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

PLAINTIFFS' UNOPPOSED MOTION FOR SETTLEMENT CLASS CERTIFICATION

Note on Motion Calendar: December 6, 2023

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I. INTRODUCTION

Plaintiffs Andrea Schmitt, Elizabeth Mohundro, and O.L. by and through her parents, K.L. and J.L., have reached a settlement agreement with Defendants Kaiser Foundation Health Plan of Washington, Kaiser Foundation Health Plan of Washington Options, Kaiser Foundation Health Plan of the Northwest and Kaiser Foundation Health Plan, Inc. (collectively, "Kaiser"). At the time this lawsuit was filed, Kaiser excluded all coverage for hearing aids and associated services, except for cochlear implants. Starting January 1, 2024, all non-grandfathered group health plans in Washington, except small group health plans, will be required to cover hearing aids and associated services. *See* RCW 48.43.135. It is anticipated that the federal approvals necessary to allow the Washington Legislature to change both the individual and small group insurance market requirements without a financial penalty to the state will be forth coming in the near future. These legislative changes have facilitated settlement of this litigation, which provides for retrospective coverage to settlement class members.

The parties have executed a proposed Settlement Agreement. That Agreement, if approved, would create a $3,000,000.00 fund to reimburse settlement class members for out-of-pocket costs associated with hearing aids and related services during the class period, and to pay attorney fees, costs, claims administration costs, and case contribution awards. *See* Agreement to Settle Claims, attached as *Appendix 1* ("*App. 1*" or "Settlement Agreement") to Plaintiffs' Unopposed Motion: (1) For Preliminary Approval of Settlement Agreement; (2) For Approval of Class Notice Package; and (3) To Establish a Final Settlement Approval Hearing and Process ("Plaintiffs' Motion for Preliminary Approval"). Plaintiffs' counsel anticipates that this fund will be sufficient to pay all valid claims submitted by class members at 100%, even after the payment of attorneys' fees, costs, notice and administrative costs.

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Consistent with the Settlement Agreement, Plaintiffs move this Court to certify a settlement class under Federal Rule of Civil Procedure 23(b)(3). The proposed settlement class meets all the requirements of Rule 23(a) and (b)(3). Plaintiffs Schmitt, Mohundro, and O.L., by and through her parents, should be appointed as the class representatives of the settlement class, with Sirianni Youtz Spoonemore Hamburger, Eleanor Hamburger, Richard Spoonemore and Daniel S. Gross appointed as class counsel.

II. PROPOSED SETTLEMENT CLASS DEFINITION

Plaintiffs move for the certification of the following settlement class:

All individuals who:

(1) were insured at any time during the Settlement Class Period under a Washington health insurance plan that has been, is or will be delivered, issued for delivery, or renewed by Kaiser Foundation Health Plan of Washington and Kaiser Foundation Health Plan of Washington Options (collectively, "Kaiser"), excluding Medicare Advantage plans and plans governed by Federal Employee Health Benefits Act, that did not cover Hearing Aids and Associated Services and

(2) have required, require or will require treatment for hearing loss other than treatment associated with cochlear implants, or with Bone Anchored Hearing Aids (BAHAs).

The Settlement Class Period is defined as October 30, 2014, through December 31, 2023, inclusive.

III. EVIDENCE RELIED UPON

Plaintiffs rely upon the Declaration of Richard E. Spoonemore submitted in connection with this motion and the Plaintiffs' Unopposed Motion for Preliminary Approval, as well as the pleadings and files in the record. While Kaiser does not oppose this motion, it does not necessarily agree with the facts or legal conclusions herein.

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IV. FACTS

A. Procedural Facts

This case was filed on October 30, 2017. Dkt. No. 1. Kaiser brought its first Motion to Dismiss on January 5, 2018. Dkt. No. 17. After briefing on the Motion to Dismiss was complete, oral argument was heard on August 2, 2018. Dkt. No. 37. The Court granted Defendants' Motion, dismissing Plaintiffs' claims with prejudice. Dkt. Nos. 42, 43.

