

The Honorable Robert S. Lasnik

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREA SCHMITT; ELIZABETH
MOHUNDRO; and O.L. by and through her
parents, J.L. and K.L., each on their own
behalf, and on behalf of all similarly situated
individuals,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN
OF WASHINGTON; KAISER
FOUNDATION HEALTH PLAN OF
WASHINGTON OPTIONS, INC.; KAISER
FOUNDATION HEALTH PLAN OF THE
NORTHWEST; and KAISER FOUNDATION
HEALTH PLAN, INC.,

Defendants.

NO. 2:17-cv-1611-RSL

JOINT MOTION TO AMEND ORDER
PRELIMINARILY APPROVING
SETTLEMENT (DKT. NO. 171)

**Note on Motion Calendar:
December 12, 2023**

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I. INTRODUCTION

Plaintiffs and Defendants move the Court to amend the Order Preliminarily Approving Settlement Agreement, etc., Dkt. No. 171, to ensure that the Order is consistent with the terms of the Agreement and does not impose unnecessary costs on the limited Settlement Fund.

Specifically, the parties jointly request that paragraphs 7 and 18 of the Order be amended as follows:

7. With respect to Class Notice Recipients who did not previously make a claim, and whose email address was not supplied by Kaiser, the Class Notice and Claims Processor is directed to mail the ~~Class Notice and~~ short-form postcard notice.

...

18. The Notice and Claims Processor shall establish a trust account into which Defendants shall cause that portion of the Settlement Amount as described in Section 6.2.1 of the Agreement to be paid within ~~14~~ 30 days of the date of this Order ~~as described in Section 6.1.1 of the Agreement.~~ ...

Class counsel has conferred with Kaiser’s counsel on these changes and it joins in this motion. An Amended Proposed Order reflecting these minor changes is filed with this Motion.

II. ARGUMENT

The Court may amend its Preliminary Approval Order for good cause. *See Greater Gila Biodiversity Project v. United States Forest Serv.*, 926 F. Supp. 914, 915 (D. Ariz. 1994). The parties request that the Court consider two amendments to the existing order as described below and as shown in the attached redline to the Court’s Order. *See Appendix A.*

1 **A. Paragraph 7 Should Be Modified to Require Mailing of Only the Short-form**
2 **Postcard to Class Notice Recipients for Whom Kaiser Does Not Have an**
3 **Email Address.**

4 The Court modified the proposed order submitted by the parties to require
5 mailing of both the long-form Claims Notice and the short-form postcard notice to all
6 Class Notice Recipients for whom no email address was provided by Kaiser and who
7 did not previously make a claim. The parties respectfully request that the Court amend
8 this paragraph to require only mailed notice using the short-form postcard.

9 As originally proposed by the parties, the type and form of notice varied by the
10 group of potential class members. With respect to class members with known claims,
11 they would get a large mailing consisting of the long-form notice, a pre-populated claim
12 form, and a claim form for making additional claims. That's the easy set of class
13 members.

14 Among Kaiser's hundreds of thousands of enrollees on plans that excluded
15 coverage, however, there is likely to be a very small subset that also incurred expenses.
16 The question therefore becomes how to efficiently let those individuals, among the
17 hundreds of thousands of subscribers without claims, know that they might be class
18 members. The proposal was to first identify who could receive notice by email. Where
19 email addresses exist, it makes sense to send the long form notice. There is no postage
20 expense involved, so the more detailed notice is not more expensive to provide.

21 With respect to the hundreds of thousands of subscribers where no email exists,
22 mail must be used. Postage alone becomes a significant issue whenever hundreds of
23 thousands of pieces of mail must be sent. With respect to this group the parties elected
24 to use a short-form notice that could be sent on a postcard. With postage alone (not
25 including printing costs or materials), the difference between the cost of mailing the long
26 form notice (estimated at \$.66 a unit) and the short form notice (estimated at \$.376) is
very significant when 300,000 to 400,000 notices are at issue (an increase of between
\$85,200 and \$113,600). Plaintiffs estimated that they could achieve appropriate classwide

1 notice without incurring costs that could cause a *pro rata* reduction in claims under this
2 process. See Dkt. No. 168, ¶3.

