower than now under LLNS (*i.e.*, $4,056 - $2,047 = $2,009). (*Id.*) This is comparable to (or less than) what the other non-Medicare eligible Class Members will pay and is within the target contemplated by the settlement (*i.e.*, 10% of plan cost). (*Id.* ¶ 63.) These Class Members will also receive a larger amount of past damages on average, as well as a significant supplement going forward. (*Id.* ¶¶ 22, 63.)

In addition to funds that will allow Class Members to supplement the health care benefits provided by LLNS, the settlement provides for $4,000,000 to provide counseling services. (Settlement §§ V.B, III.A.6.) This benefit is particularly important for an aging population faced with complex health care choices. (Sinclair Decl. ¶ 25.) For example, Via Benefits offers coverage through 300 health care plans and 380 prescription plans. (Phillips Decl. ¶ 8.) Benefit counselors will be instrumental in assisting Class Members to make informed decisions. (*See* Settlement § V.B; Sinclair Decl. ¶ 25.) Benefit counselors are available for UC retirees. (Sinclair Decl. ¶ 25.)

3. Risks of Going to Trial

The risks of going to trial also justify the settlement. *See Kullar*, 168 Cal.App.4th at 129 (to determine if recovery represents a reasonable compromise, court must consider "the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation.").

First, the non-prevailing party in the trial would likely appeal, potentially leading to years of delay. With an aging population dying at the rate of 25 Class Members per month, it is not in the Class Members' best interest to forego the settlement at hand merely in hopes of obtaining a marginally better result years down the road after the deaths of hundreds of Class Members.

Second, the key rulings in Phase I have not been reviewed on appeal. In Phase I, the Court found that The Regents were authorized to enter into bilateral contracts and enacted legislation that clearly evinced a legislative intent to create private contractual rights, thus overcoming the presumption that private rights were not intended. The Regents have repeatedly attacked these rulings on multiple grounds, among them: that The Regents did not authorize the administration to enter into contracts with employees; that the 1961 resolution establishing health care benefits merely authorized the administration to enter into contracts with certain insurance companies in that particular year; and that whatever the import of the 1961 resolution, it does not overcome the presumption (required by the California Supreme Court) that legislative bodies do not enter into private contractual obligations unless they expressly say so. These rulings were sure to be tested on appeal. If these finding were reversed on appeal, no relief could be awarded.

Third, to establish the implied contractual right on which the case depends, three issues remain to be decided in Phase II. These are whether the Parties' conduct manifested an offer and acceptance of mutual promises, whether the contract terms required UC to keep the Class in the same pool as other UC retirees, and whether the contract was unconstitutionally impaired. *Moen*, 25 Cal.App.5th at 850. The Regents has contended that it never made an unqualified offer; that in its publications it disclaimed any contractual obligation; and that University-sponsored benefits were contingent on reimbursement by the federal government. The Regents also has contended that even if a contract were formed, the injury to Petitioners did not rise to the level of unconstitutional impairment. Failing to prevail on any of these issues would preclude relief.

Fourth, Petitioners would need to convince the Court at trial that a Peremptory Writ may be issued to compel health care coverage for Class Members who were still living; and that a writ (as opposed to a civil action) can be used to compel the payment of damages for Class Members (including those who are deceased).

Comparing the risks of proceeding to trial against the minimal advantages that such trial could bring to the Class with respect to either security or level of health care benefits, demonstrates the reasonableness and fairness of accepting the settlement. *See Kullar*, 168 Cal.App.5th at 129-130.

4. Past Damages

In addition to restoring UC-sponsored benefits, the Third Amended Petition asks for "restitution and/or damages ... with interest at the legal rate..." (TAP, Prayer, ¶ 3.) It is therefore appropriate to compare past damages under the settlement with what the Court could award if Petitioners prevail at trial, *Kullar*, at 130, bearing in mind that it is the settlement as a whole, not the comparison of past damages alone, that the Court should ultimately consider regarding fairness. *See Officers for Justice*, 688 F.2d at 628 ("It is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness.").