Plaintiffs appealed the Order of Dismissal to the Ninth Circuit Court of Appeals. Oral argument on the appeal was heard on November 8, 2019. In a significant and new precedent-setting decision, the Ninth Circuit held that Plaintiffs' theory under Section 1557 was correct, but that they must amend their complaint to properly allege those claims. *Schmitt v. Kaiser Health Plan of Washington*, 965 F.3d 945, 960 (9th Cir. 2020). The mandate was issued on September 4, 2020. Dkt. No. 52.

Plaintiffs' Third Amended Complaint was filed on October 20, 2020. *See* Dkt. No. 58. Plaintiffs added an additional named plaintiff, O.L., by and through her parents, J.L. and K.L., without changing the claims in the Fourth Amended Complaint. *See* Dkt. No. 65. Kaiser moved to dismiss the Fourth Amended Complaint on March 19, 2021. Dkt. No. 72. The Court denied Kaiser's motion on August 4, 2022. Dkt. No. 81.

Extensive discovery was undertaken by both parties. The parties exchanged thousands of pages of document discovery and twelve depositions were taken. Spoonemore Decl., ¶2.

On January 12, 2023, Plaintiffs moved for class certification. Dkt. No. 90. This motion had not been adjudicated at the time the settlement was reached. On June 1, 2023, Plaintiffs moved for partial summary judgment regarding their claim that Kaiser violated RCW 48.43.0128 by imposing a hearing exclusion. Dkt. No. 129. Defendants opposed this motion and filed a cross-motion for summary judgment. Dkt. No. 137. On July 10, 2023, Plaintiffs filed a second motion for partial summary judgment regarding

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Plaintiffs' claim under the Affordable Care Act's anti-discrimination law. Dkt. No. 152. The same day, Defendants filed a motion to dismiss Plaintiffs' claims under the Affordable Care Act. Dkt. No. 156. These motions were fully briefed and pending before the Court at the time of settlement (except for Defendants' reply in support of their motion to dismiss Plaintiffs' ACA claims).

The parties engaged in a day-long mediation with the Hon. (ret.) Judge Charles Burdell on July 20, 2023. At the mediation, the parties' counsel reached a tentative agreement that required further negotiation after consulting with their clients. The settlement broke down, but was eventually revived with additional negotiations and discussions. Based upon the tentative agreement, the Court suspended all pending deadlines. *See* Dkt. Note dated July 21, 2023. Ultimately, the tentative agreement was finalized on September 15, 2023 and a long-form settlement agreement was executed on December 5, 2023. *See App. 1.*

B. Class-Related Facts

The facts described in Plaintiffs' pending Motion for Class Certification (Dkt. No. 90) are incorporated herein and summarized below.

Kaiser has applied and continues to apply an exclusion of all coverage of hearing aids and associated services in its individual, small group and its base large group plans. *See id.,* pp. 4–5. Kaiser did not exclude hearing aids and related treatment based upon a determination that such devices or treatment are experimental/investigational or not medically necessary. *Id.* pp. 6–7. Indeed, Kaiser did not identify any basis grounded in medical science for the Exclusion. *Id.* Kaiser's standard practice is to deny coverage of claims submitted with diagnostic code indicating hearing loss together with the device code(s) for hearing aids. *Id.* These codes trigger the automatic denial of coverage. *Id.* Kaiser's denial of hearing aids to Plaintiffs' Mohundro and O.L. reflect this standard practice. *Id.,* p. 7.

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V. LAW AND ARGUMENT

A. Legal Standards for Settlement Class Certification

Under Rule 23 a court may, in its discretion, certify a settlement class as long as all of the requirements for class certification under Rule 23(a), and at least one of the requirements of Rule 23(b), are satisfied. *See Amchem Products Inc. v. Windsor*, 521 U.S. 591, 620–21 (1997); *see also Hanlon v. Chrysler Corporation*, 150 F.3d 1011, 1019 (9th Cir. 1998). The proposed settlement class should be certified in this case because it meets the requirements of FRCP 23(a) and (b)(3).