3 The Court's Order modified this approach. See Dkt. No. 171. Paragraph 7 has
4 been amended to require that the long-form Class Notice *and* the post card notice be
5 mailed to all past and present enrollees in Kaiser Washington health plans that contain
6 or contained an exclusion of hearing aids and associated services and for whom Kaiser
7 does not have an email address. Dkt. No. 171, ¶7. Under the Order, the lengthy, physical
8 notice would be mailed to such enrollees even if they have no diagnosis of hearing loss.
9 (And the Order seems to also require a post card notice, which appears redundant if the
10 long form notice is already being provided.) .

11 Reconsideration of this requirement is requested. Postcard notice to Kaiser
12 enrollees who did not submit claims for hearing aids and related services to Kaiser is
13 proper. As noted in Plaintiffs' Motion for Summary Judgment under the Affordable
14 Care Act, the vast majority of the general population, roughly 77%, have no hearing
15 impairment. Dkt. No. 152, p. 11, citing Dkt. No. 154-8. And of older Americans with
16 hearing loss, only about 14% use hearing aids. *Id.*, citing to Dkt. No. 154-9. Thus, only a
17 tiny percentage (likely less than 3.2%) of Kaiser enrollees who did not submit claims for
18 hearing aids, are likely to be class members. The outsized cost of mailing the long-form
19 notice to hundreds of thousands of past and present Kaiser enrollees who are not
20 members of the class, is not warranted by the small number of class members that the
21 mailed long-form notice might reach.

22 Moreover, a postcard notice directing class members to the settlement website
23 where a long-form notice and all of the relevant information is contained, is an accepted
24 form of notice by courts in class action litigation. Postcards directing potential class
25 members to settlement websites are now some of the most common forms of notice in
26 large classes:

1 The Settlement Agreement contains a detailed notice plan consisting
 2 of direct mail **postcard** notice, a settlement website, an email account for
 3 questions regarding the settlement, and a toll-free telephone number. Dkt.
 4 62-1 at 14-16. The Court finds that the notice plan satisfies the requirements
 5 of Rule 23(c) and (e). Fed. R. Civ. P. **23(e)(1)**; Fed. R. Civ. P. 23(c)(2)(B); *see*
 6 *also Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir.
 2004) ("Notice is satisfactory if it generally describes the terms of the
 settlement in sufficient detail to alert those with adverse viewpoints to
 investigate and to come forward and be heard.").

7 *Mannacio v. Sovereign Lending Grp. Inc.*, 2023 U.S. Dist. LEXIS 177275, *11 (W.D. Wash.,
 8 October 2, 2023). *See also In re 3D Sys. Sec. Litig.*, No. 21-CV-1920 (NGG) (TAM), 2023 U.S.
 9 Dist. LEXIS 217637, at *12 (E.D.N.Y. Dec. 5, 2023) (post card notice sent to class members
 10 for whom no email address was available); *Figueroa v. Capital One, N.A.*, No. 18cv692
 11 JM(BGS), 2021 U.S. Dist. LEXIS 11962, at *14 (S.D. Cal. Jan. 21, 2021) (email and postcard
 12 notice directed class members to a more detailed notice on a website); *In re Nexus 6P*
 13 *Prods. Liab. Litig.*, No. 17-cv-02185-BLF, 2019 U.S. Dist. LEXIS 197733, at *11 (N.D. Cal.
 14 Nov. 12, 2019) (class notice achieved by email and postcard notice); *Hillson v. Kelly Servs.*,
 15 2017 U.S. Dist. LEXIS 8699, *8 (E.D. Mich., January 23, 2017) ("postcards that will be
 16 mailed to class members, especially when supplemented by the long-form notice
 17 explicitly referenced in the postcards, meets the requirements of Rule 23(c)(2)(B) and
 18 Rule **23(e)(1)**"). Here, the postcard notice plainly puts a person on notice that they might
 19 be a class member, and directs them to a webpage that contains all of the relevant
 20 information under Federal Rule of Civil Procedure 23(e).

21 The parties respectfully request that the Court amend paragraph 7 to authorize
 22 notice via short-form postcard to Class Notice Recipients who did not previously make
 23 a claim, and whose email address was not supplied by Kaiser.

