

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

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

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

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I. INTRODUCTION

After years of extensive litigation, including a successful appeal to the Ninth Circuit Court of Appeals, *see Schmitt, et al. v. Kaiser Foundation Health Plan of Washington*, 965 F.3d 945 (9th Cir. 2020), the plaintiffs and the defendants have reached a class settlement of their dispute. This motion seeks preliminary approval of that agreement, approval of notices to be sent to potential class members, and the setting for a schedule for a hearing on final approval. This motion is brought simultaneously with an unopposed motion to certify a settlement class.¹

Plaintiffs O.L., by and through her parents J.L. and K.L., and Plaintiffs Andrea Schmitt and Elizabeth Mohundro (collectively, “Plaintiffs”) brought this class action lawsuit against 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. (collectively, “Kaiser” or “the Defendants”). All Plaintiffs have hearing loss that requires treatment with hearing aids and associated services. Plaintiffs seek coverage for medically necessary hearing aids and associated services for themselves and on behalf of similarly situated individuals with hearing disabilities who have received prescriptions or recommendations from licensed providers for such medical devices and treatment to address their hearing disabilities.

Plaintiffs and each member of the proposed settlement class have Kaiser plans that contain a categorical exclusion of hearing aids and related treatment (the “Exclusion”). The precise language of the Exclusion has changed over time, but the effect has been consistent – the exclusion of hearing aids and the outpatient services associated with them. It is that Exclusion that Plaintiffs challenge.

¹ While the relief sought in this motion and the motion to certify the settlement class are not opposed, Defendants do not necessarily agree with the Plaintiffs’ statement of facts or law in either motion.

1 With a class certification motion fully briefed, and cross-motions on summary
2 judgement filed and briefing nearly completed, the parties engaged in a full-day
3 mediation with Judge Charles Burdell (ret.) that extended into the night. Through this
4 mediation, the parties reached tentative agreement on the features of a settlement which
5 was finalized after further negotiations on September 15, 2023. The parties negotiated a
6 long-form agreement reflecting the terms in the September 15, 2023, which was fully
7 executed on December 5, 2023. *App. 1.*

8 Under the terms of the Agreement, Defendants will provide broad retrospective
9 relief to a settlement class of enrollees in Kaiser health plans in Washington state that
10 contained a hearing aid exclusion between October 30, 2014 and December 31, 2023.
11 Specifically, the Settlement Agreement establishes a \$3,000,000 settlement fund to pay
12 past claims (whether previously submitted or not) for out-of-pocket expenses Plaintiffs
13 and the class members incurred for hearing aids and associated services (e.g., outpatient
14 visits with a licensed audiologist to fit, adjust the auditory profile of, and train patients
15 on the operation of hearing aids). Based on the damages analysis by Plaintiffs' expert,
16 Frank G. Fox, Ph.D., and the claims processes in other class actions, class counsel
17 anticipates that the settlement fund will be sufficient to pay all claims at or near 100%,
18 even after payment of attorney fees, litigation costs and class contribution awards.
19 Declaration of Richard E. Spoonemore, ¶3.

20 Prospective relief, which is not addressed in the settlement, has been significantly
21 addressed by a recent legislative change. In 2023, the Washington Legislature passed
22 HB 1222, now codified at RCW 48.43.135. The legislation requires coverage of hearing
23 aids in non-grandfathered group health plans, other than small group plans starting
24 January 1, 2024. RCW 48.43.135(1). The State of Washington is going through the
25 required federal process to revise its benchmark plan to include hearing aid coverage so
26 that coverage may be mandated in the individual and small group markets without any

1 state fiscal impact. *See* 45 C.F.R. § 156.111; SSB 5338 (2023) (requiring hearing aids to be
2 included in any update to the benchmark plan).² Kaiser has not indicated whether it will
3 continue to apply the Exclusion after January 1, 2024, in its individual and small group
4 plans. If Kaiser continues to use the Exclusion in its small group and individual plans,
5 those enrolled in the plans could litigate anew over Kaiser’s use of the Exclusion after
6 January 1, 2024.