As explained above, most Class Members will receive compensation for past damages based solely on the Initial $1,000 Payment that will go to all Class Members. Again, for the Class Members who are eligible for Medicare and receive benefits through Via Benefits (approximately 4,700 people, or

more than half the Class), the Initial $1,000 Payment will generally cover their past damages. (Phillips Decl. ¶¶ 14, 20.) For the remaining three groups of Class Members who will then be eligible for further Past Damages Payments (non-Medicare eligible Class Members, Kaiser Senior Advantage Medicare Part B recipients, and deceased Class Members), a substantial amount of their past damages will be paid (between approximately 42% and 64% of the damages incurred). (Phillips Decl. ¶ 38.) This is a "reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation." *Kullar*, 168 Cal.App.4th at 129.

The claim for monetary damages was always secondary, compared to restoring the security of University-sponsored health care benefits. (*See* TAP, Prayer ¶¶ 2-3; Sinclair Decl. ¶¶ 12,19.) Accordingly, the parties structured the settlement such that most of the settlement funds are allocated towards better health care benefits for living Class Members going forward. (Sinclair Decl. ¶ 19.)

The settlement's approach to past damages is also justified by a consideration of the relative strength of the Petitioners' claims for past damages. The Regents argued that language from *Moen*, 25 Cal.App.5th at 860-61, foreclosed Petitioners from establishing class-wide liability for economic impairment in Phase II using common proof. (*See* Regents' Motion in Limine No. 3 (filed 4/16/19).) Petitioners disagreed, and the matter was not decided. However, if the Court adopted The Regents' position, Petitioners and the Class could be foreclosed from obtaining any past damages on a class-wide basis. And even if Petitioners prevailed on this issue and were permitted to rely on this damages model, the completeness and accuracy of their data and their experts' application of it on a class-wide basis would still have been subject to attack. Moreover, even if class-wide damages were established, individual Class Members would likely be required to go through an individualized claims process, which would be burdensome and expensive, and would cause substantial delays.

Finally, the degree to which the damages have been discounted is reasonable. As shown above, Class Members who are eligible for the Past Damages Payments will recover approximately 42% to 64% of their past damages. (Phillips Decl. ¶ 38.) This is well within the typical range of what is considered reasonable and fair, especially given that this is just one aspect of the settlement. *See Officers for Justice*,

688 F.2d at 628 (discount on back pack pay justified because *inter alia* "it can hardly be maintained that back pay was the predominant remedy sought in this lawsuit"); *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 459 (9th Cir. 2000) (one-sixth of the potential recovery was fair and adequate); *Weeks v. Kellogg Co.*, No. CV 09-08102 (MMM) (RZx), 2013 WL 6531177, at *15, n.85 (C.D. Cal. Nov. 23, 2013) (approving settlement representing approximately 10% of damages).

Accordingly, the value of the Settlement is fair and reasonable and "falls within the range of possible approval." *In re Tableware Antitrust Litigation*, 484 F.Supp.2d at 1079.

C. No Preferential Treatment

The settlement does not provide improper preferential treatment for Petitioners or any subgroup of the Class. In spite of their endless hours of dedication over the last ten years, Petitioners do not seek any monetary reward for their service. The allocation of the Settlement Funds among the Class Members is reasonable and fair. *See Edwards v. Nat'l Milk Producers Fed'n*, No. 11-CV-04766-JSW, 2017 WL 3623734, at *8 (N.D. Cal. June 26, 2017) ("Approving a plan for the allocation of a class settlement fund is governed by the same legal standard that applies to the approval of the settlement terms: that the distribution plan is 'fair, reasonable and adequate.'") As noted, all Class Members will receive the Initial $1,000 Payment, ensuring immediate relief to all without a time-consuming and expensive claims process. *See id.* ("*Pro-rata* distribution plans have been approved in many prior antitrust cases in this district."). Additional Past Damages Payments will be divided among the groups that suffered the greatest damages, with a measurement premised on the difference in premiums between UC and LLNS Plans. *See id.* ("A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable.").

