

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
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

DECLARATION OF RICHARD E.
SPOONEMORE IN SUPPORT OF
PLAINTIFFS' UNOPPOSED MOTIONS
FOR:

- (1) SETTLEMENT CLASS
CERTIFICATION; AND
- (2) PRELIMINARY APPROVAL OF
SETTLEMENT AGREEMENT,
APPROVAL OF CLASS NOTICE
PACKAGE, AND TO ESTABLISH A
FINAL SETTLEMENT APPROVAL
HEARING AND PROCESS

**Note on Motion Calendar:
December 6, 2023**

Richard E. Spoonemore declares under penalty of perjury and in accordance with
the laws of the State of Washington and United States that:

1. I am one of the attorneys for Plaintiffs in this action. Unless otherwise
stated, the facts in this declaration are based upon my personal knowledge.

2. In the six years since this case was filed, it has been aggressively litigated.
The parties have exchanged thousands of pages of formal discovery, deposed thirteen

1 witnesses, and engaged in extensive motions practice including two motions to dismiss,
2 an appeal to the Ninth Circuit, class certification, and cross-motions for summary
3 judgment. When it became clear that certain legislative changes would provide access to
4 hearing aids and related services to a significant segment of the proposed class – with
5 other legislative and regulatory proposals advancing to address other class segments –
6 the parties agreed that mediation made sense. Judge Charles Burdell (ret.) was retained
7 to mediate the matter in July. With his assistance, the parties reached a tentative
8 agreement after protracted discussions, only to have the agreement collapse in the
9 following weeks. Despite this, the parties re-engaged with each other to revive the deal,
10 which after several months of negotiation, eventually resulted in a short-form
11 agreement. That agreement was codified in the long-form agreement attached to the
12 motion for preliminary approval as *Appendix 1*. The agreement was the result of arm’s-
13 length and protracted arm’s-length negotiations, and we strongly recommend that it be
14 approved. We are unaware of any similar or comparable litigation against these
15 defendants, and this case is the only current mechanism of which we are aware to
16 provide compensation to the members of the proposed settlement class.

17 3. When addressing retrospective relief in our firms’ class action health care
18 practice, we typically model the anticipated out-of-pocket losses that will be claimed in
19 a damages settlement. In this case, as in others, we have been assisted by data and
20 analysis created by Frank G. Fox, Ph.D., a healthcare economist who specializes in this
21 area. Based upon his damage analysis and our own extensive experience in health care
22 class actions, we believe that the settlement amount of \$3,000,000 will provide claimants
23 with 100% of their out-of-pocket losses or very close to that amount. This conclusion is
24 the result of the following factors: (1) the number of claims submitted to Kaiser by the
25 proposed class members during the class period that were denied; (2) the anticipated
26 number of claims that were incurred, but not submitted, to Kaiser for payment; (3) the

1 anticipated response rate for each of the categories (1) and (2); (4) the anticipated costs
2 of litigation, attorney fees, notice and administrative costs; and (5) potential case
3 contribution awards to the class representatives. Based on data received in discovery,
4 we anticipate that between 400 and 600 potential class members fall into the first
5 category, with somewhere between \$1M and \$1.5M in denied claims. These figures need
6 to be adjusted down to account for the following factors (1) secondary insurance,
7 (2) other payors, (3) provider discounts and waivers, and (4) foregone care after the
8 receipt of the denial. In addition, even with prepopulated claims forms and very simple
9 ways to claim funds, the disappointing reality is that a large percentage of people do not
10 bother to return even the most simple claim forms. We plan to aggressively target the
11 potential class members in category (1) using prepopulated forms, simple online
12 verification, alternative methods of confirmation, and reminder notices during the
13 process. We are aiming for a 50% response rate among class members who submitted
14 claims to Kaiser, which is aggressive. The notice aimed at class members who did not
15 make claims to Kaiser, category (2), will result in a very low response rate, since the Class
16 Notice will be sent to all current and former Kaiser under-age 65 enrollees in plans with
17 hearing aid exclusions, and given that the vast majority of these insureds will not have
18 claims. Our modeling indicates a range, from claimants receiving a slight *pro rata*
19 deduction from their full claim amount to the existence of significant *cy pres* funds.
20 Historically, our models have been extremely accurate. *See, e.g., C.S. v. Boeing*, United
21 States District Court for the Western District of Washington, Cause No. 2:14-00574-RSM
22 (100% paid); *A.D. v. T-Mobile USA, Inc.*, United States District Court for the Western
23 District of Washington, Cause No. 2:15-cv-00180-RAJ (100% paid); *D.T. v. NECDA/IBEW*
24 *Family Medical Care Plan, et al.*, United States District Court for the Western District of
25 Washington, Cause No. 2:17-cv-00004-RAJ (100% paid); and *N.R. v. Raytheon Company,*
26 *et al.*, United District Court for Massachusetts, Cause No. 1:20-cv-1053-RGS (100% paid).