7 Accordingly, Plaintiffs move for an Order preliminarily approving the Settlement
8 Agreement. In particular, pursuant to Federal Rule of Civil Procedure 23(e), Plaintiffs
9 hereby move the Court to:

- 10 (a) preliminarily approve the Settlement Agreement;
11 (b) authorize the sending of notice and claims document to class members;
12 and
13 (c) establish a final settlement approval hearing and process.

14 **II. EVIDENCE RELIED UPON**

15 Plaintiffs rely on the Declaration of Richard E. Spoonemore. While Defendants
16 do not oppose this motion, they do not necessarily agree with the facts or legal
17 conclusions alleged herein.

18 **III. FACTS**

19 **A. Named Plaintiffs**

20 Plaintiffs Schmitt, Mohundro and O.L. are diagnosed with hearing impairments
21 for which they require treatment with hearing aids and associated services. Dkt. No. 131,
22 p. 16; Dkt. No. 132; Dkt. No. 133-6. Each were or are enrolled in a Kaiser non-
23 grandfathered health plan, subject to RCW 48.43.0128 and the Affordable Care Act’s anti-
24

25 ² The Office of the Insurance Commissioner maintains a website regarding the benchmark update
26 process. *See* <https://www.insurance.wa.gov/essential-health-benefits-benchmark-plan> (last visited
November 16, 2023).

1 discrimination law. Dkt. No. 65, ¶97; Dkt. No. 87, ¶97. Plaintiffs' Kaiser health plans,
2 like those of class members, excluded all coverage for hearing aids and related services.

3 **B. Kaiser's Hearing Exclusion**

4 Kaiser and its predecessor, Group Health Cooperative ("GHC") historically
5 excluded all coverage for hearing treatment, just as it did for treatment of certain other
6 disabilities and chronic health conditions. Dkt. No. 154-1, pp. 21:7-13; 40:19-21; 48:10-
7 17. Eventually, a narrow exception for cochlear implants (CIs) was added. Dkt. No. 18,
8 p. 29 of 66; Dkt. No. 133-18, p. KAISER_3951. After this lawsuit was filed, in 2019, Kaiser
9 broadened the coverage to include bone anchored hearing aids (BAHAs) and diagnostic
10 hearing examinations. Dkt. Nos. 133-1, pp. 23-24; 133-2, pp. 72:2-77:1; 133-3. But the
11 Hearing Exclusion remains in Kaiser's base contract to eliminate coverage of hearing
12 aids and hearing aid related treatment.

13 Kaiser concedes that hearing aids are clinically effective. *See* Dkt. No. 133-2,
14 pp. 36:24-37:2; 38:16-39:2, 42:15-24; Dkt. No. 133-7, p. 49:4-11. Hearing aids are the
15 "conventional treatment option" for hearing loss. Dkt. No. 133-19, p. KAISER_3892.
16 And Kaiser covered O.L.'s hearing aids as medically necessary in the past. *See* Dkt. No.
17 105, ¶5, Dkt. No. 105-2. In sum, Kaiser had no clinical, medical, or scientific justification
18 for the Exclusion.

19 **C. Procedural Facts**

20 This case was filed on October 31, 2017, on behalf of Plaintiffs Schmitt and
21 similarly situated individuals. Dkt. No. 1. Plaintiffs alleged that Defendants' exclusion
22 of coverage for hearing loss violated Section 1557 of the ACA, 42 U.S.C. §18116. *Id.* The
23 Complaint was later amended to add Plaintiff Mohundro as a class representative. Dkt.
24 No. 28.