24 **B. Paragraph 18 Should Be Modified to Require Payment of a Portion of the
 Settlement Fund Consistent with the Settlement Agreement.**

25 Class counsel inadvertently submitted an earlier version of the proposed order
 26 that did not reflect the agreements as to the timing and amount of payments to be made

1 by Defendants. The parties had agreed that Kaiser would make an initial payment to
2 assist with class notice within 30 days of the Court's Order preliminarily approving the
3 settlement agreement, but the order sent to the Court mistakenly reflected only 14 days.
4 Additionally, the Order, as it now reads, would require Kaiser to pay the full settlement
5 amount in advance, rather than the agreed upon portion of the settlement amount as
6 described in Section 6.2.1 of the Agreement. Both parties agree that this change is
7 required to ensure that the Order is consistent with the Settlement Agreement.

8 **III. CONCLUSION**

9 The Court should amend the Order Granting Preliminary Approval etc., Dkt.
10 No. 171, as described in Appendix A to this Motion.

11 DATED: December 12, 2023.

12 *I certify that the foregoing contains 1,446 words,*
13 *in compliance with the Local Civil Rules.*

14 SIRIANNI YOUTZ
15 SPOONEMORE HAMBURGER PLLC

16 /s/ Eleanor Hamburger

17 Eleanor Hamburger (WSBA #26478)
18 Richard E. Spoonemore (WSBA #21833)
19 Daniel Gross (WSBA #23992)
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21 Seattle, WA 98121
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26 Attorneys for Plaintiffs

APPENDIX A

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREA SCHMITT; ELIZABETH
MOHUNDRO; and O.L. by and through
her parents, J.L. and K.L., each on their own
behalf, and on behalf of all similarly
situated individuals,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN
OF WASHINGTON; KAISER
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WASHINGTON OPTIONS, INC.; KAISER
FOUNDATION HEALTH PLAN OF THE
NORTHWEST; and KAISER
FOUNDATION HEALTH PLAN, INC.,

Defendants.

NO. 2:17-cv-01611-RSL

[PROPOSED] AMENDED ORDER:

- (1) PRELIMINARILY APPROVING SETTLEMENT AGREEMENT;
- (2) APPROVING CLASS NOTICE PACKAGE; AND
- (3) ESTABLISHING A FINAL SETTLEMENT APPROVAL HEARING AND PROCESS;

Upon consideration of Plaintiffs' motion pursuant to Federal Rule of Civil Procedure 23(e) for an order preliminarily approving the settlement of this action ("Motion for Preliminary Approval") and in accordance with the Parties' Settlement

1 Agreement dated as of December 5, 2023, (the “Agreement”), and the Court having read
2 and considered the Agreement, orders as follows:¹

3 1. Based on the record before it, the Court tentatively finds, pursuant to
4 Federal Rule of Civil Procedure 23(e), that the Agreement attached as Appendix 1 to the
5 Motion for Preliminary Approval, is fair, reasonable, and adequate. The Court finds that:
6 (a) the Agreement resulted from extensive arm’s length negotiations; (b) there is no
7 evidence at this stage of the proceedings of fraud, collusion, or overreaching or that the
8 rights of absent Class Members were disregarded; and (c) counsel has sufficient
9 experience in similar litigation to propose the Agreement. The Court’s preliminary
10 approval is subject to change pending the outcome of the final settlement approval
11 hearing (“Fairness Hearing”) established herein.

12 2. The Court finds that the proposed Class Notice, attached as Appendix 2,
13 meets the requirements of Federal Rule of Civil Procedure 23, due process, and the
14 applicable law in that it fairly and adequately describes the terms of the Agreement,
15 including the attorneys’ fees and costs sought by Class Counsel and Named Plaintiffs’
16 ability to seek Incentive Awards; gives notice of the time and place of the Fairness
17 Hearing; and describes how a Class Member may comment on, object to, or support the
18 Agreement. The Court also finds that the postcard notice attached as Appendix 3 fairly
19 and reasonably apprises potential class members of the action, and directs them to a
20 webpage and/or phone number to receive copies of the full notice and claims package.