Deceased Class Members will also be eligible for Past Damages Payments (even if they did not suffer a disproportionate amount of damages) as a matter of fairness to account for the fact that they, unlike all other Class Members, will not receive the annual Supplemental Payments. Further, the allocation between Past Damages (capped at $20,000,000) and Supplemental Payments (approximately $60,000,000, minus administrative costs) reflects both the purposes of the litigation and the relative strength of the claims at issue. (Sinclair Decl. ¶ 19.) In providing different relief to subsections of the

class, the settlement tailors the relief to the harm suffered. "A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable." *In re Cathode Ray Tube (Crt) Antitrust Litig.*, No. 07-CV-05944-JST, 2016 WL 721680, at *21 (N.D. Cal. Jan. 28, 2016) (citing *In re Citric Acid Antitrust Litig.*, 145 F.Supp.2d 1152, 1154 (N.D. Cal. 2001)); *see also In re Oracle Sec. Litig.*, No. 90-CV-00931-VRW, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) ("A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable."). The mere fact that "relief varie[s] among the different groups of class members [does] not demonstrate ... conflicting or antagonistic interests within the class" or adequacy of representation issues. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 272 (3d Cir.2009). "Instead, the different allocations reflect the relative value of the different claims." *See In re Pet Food Products Liability Litigation*, 629 F.3d 333, 347 (3rd. Cir. 2010). While an allocation plan may not satisfy everyone, the allocation in the Settlement helps protect the most vulnerable Class Members and provides a reasonable and fair division of funds consistent with the claims in the Third Amended Petition.

V. THE SETTLEMENT ADMINISTRATOR HAS THE NECESSARY EXPERIENCE AND EXPERTISE TO ADMINISTER THE SETTLEMENT

The Settlement Agreement places both short-term and long-term responsibilities on the proposed Settlement Administrator, Archer Systems, LLC ("Archer"). (Settlement § VIII.A.1.)

The short-term duties include everyday settlement administration such as implementing the Notice procedures, creating a Settlement Website, gathering data and information regarding the Class Members, and distributing the Initial $1,000 Payment and Past Damages Payments. (Freeman Decl. ¶ 9.)

The long-term duties include a wide range of substantive responsibilities, including hiring, working with, and monitoring the performance of a VEBA Trustee and third-party benefits counseling services provider; determining an appropriate plan design for issuance of Supplemental Payments to be distributed by the VEBA; monitoring the level of LLNS benefits; obtaining information required for the annual Supplemental Payments distributing the annual Supplemental Payments; reporting annually to the Court; responding to Class Members' Requests for Review; and, eventually, performing a final

distribution when the settlement period is over or the Class numbers fewer than 1,000 members. (Freeman Decl. ¶ 10.)

To complete these tasks, it is necessary to have a settlement administrator that has expertise in dealing with highly complex settlements, has the personnel to handle the volume and scope of the work involved, and is positioned to carry out these tasks over two decades. Archer meets all these criteria. (*See* Freeman Decl. ¶¶ 4, 5, 7, 11.) It has an extraordinary wealth of experience in administering highly complex settlements and is ready, willing and able to perform all the tasks required to administer this Settlement. (*See id.* at ¶¶ 7, 11.)

Given the scope of the responsibilities being placed on the Settlement Administrator, the costs of administering the Settlement are significant. Petitioners have budgeted approximately $500,000 per year for the time being, although they are subject to a number of uncertainties, including those surrounding the terms of the eventual contract with the VEBA Trustee. (*See* Sinclair Decl. at ¶ 27; *see also* Phillips Decl. Exh. ¶¶ 46-47, Settlement, Schedule C, Exh. 2; Settlement § VIII.A.1(ix).) While substantial, these costs are reasonable in light of the duties of the Settlement Administrator, which require the annual performance of a set of complex and wide-ranging duties including the distribution of health benefits. There are few, if any, other administrators who are both qualified and willing to perform these duties.

VI. THE PROPOSED NOTICE PLAN IS ADEQUATE

The proposed content and procedure for the Notice of Settlement satisfy California Rules of Court, Rule 3.769(f) and all applicable requirements.