25 On January 5, 2018, Kaiser moved to dismiss Plaintiffs' Claims. Dkt. No. 17. After
26 briefing was completed and oral argument, the Court granted Defendants' Motion to

1 Dismiss. Dkt. No. 42. An appeal was taken and, on July 14, 2020, the Ninth Circuit
2 reversed in part and remanded the case, directing the trial court to allow Plaintiffs to
3 amend their Complaint in accordance with the panel's decision. *Schmitt v. Kaiser Health*
4 *Plan of Wash.*, 965 F.3d 945 (9th Cir. 2020). On October 20, 2020, Plaintiffs filed their Third
5 Amended Complaint, and added a claim that Kaiser's creation and implementation of
6 the Hearing Loss Exclusion violated RCW 48.43.0128 and breached Kaiser's insurance
7 contracts with their insureds. Dkt. No. 58, ¶¶113-117. Subsequently, the Court also
8 granted Plaintiffs' Motion for Leave to File Fourth Amended Complaint, which added
9 Plaintiff O.L. without changing any of the claims. Dkt. Nos. 64-65.

10 Throughout this period, the litigation proceeded apace. During the six years since
11 this case was commenced, the parties exchanged thousands of pages of formal discovery,
12 deposed thirteen witnesses, and engaged in extensive motions practice including two
13 motions to dismiss, an appeal to the Ninth Circuit, class certification and cross motions
14 for summary judgment. *See* Spoonemore Decl. ¶2; Dkt. Nos. 17, 72, 90, 129, 137.

15 When the summary judgment briefing was nearly complete and after it was
16 certain that HB 1222 would become law, the parties engaged in a day-long mediation
17 facilitated by Judge Charles Burdell (ret), on July 20, 2023. A tentative agreement was
18 reached on that date and the Court suspended all pending deadlines. *See* Dkt. Note
19 dated July 21, 2023. The parties continued to negotiate over the short-form agreement
20 which was executed on September 15, 2023, and a long-form Final Settlement Agreement
21 was signed. *See App. 1.*

22 **IV. OVERVIEW OF THE SETTLEMENT AGREEMENT**

23 This "Overview" section provides a summary of the key terms of the proposed
24 Settlement Agreement. The "Law and Argument" section of this brief then addresses
25 why the Court should preliminarily approve the agreement and authorize the class
26 notice package to be sent.

1 **A. The Agreement Provides for Retrospective Relief for Insureds Who**
2 **Required Hearing Aids and Associated Services**

3 The Settlement Agreement provides for a \$3,000,000 fund from which payments
4 will be made for class members' claims for uncovered hearing aids and associated
5 services during the class period. *App. 1*, ¶¶1.20, 6.2.1.

6 Based on the expert damages report by Dr. Fox in this matter and class counsel's
7 experience with other class action settlements, Class counsel anticipates that the
8 Settlement Amount will be sufficient to ensure coverage of claims at or near 100%.
9 Spoonemore Decl., ¶3; *see, e.g., C.S. v. Boeing*, United States District Court for the Western
10 District of Washington, Cause No. 2:14-00574-RSM, *A.D. v. T-Mobile USA, Inc.*, United
11 States District Court for the Western District of Washington, Cause No. 2:15-cv-00180-
12 RAJ, *D.T. v. NECDA/IBEW Family Medical Care Plan, et al.*, United States District Court
13 for the Western District of Washington, Cause No. 2:17-cv-00004-RAJ, and *N.R. v.*
14 *Raytheon Company, et al.*, United District Court for Massachusetts, Cause no. 1:20-cv-1053-
15 RGS (all settlements that resulted in payment of approved and valid claims at 100%).

16 Plaintiffs' counsel, after soliciting three bids, selected Epiq (*see*
17 <https://www.epiqglobal.com/en-us>) as the Notice and Claims Processor who will
18 administer the \$3,000,000 settlement amount to be paid to settlement class members and
19 to cover specified claims administration and litigation costs, fees, and incentive awards.
20 *App. 1*, §§ 1.2, 2.2.3.1, 6.1.1-6.1.6. The Claims Processor will process and may pay two
21 types of claims: (1) denied claims that were previously submitted and denied by Kaiser
22 and (2) claims never previously submitted to Kaiser for payment during the class period.
23 *Id.*, ¶¶1.18, 1.18.1, 1.18.2.