21 3. The Court appoints Epiq to act as the Notice and Claims Processor with the
22 powers and responsibilities set forth in Sections 1.2, 2.2.3 and 6 of the Agreement.

23 4. The Court authorizes and directs Defendants Kaiser Foundation Health
24 Plan of Washington, Inc., Kaiser Foundation Health Plan of Washington Options, Inc.,

25 ¹ The initial capitalization of terms used in this Order and not defined herein shall have the meanings
26 assigned to them in the Agreement.

1 Kaiser Foundation Health Plan of the Northwest Inc., and Kaiser Foundation Health
2 Plan, Inc. or a designated agent to transmit the names, addresses and email addresses
3 (where known) of the Class Notice Recipients located after a reasonable search to the
4 Notice and Claims Processor within 40 days of the entry of this Order. This Order is
5 intended to satisfy 45 C.F.R. § 164.512(e)(1)(i).

6 5. With respect to Class Notice Recipients whose email address is supplied
7 by Kaiser, the Court directs the Notice and Claims Processor to email the Class Notice
8 and short-form postcard notice explaining how to access the Class Notice and Claim
9 Form Materials.

10 6. With respect to Class Notice Recipients who previously made a claim for
11 hearing aid(s) and/or associated services during the class period, the Notice and Claims
12 Processor is directed to mail and email a long-form notice, pre-populated claim form and
13 supplemental claim form along with instructions on how to perfect a claim.

14 7. With respect to Class Notice Recipients who did not previously make a
15 claim, and whose email address was not supplied by Kaiser, the Class Notice and Claims
16 Processor is directed to mail the ~~Class Notice and~~ short-form postcard notice.

17 8. The Notice and Claims Processor shall complete its emailing and mailing
18 within 30 days after receipt of the names, mailing addresses and, if available, email
19 addresses of the Class Notice Recipients. The Notice and Claims Processor will submit a
20 declaration to the Court confirming its compliance with the class notice procedures
21 contained in this Order within 45 days of the date of this Order.

22 9. Class Counsel and/or the Notice and Claims Processor shall establish a
23 settlement web page available to the public within 30 days of the date of this order. The
24 web page shall, at minimum, contain the Settlement Agreement, long form notice, claims
25 forms, claim form instructions, a description of the action, deadlines and key pleadings
26

1 (including, without limitation, the motions for approval and orders certifying the
2 settlement class and preliminarily approving the agreement) as described in Section
3 2.2.3.2 of the Agreement.

4 10. The Court concludes that direct notice by email, where email addresses are
5 available, and by direct U.S. mail as described above to the Class Notice Recipients, in
6 addition to web-based notice, is the best notice practicable under the circumstances and
7 complies with the requirements of Federal Rule of Civil Procedure 23, due process, and
8 any other applicable law.

9 11. Not more than five (5) days after the date of this Order, Defendants shall
10 provide any notices and materials that may be required under the Class Action Fairness
11 Act ("CAFA"), 28 U.S.C. §1715(b).

12 12. A Fairness Hearing to consider whether the proposed Agreement is fair,
13 reasonable, and adequate and should be finally approved is scheduled for April 18, 2024
14 at 11:00 a.m. at the United States Courthouse, 700 Stewart Street, Suite 13206, Seattle, WA
15 98101.

16 13. A Class Member who wishes to comment on or object to the Agreement
17 must submit written comments and/or objections to the Court no later than April 4,
18 2024.

19 14. A Class Member who wishes to appear at the Fairness Hearing may do so
20 if he or she submits written notice to the Court, with copies to counsel, that he or she
21 intends to appear in person or through counsel. In that written notice to appear, the Class
22 Member must describe the nature of his or her comment or objection. Written notice of
23 intent to appear must be filed with the Court and mailed to counsel by April 4, 2024.

24 15. A Motion for Final Approval of the Agreement, together with any
25 supporting declarations or other documentation, must be filed no later than April 11,
26

1 2024. Class Counsel shall also mail and, if an address is available, email the Motion for
2 Final Approval to all Class Members who object to the Agreement or file written notice
3 with the Court that they intend to appear at the Fairness Hearing.

4 16. Claims by Class Members must be received by the Notice and Claims
5 Processor no later than April 4, 2024.