A. The Notice Procedure Is Adequate

Procedurally, notice to class members must have a "reasonable chance of reaching a substantial percentage of the class members." *Wershba v. Apple Comput., Inc.*, 91 Cal.App.4th 224, 251 (2001) (quoting *Cartt v. Super. Ct.*, 50 Cal.App.3d 960, 974 (1975)). The procedure for notifying Class Members of the Settlement is designed to reach as many Class Members as possible.

Class Counsel has an electronic database assembled in 2017 containing the Operative Class List, which includes the last known mailing addresses for all Class Members. (Settlement § III.A.24; Freeman Decl. ¶ 13; Sinclair Decl. ¶ 39.) This will be provided to the Settlement Administrator. The Regents

issued a subpoena to CalPERS and provided all relevant information within The Regents' control to assist the Settlement Administrator with obtaining the most current contact information for the Class Members, including current mailing addresses and whether a given Class Member is living or deceased. (*See* Order - Joint Stipulation Regarding Production of CalPERS Data (9/26/19).) The updated information will be used to mail the Notice of Settlement to the Class Members via U.S. Mail. (Settlement § VI.) This procedure of providing direct notice by mail to the Class Members was previously approved twice by the Court as adequate – and was highly successful. (Freeman Decl. ¶ 13; *see also* Renewed Ex Parte Application for Approval of Notice of Pendency of Class Action and Petitioners' Statement regarding Class Notice (12/2/2014), Exh. A; Application Re: Other Ex Parte Granted (12/3/2014); Order Re Supplementary Notice of Pendency of Class Action and Petitioners' Statement Re Class Notice in Support Thereof (5/25/2017).)

Given the large numbers of deceased Class Members, certain special procedures have also been set forth in the Settlement Agreement. Prior to sending the Notice to Deceased Class Members, the Settlement Administrator will attempt to identify each deceased Class Member's personal representative or successor-in-interest. (Settlement § V.A.12(i).) If that is unsuccessful, the envelope containing the Notice of Settlement will be addressed to the "Estate of [Name of Deceased Class Member]" and mailed to the deceased Class Member's last known address. (*Id.*)

Attached to the Notice of Settlement along with a self-addressed stamped envelope is the Class Member Data Form, which the Class Members will be strongly encouraged to return. (Freeman Decl. Exh. 2 [Notice of Settlement at 2].) This form is intended to provide the Settlement Administrator with information it needs to ensure that Class Members receive the full payments to which they are entitled. (*See* Settlement, Schedule B.) As mentioned above, it is particularly important that the heirs of deceased Class Members return the Class Member Data Form, since the Settlement Administrator cannot distribute checks on behalf of deceased Class Members until their heirs are adequately identified and/or verified. (Settlement § V.A.12.)

The Notice of Settlement and other relevant documents will also be posted on the Settlement Website that the Settlement Administrator will create. (Settlement § VI.B.1.ii; Freeman Decl. ¶19.)

B. The Proposed Notice of Settlement Is Adequate

The Proposed Notice of Settlement is attached to the Declaration of Scott H. Freeman, the co-founder and co-chairman of the proposed Settlement Administrator, Archer Systems, LLC. (*See* Freeman Decl. Exh. 2.) As to its content, the "notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members." *Wershba*, 91 Cal.App.4th at 251 (quoting *Trotsky v. L.A. Fed Sav. & Loan Ass'n*, 48 Cal.App.3d 134, 151-52 (1975)).

The proposed Notice of Settlement informs Class Members of: (1) the material terms of the settlement, (2) the proposed fees and costs of Petitioners' Counsel and for the Settlement Administrator, (3) how Class Members may object to the Settlement, (4) details about the court hearing on settlement approval and the submission and presentation of objections, and (5) how Class Members can obtain additional information. (*See* Freeman Decl. Exh. 2 & ¶ 21.) *See* Cal. Rules of Court, Rule 3.769(f). The proposed Notice of Settlement also provides information about Class Members' estimated awards under the initial distribution formula for Supplemental Payments, how to challenge the calculation of the distribution formula, and the tax treatment of the awards. (*See* Freeman Decl. Exh. 2 & ¶ 21.) The proposed Notice of Settlement provides Class Members sufficient information to decide whether they should accept the benefits offered, or object to the settlement. *See Wershba*, 91 Cal.App.4th at 252 (citing *Trotsky*, 48 Cal.App.3d at 151-52).