24 Class members with previously denied claims will not be required to submit
25 documentation to support their claims but will only be required to verify the out-of-
26 pocket expenses they actually incurred for hearing aids and associated services during
the class period. *Id.* ¶6.1.5.2(b). They will be provided with a pre-populated claim form

1 that they can confirm online or by postage prepaid return mail. (Verification of
 2 expenditure is necessary to confirm that the class member suffered an out-of-pocket loss,
 3 *e.g.*, secondary insurance did not pay, the provider did not waive some charges, or that
 4 the services were actually obtained and not forgone after a preauthorization denial.)

5 For claims that were not previously submitted to Kaiser, a class member can make
 6 a claim by filling out a supplied claim form. A claim need only include certain basic
 7 elements of *prima facie* proof, such as the fact that the hearing aid was prescribed or
 8 recommended by a hearing professional and purchased within the class period, along
 9 with an identification of the hearing aid type and the amount they paid for the hearing
 10 aid and associated services. *Id.*, ¶¶6.5.1.1, 1.18.1, 1.18.2. To receive reimbursement for
 11 out-of-pocket expenses for hearing aids and associated services, class members must also
 12 verify that their claims were not covered by other insurance and have not been paid or
 13 reimbursed by another person or entity. *Id.*, ¶6.5.2.3.

14 The Notice and Claims Processor shall send class members notice of the proposed
 15 settlement. This information will either include a claim form and instructions for filling
 16 them out and submitting them, or it will inform class members how they may obtain
 17 such documents. *Id.*, ¶¶2.2.2 – 2.2.3.2.³ For class members who submitted claims, a long
 18 form notice and pre-populated claim form specific to that class member will be sent to
 19 them.

20 The Notice and Claims Processor will review all claims for their inclusion and
 21 verification of the above information. *Id.*, ¶¶6.5.2, 6.5.2.1 – 6.5.2.3, 6.5.5.1. The Claims

22
 23 ³ Class members for whom Defendants have an email address, from the class member's current or
 24 prior enrollment in a Kaiser plan, shall initially be sent the Settlement Notice and Claims packet via email,
 25 consonant with Fed. R. Civ. P. 23(c)(2)(B). *App. 1*, ¶2.2.3.1. If Defendants have no email address for a class
 26 member, or if the emailed notice is returned undelivered, the Claims Processor shall send the class member
 a post-card notice via U.S. Mail. *Id.*; *Appendix 3*. The post-card notice includes directions to obtain online
 relevant documents, such as the long-form notice and claims forms, in addition to other information about
 the settlement process. *Id.*

1 Processor will also confirm that the class member was enrolled under the Plan during
 2 the class period and at time of services provided. *Id.* The Processor must provide a class
 3 member who has a deficient claim form an opportunity to cure any problems and shall
 4 provide class counsel with notice of the claim's deficiency; class counsel is empowered
 5 to assist the class member in curing or otherwise making any claim. *Id.*, ¶¶6.5.3, 6.5.4.
 6 Any dispute concerning whether a claim should be granted or denied is subject to
 7 binding arbitration before (ret.) Judge George Finkle. *Id.*, ¶¶6.5.5.2, 6.5.7.

8 Class members who previously submitted claims need only verify (online or by
 9 returning a prepaid card) that they (as opposed to secondary insurance) are out-of-
 10 pocket in the amount indicated on the pre-populated claim form. Those individuals can
 11 also file for additional reimbursement under the claims process by filling out a claim
 12 form to include charges that they may not have submitted. (Some individuals may have
 13 stopped submitting claims after denial - this process permits them to seek sums in
 14 addition to the amount on the pre-populated form.) Individuals with claims who never
 15 submitted them will be eligible for payment from the settlement fund upon submission
 16 of a claim form verifying the elements of the claim. The proposed notice and claims
 17 process is functionally identical to those approved by the Court in *Z.D. v. Grp. Health*
 18 *Coop.*, 2014 U.S. Dist. LEXIS 14376, at *3 (W.D. Wash. Feb. 5, 2014) and *R.H. v. Premera*
 19 *BlueCross*, 2014 U.S. Dist. LEXIS 108503 (W.D. Wash. Aug. 6, 2014), among others.
 20 Spoonemore Decl., ¶4.