1 In short, while we cannot guarantee a 100% recovery, we believe it is likely that all
2 claimants will receive close to that amount. It is also noteworthy that a 100% recovery
3 for claimants does not include any deductions for copayments, coinsurance, or
4 deductibles. As a result, a recovery at or near 100% of claimants' out-of-pocket costs for
5 hearing aids and related services will likely provide them with more reimbursement than
6 they would have received if Kaiser had paid their claims under the policies of insurance.

7 4. We are working with Epiq, the notice and claims administrator that we are
8 recommending, to make the claims process as simple as possible. (We are
9 recommending Epiq be appointed given that they were within 5% of the lowest estimate
10 received in response to class counsel's request for proposal, and their experience in
11 adjudicating medical claims. We had a very good experience with Epiq in connection
12 with the claims process in our autism coverage cases.) Under the claims process, class
13 members who previously submitted claims need only verify (online or by returning a
14 prepaid card) that they (as opposed to secondary insurance) are out-of-pocket in the
15 amount indicated on the pre-populated claim form. Those individuals can also file for
16 additional reimbursement under the claims process by filling out a claim form to include
17 charges that they may not have submitted. (Some individuals may have stopped
18 submitting claims after denial – this process permits them to seek sums in addition to
19 the amount on the pre-populated form.) Individuals with claims who never submitted
20 them will be eligible for payment from the settlement fund upon submission of a claim
21 form verifying the elements of the claim. The proposed notice and claims process is
22 functionally identical to those approved by the Court in *Z.D. v. Grp. Health Coop.*, 2014
23 U.S. Dist. LEXIS 14376, at *3 (W.D. Wash. Feb. 5, 2014), and *R.H. v. Premera BlueCross*,
24 2014 U.S. Dist. LEXIS 108503 (W.D. Wash. Aug. 6, 2014), among others.

25 5. Here, Plaintiffs O.L., through her parents, Mohundro and Schmitt
26 dedicated substantial time, effort, and risk to protect the interests of the class. Plaintiff

1 Schmitt was willing to pursue this case to make systemic change on behalf of insureds
2 with hearing loss, and became one of the first plaintiffs in the country to challenge health
3 benefit design as discriminatory under the Affordable Care Act. Schmitt, as a legal
4 advocate for low-income consumers at Columbia Legal Services, was well aware of the
5 time, effort and energy it takes to be part of precedent-setting litigation. Plaintiff Schmitt
6 gladly participated in every stage of this litigation, including planning and preparing for
7 the initial filing. She also agreed to a slightly longer release of her personal claims when
8 such release was sought by Kaiser in order to get a deal done. At all times, Plaintiff
9 Schmitt was willing to put the benefit of the class far ahead of her own benefit. Plaintiff
10 Mohundro's commitment to this case is also exceedingly strong. She heard about the
11 litigation and reached out to Class counsel to participate, because she was eager for the
12 opportunity to make systemic change on behalf of people with hearing loss. Plaintiff
13 Mohundro's involvement ensured that a named plaintiff had exhausted the
14 administrative process at a critical time in the case. Similarly, Plaintiff O.L. and her
15 parents had been monitoring the litigation, and when the Schmitt case was remanded
16 from the Ninth Circuit, they stepped forward to join the case, representing the important
17 developmental needs faced by class members who are children with hearing loss. All
18 named plaintiffs were subjected to extensive written discovery and document
19 production that required hours of plaintiffs' time and attention to respond. Plaintiffs
20 Schmitt, Mohundro and O.L.'s mother, J.L., had lengthy and aggressive depositions
21 taken by Kaiser. The named plaintiffs participated in the extensive negotiations, and
22 were fully involved in every step of the settlement process. These named plaintiffs went
23 above and beyond the requirements of class representatives, playing an active role in
24 both the litigation and settlement process to ensure that the rights of Kaiser insureds
25 with hearing loss would be respected and protected from discrimination. There is no
26 conflict between the named plaintiffs and the class. The proposed case contribution

1 award of \$15,000 is proper where, as here, the plaintiffs were involved in litigation for
2 many years, and all plaintiffs endured a lengthy appeal to the Ninth Circuit, extensive
3 discovery and depositions, and an exhaustive settlement process.

4 6. Class counsel has met and conferred with Kaiser's counsel on the form of
5 the proposed order and Kaiser does not object to its entry.

6 DATED: December 6, 2023 at Seattle, Washington.

7 /s/ Richard E. Spoonemore

8 Richard E. Spoonemore (WSBA #21833)

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