C. An Additional Opt-Out Period Is Unnecessary

Class Members had an opportunity to opt-out when the prior notices were sent during the class certification stage in 2015 and 2017. As stated above, upon receiving these notices approximately 202 putative Class Members exercised their rights to opt out and were removed from the Class List. (Sinclair Decl. ¶¶ 40-42.) Now that a proposed settlement has been reached, the Class Members are not required to be given another opportunity to opt out. As the Ninth Circuit Court of Appeal recently reaffirmed, "[There is] no authority of any kind suggesting that due process requires that members of a [FRCP] Rule 23(b)(3) class be given a second chance to opt out. We think it does not." *Low v. Trump Univ., LLC*,

881 F.3d 1111, 1121–22 (9th Cir. 2018) (quoting *Officers for Justice*, 688 F.2d at 622-23); *see also* 3 Newberg on Class Actions § 9:52 (5th ed.).

While the Court retains discretion to order an additional opt out period if it deems it necessary, the Settlement Agreement provides that under such circumstances "The Regents shall have the right to terminate this Agreement and declare as void the terms agreed to herein, in which case the Settlement shall not take effect, and the matter shall proceed to trial." (*See* Settlement § VII.A.7.) In light of the foregoing, Petitioners submit than an additional opt out period is unnecessary and unwarranted.

VII. ATTORNEYS' FEES AND COSTS ARE REASONABLE, FAIR, AND APPROPRIATE

Petitioners' formal request for attorneys' fees and costs will be submitted in a later motion. A brief summary of the request follows so that the Court and the Class Members can assess the agreement between the Parties and the request that will be made. *See* Cal. Rules of Court, Rule 3.769(b).

The operative fee agreement between Class Counsel and Petitioners provides that Class Counsel is entitled to 20% of any settlement fund (or approximately $16,800,000). (Sinclair Decl. ¶ 32 & Exh. 2.) However, the fee agreement also obligates Counsel to seek an award of fees from the Regents under California Code of Civ. Proc. § 1021.5 before claiming a contingency fee award. (*Id.* & Exh. 2 at 8-10.)

Pursuant to the April 3, 2019 Mediator's Proposal, the Parties agreed that attorneys' fees and costs would *not* come from the settlement fund proposed by the mediator, but would instead be subject to a motion for fees and costs under section 1021.5. The Parties did not negotiate attorneys' fees and costs until the other terms of the settlement had been negotiated. (Sinclair Decl. ¶¶ 7, 33.) When those other terms had been settled, Judge James presented a mediator's proposal regarding fees and costs, which both Parties accepted. (*Id.*) The Parties agreed that Class Counsels' request for an award of fees and costs would not exceed $12,000,000; and that The Regents would not oppose a request that does not exceed that amount. (Settlement § XII.A, B; Sinclair Decl. ¶ 33.) Pursuant to that agreement, Class Counsel will present a formal request for attorneys fees and costs in an amount not to exceed $12,000,000 to the Court. If approved, the award of fees and costs will be paid separately by The Regents and will not come out of the Settlement Fund. (*Id.*)

There are two methods used to calculate attorneys' fees in class action litigation: the lodestar-multiplier method and the percentage method. *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 489 (2016). As will be addressed in more detail in the formal request for an award of attorneys' fees and costs, the requested fees and costs are justified in light of either method. Petitioners were represented by four different law firms over 10 years of hard-fought litigation. As of October 31, 2019, counsel for Petitioners and the Class have incurred more than 15,700 hours of billable work by the four law firms and at least 12 attorneys have made substantial efforts on the case over the years. (Sinclair Decl. ¶ 34.) Multiplying these hours by a reasonable rate more than justifies the requested fees and costs. Further, the key consideration is whether the degree of success achieved by the settlement justifies the requested fee and cost award. Here, the requested fees and costs (which, again, will not come out of the Settlement Fund) represent only 14% of the Settlement Fund ($12,000,000 ÷ $84,500,000 = 14.2%), well below the normal 25% benchmark for a contingency case. *See Edwards v. Nat'l Milk Producers Fed'n*, No. 11-CV-04766-JSW, 2017 WL 3616638, at *8 (N.D. Cal. June 26, 2017); *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 65 (2008).