6 17. Class Counsel shall file any motion for an award of attorneys' fees or
7 reimbursement of expenses or costs and any motion for an Incentive Award on behalf of
8 a Named Plaintiff no later than March 7, 2024. Class Counsel shall post this motion on
9 the web page within three days of its filing with the Court.

10 18. The Notice and Claims Processor shall establish a trust account into which
11 Defendants shall cause that portion of the Settlement Amount as described in Section
12 6.2.1 of the Agreement to be paid within 14-30 days of the date of this Order ~~as described~~
13 ~~in Section 6.1.1 of the Agreement~~. The trust account shall constitute a "qualified
14 settlement fund" within the meaning of Internal Revenue Code § 468B and Treas. Reg. §
15 1.468B-1, et seq. The Qualified Settlement Fund shall remain subject to the jurisdiction of
16 the Court, until such time as the Settlement Amount is distributed pursuant to the
17 Agreement and/or further order(s) of the Court. In order to fund notice, the Notice and
18 Claims Processor, with advance notice to each party, may withdraw from the Qualified
19 Settlement Fund amounts to pay its invoices as provided under 6.2.1 of the Settlement
20 Agreement prior to final approval.

21 19. Neither Defendants nor Defendants' counsel shall have any responsibility
22 for the distribution of the Qualified Settlement Fund, or any application for attorneys'
23 fees or reimbursement of expenses or for a Case Contribution Award for any Named
24 Plaintiff submitted by Class Counsel, and such matters will be considered separately
25 from the fairness, reasonableness, and adequacy of the Agreement.

1 Presented by:

2 SIRIANNI YOUTZ
3 SPOONEMORE HAMBURGER PLLC

4 /s/ Richard E. Spoonemore

5 Eleanor Hamburger (WSBA #26478)
6 Richard E. Spoonemore (WSBA #21833)
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13 dgross@sylaw.com

14 Attorneys for Plaintiffs

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
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AT SEATTLE

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3 1. Based on the record before it, the Court tentatively finds, pursuant to
4 Federal Rule of Civil Procedure 23(e), that the Agreement attached as Appendix 1 to the
5 Motion for Preliminary Approval, is fair, reasonable, and adequate. The Court finds that:
6 (a) the Agreement resulted from extensive arm’s length negotiations; (b) there is no
7 evidence at this stage of the proceedings of fraud, collusion, or overreaching or that the
8 rights of absent Class Members were disregarded; and (c) counsel has sufficient
9 experience in similar litigation to propose the Agreement. The Court’s preliminary
10 approval is subject to change pending the outcome of the final settlement approval
11 hearing (“Fairness Hearing”) established herein.

12 2. The Court finds that the proposed Class Notice, attached as Appendix 2,
13 meets the requirements of Federal Rule of Civil Procedure 23, due process, and the
14 applicable law in that it fairly and adequately describes the terms of the Agreement,
15 including the attorneys’ fees and costs sought by Class Counsel and Named Plaintiffs’
16 ability to seek Incentive Awards; gives notice of the time and place of the Fairness
17 Hearing; and describes how a Class Member may comment on, object to, or support the
18 Agreement. The Court also finds that the postcard notice attached as Appendix 3 fairly
19 and reasonably apprises potential class members of the action, and directs them to a
20 webpage and/or phone number to receive copies of the full notice and claims package.

21 3. The Court appoints Epiq to act as the Notice and Claims Processor with the
22 powers and responsibilities set forth in Sections 1.2, 2.2.3 and 6 of the Agreement.

23 4. The Court authorizes and directs Defendants Kaiser Foundation Health
24 Plan of Washington, Inc., Kaiser Foundation Health Plan of Washington Options, Inc.,

25 ¹ The initial capitalization of terms used in this Order and not defined herein shall have the meanings
26 assigned to them in the Agreement.

1 Kaiser Foundation Health Plan of the Northwest Inc., and Kaiser Foundation Health
2 Plan, Inc. or a designated agent to transmit the names, addresses and email addresses
3 (where known) of the Class Notice Recipients located after a reasonable search to the
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6 5. With respect to Class Notice Recipients whose email address is supplied
7 by Kaiser, the Court directs the Notice and Claims Processor to email the Class Notice
8 and short-form postcard notice explaining how to access the Class Notice and Claim
9 Form Materials.