21 **B. Pro Rata Reduction in the Event of Insufficient Funds**

22 Class counsel anticipates - but does not guarantee - that the settlement amount
 23 will be sufficient to pay all claims at 100%. Spoonemore Decl., ¶3. However, if
 24 insufficient funds remain to pay all claimants at 100% after fees, costs, incentive awards
 25 and specified expenses are paid, then all class members will receive a *pro rata* distribution
 26 of their approved claimed amount. *App. 1*, ¶¶6.6. 6.8.

1 **C. Cy Pres Distribution**

2 If funds remain after the payment of claims, those funds will be distributed to the
3 Washington State Communication Access Project, a nonprofit organization dedicated to
4 enabling persons who are hard of hearing to fully enjoy public venues and in honor of
5 Plaintiffs' counsel, John Waldo, who dedicated his career to advocacy on behalf of people
6 who are deaf or hard of hearing.⁴ See <https://wash-cap.com>, *App. 1*, ¶6.7. If the funds
7 available for cy pres exceed \$300,000 then the funds above \$300,000 will go to the Legal
8 Foundation of Washington to be distributed to charitable organizations that provide
9 advocacy on behalf of people who are deaf or hard of hearing. *Id.* Any organization
10 receiving cy pres funds must report to the Court and the parties as to how the funds
11 were used. *Id.*

12 **D. Plaintiffs' Releases**

13 If approved (and in return for the benefits under the Settlement Agreement), the
14 named Plaintiffs O.L. and Mohundro and unnamed class members will release
15 Defendants from any and all claims brought or that could have been brought in this
16 litigation against Defendants relating to coverage of or benefits for hearing aids and
17 associated services by members of the settlement class. Provided, however, that claims
18 relating to denials, exclusions, or limitations of coverage of Hearing Aids and Associated
19 Services prescribed or received after December 31, 2023 are not released on or after
20 January 1, 2024. *App. 1*, ¶¶1.4, 1.15, 1.16, 3.1- 3.4.

21 Plaintiff Schmitt shall be subject to identical release requirements, except insofar
22 as Schmitt's claims relating to denials, exclusions, or limitations of coverage of Hearing
23

24 _____
25 ⁴ Mr. Waldo passed away from a brain tumor on September 17, 2023. See <https://hearingloss-wa.org/in-deeply-respectful-memory-of-hearing-loss-hero-john-waldo-esq/>. He was actively
26 prosecuting this case right up to his diagnosis in mid-July 2023 when, upon returning to his home after taking a deposition in this matter, he sought medical treatment for exhaustion and headaches.

1 Aids and Associated Services prescribed or received after December 31, 2023, are
2 released up until December 31, 2024. *Id.*

3 **E. Attorney Fees, Costs and Incentive Awards**

4 The Agreement provides that class counsel shall apply for attorney's fees under
5 the common fund/common benefit doctrine, in an amount up to, but not exceeding, 35%
6 of the Settlement Amount, which is subject to review and approval by the Court. *Id.*,
7 ¶¶6.3, 10.1. The Agreement also contemplates that class counsel shall apply to the Court
8 for reimbursement of litigation costs, including the cost of class notice, to be paid out of
9 the Settlement Amount. *Id.*, ¶¶6.3, 10.2. A case contribution award of \$15,000 for each
10 of the Plaintiffs, totaling \$45,000, shall be requested from the Court to be paid out of the
11 Settlement Amount. *Id.*, ¶10.3.

12 **V. LAW AND ARGUMENT**

13 This motion requests three separate items: (1) that the Court preliminarily
14 approve the Settlement Agreement; (2) that the Court approve the written notices and
15 claim forms; and (3) that the Court set a schedule for distribution of notices and claim
16 forms, dates for opt-outs, comments and objections and a final approval hearing.