VIII. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

A. The Court Already Certified a Class for Liability Purposes

The Class was certified for liability purposes in October 2014. (Order 10/30/2014, p. 7.) The Court approved forms of notice in 2014 and 2017 that contained a slightly modified class definition to limit the Class to retirees whose retirement date was effective prior to October 1, 2007. (Sinclair Decl. ¶ 40; Renewed Ex Parte Application for Approval of Notice of Pendency of Class Action and Petitioners' Statement regarding Class Notice (12/2/2014), Exh. A; *see also* Application Re: Other Ex Parte Granted (12/3/2014); Order re Supplementary Notice of Class Action and Petitioners' Statement re Class Notice in Support Thereof (5/25/2017); *see also* Stipulation re Notice to Updated Class List (5/24/2017), Exh. A; *see also* Order, Motion Granted (2/22/2017) at 1.) Consistent with the two prior notices, the class definition in the proposed Notice of Settlement reads as follows:

> All University of California Retirees who worked at Lawrence Livermore National Laboratory (LLNL), who were eligible for University of California-sponsored group

health plan coverage when they retired, and who retired prior to October 1, 2007 and received University-sponsored group health plan coverage after retiring until November 30, 2007 in connection with transfer of LLNL's management to Lawrence Livermore National Security (LLNS), and

Spouses, surviving spouses, or dependents, who were eligible for University-sponsored group health plan coverage as a consequence of a University of California employee's retirement after working at LLNL, or death while working at Lawrence LLNL, and who received University-sponsored group health plan coverage until November 30, 2007 in connection with transfer of LLNL's management to Lawrence Livermore National Security (LLNS).

(Freeman Decl. Exh. 2 [Notice of Settlement at 1].)

IX. PROPOSED SCHEDULE OF EVENTS

Consistent with the Proposed Order Granting Preliminary Approval, Petitioners propose the following schedule:

Preliminary Approval Hearing	Dec. 20, 2019 [pursuant to shortened briefing schedule, CCP § 1005]
Preliminary approval order	TBD by Court/Week of Dec. 23
The Regents' Payment Date for $500,000 for Administrative Costs	Dec. 30, 2019 [within 7 days of Prelim. Approval Order]
Mail Notice of Settlement to Class Members ("Notice Date")	Jan. 22, 2019 [30 days after Prelim. Approval Order]
Settlement Administrator creates settlement website	Jan. 22, 2019 [30 days after Prelim. Approval Order]
Deadline for receipt by Settlement Administrator of Objections to Settlement	March 9, 2020 [45 days after Notice Date]
Deadline for Settlement Administrator to provide all Objections to Parties' Counsel	March 16, 2020 [7 days after Objection Deadline]
Deadline for Settlement Administrator/Class Counsel to submit proof that Notice of Settlement procedures have been complied with	March 24, 2020 [15 days after Objection Deadline]

Deadline for Class Counsel to file Motion for Final Approval of Settlement and Motion for Final Approval of Fees and Costs	March 19, 2020 [16 court days before Final Approval Hearing]
Deadline for Class Counsel to Submit Objections to Court	March 30, 2020 [20 days after Objection Deadline]
Deadline for Class Counsel to file reply papers in support of Motion for Final Approval	April 3, 2020. [5 court days before Final Approval Hearing]
Final Approval Hearing	April 10, 2020. [Approximately 80 days after Notice]
Court issues Final Approval and Judgment	TBD by Court/April 13, 2020
Deadline to appeal any objections runs – Effective Date of Settlement	June 12, 2020 (60 days after Judgment)

X. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant Preliminary Approval of the Settlement.

DATE: December 11, 2019

Andrew Thomas Sinclair
Attorney for Petitioners and Class