The Court's review of the class certification requirements should be conducted in light of the terms of the Settlement Agreement. *See Amchem,* 521 U.S. at 619–20. For example, when confronted with a request for a settlement-only class certification, a court need not inquire whether the case, if tried, would present intractable management problems under Rule 23(b)(3)(D), because there will be no trial. *Id*. Importantly, the court must ensure that those provisions which are designed to protect absent class members are satisfied. *Id.; see also* Alba Conte and Herbert Newberg, 4 NEWBERG ON CLASS ACTIONS, §11:37 at 56 (4th ed. 2002) ("Newberg"). This Settlement Agreement protects those interests.

Plaintiffs therefore ask that this Court certify the proposed settlement class by applying FRCP 23 criteria to the present posture of the case, *i.e.*, a case where the parties propose to settle their dispute, contingent upon certification.

B. The Proposed Settlement Class Meets the Requirements of FRCP 23(a)

Pursuant to FRCP 23(a), certification of a class requires a showing of numerosity, commonality, typicality, and adequacy of representation. *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994).

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1. Numerosity

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." The requirement is, in reality, "an impracticability of joinder requirement." H. Newberg and A. Conte, 1 NEWBERG ON CLASS ACTIONS, § 3:3 (4th ed.). *See also Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1340 (W.D. Wash. 1998) (joinder does not need to be impossible, but simply impracticable depending on the facts and circumstances of the case). Although sheer numbers are not dispositive, classes in excess of 40 members are generally so numerous as to render joinder impracticable. *McCluskey v. Trustees of Red Dot Corp.*, 268 F.R.D. 670, 673–74 (W.D. Wash. 2010).

This criterion is easily met. Kaiser concedes that the proposed class exceeds 40 members. *See* Dkt. No. 91-10, Answer to Request for Admission No. 1. Indeed, Kaiser's Rule 30(b)(6) witness agreed that, based upon an actuarial analysis performed by Kaiser, far more than 40 individuals are subject to the Exclusions. Dkt. No. 91-2, pp. 49:7-16, 55:16–21, 125:18–21. Plaintiffs' expert witness, Frank G. Fox, Ph.D., confirmed as much. Dkt. No.97, ¶8.

2. Commonality

FRCP 23(a)(2) requires plaintiffs to show that questions of law or fact are common to each member of the proposed class. The existence of shared legal issues establishes commonality:

> Indeed, Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

Rule 23(a)(2) requires that there be at least one question of law or fact common to members of the class. *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001); *Blackie v. Barrack*, 524 F.2d 891, 904 (9th Cir. 1975). Commonality does not require that plaintiff's

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injuries be identical to those of other class members, only that the injuries be similar and that they result from the same course of conduct. *Baby Neal*, 43 F.3d at 56. "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Id.* at 56. This test is "easily met" because "the requirement may be satisfied by a single common issue." *Id*. Ultimately, the test looks to whether the ***answers*** to the shared legal issue or issues will result in class-wide adjudication. *Wal-Mart Stores, Inc. v. Dukes,* 464 U.S. 338, 131 S. Ct. 2541, 2551 (2011) (*quoting* Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

Commonality only imposes a "limited burden" upon the plaintiff given that it "only requires a single significant question of law or fact." *Mazza v. American Honda Motor Co., Inc.,* 666 F.3d 581 589 (9th Cir. 2012).

> The Supreme Court has recently emphasized that commonality requires that the class members' claims "depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." The plaintiff must demonstrate "the capacity of class wide proceedings to generate common answers" to common questions of law or fact that are "apt to drive the resolution of the litigation."

Id. at 588–89 (quoting *Wal-Mart Stores, Inc.,* 131 S. Ct. at 2551). This case seeks a determination of a single core legal question: Do Kaiser's Exclusions violate state and federal non-discrimination law?

In addition to this overriding common question, the following common issues are also present: (1) whether Kaiser is prohibited by Section 1557 from enforcing and administering the Exclusions even when large group employers chose not to purchase a rider? (2) Did Kaiser breach its contracts with Plaintiffs and the class by designing and applying a written exclusion that is rendered void and unenforceable by RCW 48.43.0128? and (3) whether the remedy for such discrimination includes

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retrospective processing of claims, including those claims never submitted to Kaiser due to the Exclusions.