17 **A. Legal Standards for the Approval of a Class Action Settlement Agreement**

18 Compromise of complex litigation is encouraged and favored by public policy. *In*
19 *re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *In re Pac. Enters. Sec. Litig.*, 47
20 F.3d 373, 378 (9th Cir. 1995). Federal Rule of Civil Procedure 23 governs the settlement
21 of certified class actions and provides that “[t]he claims, issues, or defenses of a certified
22 class may be settled, voluntarily dismissed, or compromised only with the court’s
23 approval.” Fed. R. Civ. P. 23(e). The Court must consider the settlement as a whole,
24 “rather than the individual component parts,” to determine whether it is fair and
25 reasonable. *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003); *see Hanlon v. Chrysler*
26

1 Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (“The settlement must stand or fall in its
2 entirety”).

3 Fed. R. Civ. P. 23(e) sets forth the following procedures:

- 4 (1) The court must direct notice in a reasonable manner to all class
5 members who would be bound by the proposal.
- 6 (2) If the proposal would bind class members, the court may
7 approve it only after a hearing and on finding that it is fair,
8 reasonable, and adequate.
- 9 (3) The parties seeking approval must file a statement identifying
10 any agreement made in connection with the proposal.
- 11 (4) If the class action was previously certified under Rule 23(b)(3),
12 the court may refuse to approve a settlement unless it affords
13 a new opportunity to request exclusion to individual class
14 members who had an earlier opportunity to request exclusion
15 but did not do so.
- 16 (5) Any class member may object to the proposal if it requires
17 court approval under this subdivision (e); the objection may be
18 withdrawn only with the court’s approval.

19 *Id.*

20 Judicial review of a proposed class settlement typically requires two steps: a
21 preliminary approval review and a final fairness hearing. Preliminary approval is not a
22 commitment to approve the final settlement; rather, it is a determination that “there are
23 no obvious deficiencies and the settlement falls within the range of reason.” *Smith v.*
24 *Professional Billing & Management Services, Inc.*, 2007 WL 4191749, *1 (D.N.J. 2007) (citing
25 *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)). *See also*
26 *Nat’l Rural Telecomms. Coop. v. DIRECTTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004);
MANUAL FOR COMPLEX LITIGATION (4th), § 21.632 at 320 (2004). If the settlement is
preliminarily approved by the Court, then notice of the proposed settlement and the
fairness hearing is provided to class members. At the fairness hearing, class members

1 may object to the proposed settlement, and the Court decides whether the settlement
2 should be approved.

3 As part of the Court's consideration, it should consider factors including:

4 [T]he strength of plaintiffs' case; the risk, expense, complexity, and
5 likely duration of further litigation; the risk of maintaining class
6 action status throughout the trial; the amount offered in settlement;
7 the extent of discovery completed, and the stage of the proceedings;
8 the experience and views of counsel; the presence of a governmental
9 participant; and the reaction of the class members to the proposed
10 settlement.

11 *Staton*, 327 F.3d at 959. Some of these factors, such as the reaction of class members, can
12 only be gauged after preliminary approval and notice is provided. Especially at this
13 preliminary phase, the question is not "whether the final product could be prettier,
14 smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*,
15 150 F.3d at 1027.

16 In this case, the parties negotiated extensively at arm's length both independently
17 and with the help of the Hon. Charlie Burdell (ret.) to arrive at a comprehensive
18 Settlement Agreement that will provide reimbursement significant back benefits to
19 Plaintiffs and the class stretching back to October 30, 2014 through the end of this
20 calendar year. While the settlement does not include prospective relief, the Washington
21 Legislature has ensured prospective coverage for class members in large group
22 insurance health plans, and it is anticipated that full coverage will be mandated in all
23 Washington health plans in the near future. The settlement is patently fair and adequate,
24 and was not the result of collusion between the parties.