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11 hearing aid(s) and/or associated services during the class period, the Notice and Claims
12 Processor is directed to mail and email a long-form notice, pre-populated claim form and
13 supplemental claim form along with instructions on how to perfect a claim.

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20 declaration to the Court confirming its compliance with the class notice procedures
21 contained in this Order within 45 days of the date of this Order.

22 9. Class Counsel and/or the Notice and Claims Processor shall establish a
23 settlement web page available to the public within 30 days of the date of this order. The
24 web page shall, at minimum, contain the Settlement Agreement, long form notice, claims
25 forms, claim form instructions, a description of the action, deadlines and key pleadings
26

1 (including, without limitation, the motions for approval and orders certifying the
2 settlement class and preliminarily approving the agreement) as described in Section
3 2.2.3.2 of the Agreement.

4 10. The Court concludes that direct notice by email, where email addresses are
5 available, and by direct U.S. mail as described above to the Class Notice Recipients, in
6 addition to web-based notice, is the best notice practicable under the circumstances and
7 complies with the requirements of Federal Rule of Civil Procedure 23, due process, and
8 any other applicable law.

9 11. Not more than five (5) days after the date of this Order, Defendants shall
10 provide any notices and materials that may be required under the Class Action Fairness
11 Act ("CAFA"), 28 U.S.C. §1715(b).

12 12. A Fairness Hearing to consider whether the proposed Agreement is fair,
13 reasonable, and adequate and should be finally approved is scheduled for April 18, 2024
14 at 11:00 a.m. at the United States Courthouse, 700 Stewart Street, Suite 13206, Seattle, WA
15 98101.

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17 must submit written comments and/or objections to the Court no later than April 4,
18 2024.

19 14. A Class Member who wishes to appear at the Fairness Hearing may do so
20 if he or she submits written notice to the Court, with copies to counsel, that he or she
21 intends to appear in person or through counsel. In that written notice to appear, the Class
22 Member must describe the nature of his or her comment or objection. Written notice of
23 intent to appear must be filed with the Court and mailed to counsel by April 4, 2024.

24 15. A Motion for Final Approval of the Agreement, together with any
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2 Final Approval to all Class Members who object to the Agreement or file written notice
3 with the Court that they intend to appear at the Fairness Hearing.

4 16. Claims by Class Members must be received by the Notice and Claims
5 Processor no later than April 4, 2024.

6 17. Class Counsel shall file any motion for an award of attorneys' fees or
7 reimbursement of expenses or costs and any motion for an Incentive Award on behalf of
8 a Named Plaintiff no later than March 7, 2024. Class Counsel shall post this motion on
9 the web page within three days of its filing with the Court.

10 18. The Notice and Claims Processor shall establish a trust account into which
11 Defendants shall cause that portion of the Settlement Amount as described in Section
12 6.2.1 of the Agreement to be paid within 30 days of the date of this Order. The trust
13 account shall constitute a "qualified settlement fund" within the meaning of Internal
14 Revenue Code § 468B and Treas. Reg. § 1.468B-1, et seq. The Qualified Settlement Fund
15 shall remain subject to the jurisdiction of the Court, until such time as the Settlement
16 Amount is distributed pursuant to the Agreement and/or further order(s) of the Court.
17 In order to fund notice, the Notice and Claims Processor, with advance notice to each
18 party, may withdraw from the Qualified Settlement Fund amounts to pay its invoices as
19 provided under 6.2.1 of the Settlement Agreement prior to final approval.

20 19. Neither Defendants nor Defendants' counsel shall have any responsibility
21 for the distribution of the Qualified Settlement Fund, or any application for attorneys'
22 fees or reimbursement of expenses or for a Case Contribution Award for any Named
23 Plaintiff submitted by Class Counsel, and such matters will be considered separately
24 from the fairness, reasonableness, and adequacy of the Agreement.

1 Presented by:

2 SIRIANNI YOUTZ
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4 /s/ Richard E. Spoonemore

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14 Attorneys for Plaintiffs