These questions would "generate common answers apt to drive the resolution of the litigation," and pending motions for summary judgment demonstrate that the Court's adjudication may resolve the class claims "in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. Indeed, the answer to these common questions would determine whether declaratory, injunctive, and other relief is merited and the appropriate scope of such relief. *See K.M.*, 2014 U.S. Dist. LEXIS 9156, at *39–40; *Z.D. v. Group Health Coop.*, 2012 U.S. Dist. LEXIS 76498, at *8 (W.D. Wash. June 1, 2012). Commonality is easily met here.

3. Typicality

Rule 23(a)(3) is met where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality is found when (1) other members have the same or similar injury, (2) the action is based on conduct that is not unique to the named plaintiffs, and (3) other class members have been injured by the same course of conduct. *Hansen v. Ticket Track, Inc.*, 213 F.R.D. 412, 415 (W.D. Wash. 2003), citing *Hannon v. Dataproducts Corp., 976 F.2d* 497, 508 (9th Cir. 1992). All that is required is that class members have injuries similar to the representatives and that those injuries result from the same course of conduct. *Armstrong,* 275 F.3d at 869.

Under Rule 23(a)'s permissive standards, representative claims are "typical" if they are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Baby Neal*, 43 F.3d at 58. As a result, "[w]here an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are

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shown to result from the practice." *Id.* at 57–58. "[T]he Ninth Circuit has noted that the commonality and typicality requirements of Rule 23(a) tend to merge. A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Hunt v. Check Recovery Systems, Inc.*, 241 F.R.D. 505, 510–11 (N.D. Cal. 2007) (internal citations omitted).

Plaintiffs' claims are co-extensive with those of the proposed settlement class. Like all class members, Ms. Schmitt, Ms. Mohundro and O.L. have been or are insured in Kaiser non-grandfathered plans and require treatment for hearing loss other than with cochlear implants or BAHAs. *See* Dkt. No. 65, ¶22, Dkt. Nos. 93–96. Each seeks to enforce Defendants' compliance with Section 1557 of the ACA and the WLAD, including their right to coverage of medically necessary hearing care without the administration of discriminatory Exclusions. Dkt. No. 65, ¶¶108–124. Plaintiffs Mohundro and O.L. were denied coverage for their hearing aids and related treatment by Kaiser. Dkt. Nos. 91-8, 91-9. Ms. Schmitt, like many other Kaiser enrollees, required and purchased hearing aids and associated services during the Settlement Class Period, but did not submit a claim because to do so would have been futile. *See generally*, Dkt. No. 90, p. 12. Typicality is established.

4. Adequate Representation

Fair and adequate protection of the interests of the settlement class requires that (1) counsel representing the class must be qualified and competent, and (2) the class representative must not have antagonistic or conflicting interests with the unnamed members of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them. *Hanlon*, 150 F.3d at 1020, citing *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940).

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The requirement of adequate representation set forth in FRCP 23(a)(4) has two components: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020.

Plaintiffs Schmitt, Mohundro and O.L. will fairly and adequately represent the class. Plaintiffs have dedicated years of effort to this case, and are committed to its vigorous prosecution. Spoonemore Decl., ¶5; Dkt. Nos. 92–96. Their claims and interests do not conflict with any interests of the proposed class. *Id.* They are familiar with the duties and responsibilities of being class representatives and will continue to diligently look out for the interests of all class members. *Id.*

The second factor—competency of counsel—has now been subsumed under Federal Rule of Civil Procedure 23(g), the requirement that the Court appoint adequate class counsel. The declaration of counsel who represent the plaintiffs establish that they (1) have done extensive work in identifying the claims in this action, (2) have far-reaching experience in class litigation, specifically ERISA class actions, (3) are well versed in this area of the law, and (4) are willing to commit the resources necessary to vigorously prosecute this litigation. Fed. R. Civ. P. 23(g)(1)(A)(i)–(iv). *See* Dkt. No. 91, ¶¶3–20. *See also Dunakin*, 99 F. Supp. 3d at 1332 (noting Ms. Hamburger's prior experience in disability-related class action litigation); *McCluskey*, 268 F.R.D. at 676 (noting Mr. Spoonemore's extensive experience in ERISA class actions, and stating that he is "highly qualified by his experience" to represent the class); *Unthaksinkum v. Porter,* 2011 U.S. Dist. LEXIS 111099, *45 (W.D. Wash. Sept. 28, 2011) (stating of Mr. Gross and other proposed class counsel "[e]ach is a highly qualified attorney who has class action experience [and] is prepared to represent Class Representatives and class members.…"). The requirements of Fed. R. Civ. P. 23(a)(4) and 23(g) are met.

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C. Certification Is Proper Under FRCP 23(b)(3)

Rule 23(b)(3) permits a class action when (1) questions of law or fact common to the class members predominate over questions affecting individual members, and (2) such an action is superior to other available methods of adjudicating the controversy. Both requirements are satisfied.

1. Common, Rather than Individual, Issues Predominate in this Case

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U. S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009). "The Rule 23(b)(3) predominance inquiry asks the court to make a global determination of whether common questions prevail over individualized ones." *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). "An individual question is one 'where members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045, 194 L.Ed.2d 124, 134 (2016) (citations omitted).

The universal question in this case is whether Kaiser designed and administered the Hearing Aid Exclusion in violation of federal and state anti-discrimination law. Kaiser's standard practice is fixed and uniform across class members: Claims for hearing aids and related services, apart from cochlear implants and BAHAs, were generally denied under the Exclusion. These common facts and associated legal issues dominate the case over any claim of individualized issues that may be raised by Defendants. The predominance requirement is satisfied.

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2. A Class Action Is Superior to Other Methods of Adjudicating the Claims in this Case

In addition to establishing predominance of a common question, a class proponent must also demonstrate that the class action is superior to other methods of adjudicating the controversy. Fed. R. Civ. P. 23(b)(3) recites that a court should consider: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (4) the difficulties likely to be encountered in the management of a class action. All of these factors favor certification here.

First, it is doubtful that any class member would want to control this litigation or bring an individual claim, given the small amount of money involved. While the cost of a hearing aid, approximately $6,000 every 3 years[1] is personally significant to class members, it is a relatively small sum over which to litigate. "These considerations are at the heart of why the Federal Rules of Civil Procedure allow class actions in cases where Rule 23's requirements are satisfied. This case vividly points to the need for class treatment. The individual damages of each merchant are too small to make litigation cost effective in a case against funded defenses and with a likely need for expert testimony." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1123 (9th Cir. 2017).

As for the second factor, we are unaware of any other litigation pending against these Defendants for the claims Plaintiffs assert on behalf of the settlement class. Spoonemore Decl., ¶2.

The third factor, desirability of concentrating the litigation in a particular forum, weighs in favor of class action treatment. This case is brought in the Western District of

[1] *See e.g.*, HCA Fiscal Note for ESHB 1222 (2023) located at: https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=68177 (last visited 10/30/23).

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Washington, where the named Plaintiffs all reside, and where Kaiser is located. Moreover, the proposed class consists of enrollees in Washington health plans, all of whom are Washington residents or employees of companies headquartered in Washington.

The fourth factor—difficulties in managing the class action—also supports class certification, because it is likely that managing this single class action will require fewer judicial resources than managing separate suits. This case does not present any unique case management issues, and the members of the class are ascertainable from the records maintained by Kaiser. All the requirements of Fed. R. Civ. P. 23(b)(3) are met.

VI. CONCLUSION

Class actions are uniquely suited to enforcing civil rights claims, such as those brought by Plaintiffs against Kaiser for unlawful discrimination under state and federal law. The Court should certify the proposed settlement class, as defined in Section II, *above*. Plaintiffs Schmitt, Mohundro and O.L., by and through her parents, should be appointed as the settlement class representatives, and Ms. Hamburger, Mr. Spoonemore, and Mr. Gross of Sirianni Youtz Spoonemore Hamburger should be appointed as settlement class counsel.

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DATED: December 6, 2023.

I certify that the foregoing contains 3,889 words, in compliance with the Local Civil Rules.

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The Honorable Robert S. Lasnik

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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-01611-RSL **[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR SETTLEMENT CLASS CERTIFICATION**

This matter came before the Court on Plaintiffs' Motion for Settlement Class Certification. Plaintiffs Schmitt, Mohundro and O.L., by and through her parents, J.L. and K.L. were represented by Eleanor Hamburger, Richard E. Spoonemore and Daniel S. Gross of Sirianni Youtz Spoonemore Hamburger PLLC. Defendants Kaiser Foundation Health Plan of Washington, Kaiser Foundation Health Plan of Washington Options, Inc.,

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Kaiser Foundation Health Plan of the Northwest and Kaiser Foundation Health Plan, Inc. were represented by its counsel, Medora Marisseau, Mark A. Bailey and Joshua M. Howard of Karr Tuttle.

The Court has reviewed and considered Plaintiffs' Motion for Settlement Class Certification and the Declaration of Richard E. Spoonemore, in addition to the pleadings and records in this case. Based upon the foregoing, and for good cause shown, the Court hereby finds that all of the requirements of Fed. R. Civ. P. 23 are met and GRANTS Plaintiffs' Motion for Settlement Class Certification. The Court further appoints class counsel and class representatives as set forth below:

A. The Proposed Class Meet the Requirements of FRCP 23(a).

With respect to FRCP 23(a)(1), the Court finds that the proposed settlement class can reasonably be expected to be so numerous that joinder is impracticable. Both parties concede that the class numbers in the thousands.

The commonality requirement under FRCP 23(a)(2) is also met, as there are common questions of law and fact that affect all members of the class. The overarching common question relevant to the class is: Does Kaiser's administration of a categorical exclusion of hearing aids and related hearing treatment violate ACA's non-discrimination statute and the Washington Law Against Discrimination? The answer to this common question would result in a class-wide adjudication of the claims in this action.

The claims of the Plaintiffs are typical to those of the Class as required by FRCP 23(a)(3). In pursuing their claims, Plaintiffs will necessarily advance the interests of the Class.

The Court also finds that the named plaintiffs Andrea Schmitt, Elizabeth Mohundro and O.L., by and through her parents, J.L. and K.L., are adequate class

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representatives who have chosen counsel experienced in class actions of this nature. There are no conflicts between the named plaintiffs and the Class members. The named plaintiffs and their counsel meet the requirement of adequate representation under FRCP 23(a)(4).

B. Certification of the Class Under FRCP 23(b)(3).

The Court finds that the Class also meets the requirements of FRCP 23(b)(3) which permits certification of a class when (1) questions of law or fact common to the class members predominate over questions affecting individual members, and (2) such an action is superior to other available methods of adjudicating the controversy. Both requirements are satisfied.

Predominance is satisfied here because the global question in the case impacts all class members and dominates over any individualized questions.

A class action is superior here because the cost of litigation far exceeds the claims of any individual seeking hearing aid coverage. There is little difficulty in managing a class action when it has reached the settlement stage. *See Amchem Products, Inc. v. Windsor*, 521 U. S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009). "The Rule 23(b)(3) predominance inquiry asks the court to make a global determination of whether common questions prevail over individualized ones." *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016)

C. Class Definition.

NOW, THEREFORE, IT IS HEREBY ORDERED that the following Settlement Class is certified for all claims brought in this case:

All individuals who:

(1) were insured at any time during the Settlement Class Period under a Washington health insurance plan that has been, is or

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will be delivered, issued for delivery, or renewed by Kaiser Foundation Health Plan of Washington and Kaiser Foundation Health Plan of Washington Options (collectively, "Kaiser"), excluding Medicare Advantage plans and plans governed by Federal Employee Health Benefits Act that did not cover Hearing Aids and Associated Services and

(2) have required, require or will require treatment for hearing loss other than treatment associated with cochlear implants, or with Bone Anchored Hearing Aids (BAHAs).

The Settlement Class Period is defined as October 30, 2014 through December 31, 2023, inclusive. The Settlement Class will be dissolved in the event the Settlement Agreement between the parties is not finally approved by this Court.

D. Appointment of Class Representative and Class Counsel.

The Court APPOINTS Plaintiffs Andrea Schmitt, Elizabeth Mohundro, O.L. by and through her parents J.L. and K.L., as the class representatives, and Ms. Hamburger, Mr. Spoonemore and Mr. Gross of Sirianni Youtz Spoonemore Hamburger are appointed as class counsel.

DATED: December _____, 2023.

Robert S. Lasnik
United States District Judge

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