25 **B. Plaintiffs' Case Is Strong, But the Risk that Litigation Could Go on for Years
26 Was Also High**

Plaintiffs believe that their claims under the ACA and RCW 48.43.0128 were very
strong and that they would have prevailed on summary judgment or at trial. The
proposed settlement reflects a position of strength. It provides for reimbursement of

1 class members' claims for what is likely to be 100% of their out-of-pocket expenses
2 related to back benefits, as well as payment of attorney fees, litigation costs, settlement
3 expenses and an incentive award for named Plaintiffs. This resolution achieves a
4 complete resolution of the class's claims for past costs incurred for the wrongly excluded
5 hearing aids and associated services without further delay and without incurring
6 additional attorney fees and costs that further litigation, including appeals, that likely
7 would have followed trial in this matter. Here, compensation for past uncovered benefits
8 in a timely manner is far more valuable than the possibility of additional monetary
9 damages after more years of litigation.

10 Also, this case required the adjudication of several issues of first impression,
11 which inevitably injects uncertainty into proceeding with litigation. Plaintiffs allege that
12 Defendants' exclusion of coverage of Hearing Aids and Associated services
13 discriminates against class members with hearing disabilities, in violation of Section 1557
14 of the Affordable Care Act, and Washington state law barring discrimination in
15 insurance benefit design, found in RCW 48.43.0128. Dkt. No. 65, ¶¶108-124. Since the
16 ACA took effect in 2010, there has been limited litigation alleging disability
17 discrimination claims under Section 1557 and Class counsel is aware of only one other
18 case involving claims that hearing aid coverage exclusions violated Sec. 1557. *See E.S. v.*
19 *Regence Blue Shield*, United States District Court for the Western District of Washington,
20 Cause No. 2:17-cv-01609-RAJ. Moreover, no reported appellate cases analyze the
21 meaning or application of RCW 48.43.0128, and, to date, class counsel is aware of no state
22 trial court decisions concerning this statute. Plaintiffs' counsel are steadfastly convinced
23 that these statutes are best interpreted and applied to forbid discriminatory exclusions
24 of hearing aid coverage, such as those imposed on class members in this case. However,
25 the paucity of caselaw applying these statutes, particularly in the present context, creates
26 uncertainty regarding the result at trial. It also increases the likelihood of an appeal by

1 Kaiser, even if Plaintiffs were to prevail at trial. The Settlement Agreement's promise of
 2 prompt and likely complete reimbursement for class members' hearing aids and
 3 associated treatments for over a nine-year period more than outweighs any potential
 4 benefit from taking the case to trial.

5 **C. The Amount Offered in Settlement Is Fair, Adequate and Reasonable**

6 The Settlement Fund of \$3,000,000 is fair, adequate and reasonable. Based upon
 7 class counsel's experience with similar cases in which they represented classes in
 8 challenges to health insurance service exclusions, class counsel believes that the
 9 Settlement Fund amount is sufficient to pay all claims of settlement class members at
 10 100%. *See* Spoonemore Decl., ¶3.

11 Class counsel's estimates regarding the claims processes have proven to be
 12 accurate in its other health service exclusion cases. *Id.*, citing *C.S. v. Boeing*, United States
 13 District Court for the Western District of Washington, Cause No. 2:14-00574-RSM, *A.D.*
 14 *v. T-Mobile USA, Inc.*, United States District Court for the Western District of Washington,
 15 Cause No. 2:15-cv-00180-RAJ *D.T. v. NECDA/IBEW Family Medical Care Plan, et al.*,
 16 United States District Court for the Western District of Washington, Cause No. 2:17-cv-
 17 00004-RAJ, and *N.R. v. Raytheon Company, et al.*, United District Court for Massachusetts,
 18 Cause no. 1:20-cv-1053-RGS. The claims process in each of these cases has concluded,
 19 and every claimant was paid 100%.⁵ Spoonemore Decl. ¶3. There is no reason to believe
 20 that the amount here will be insufficient, and every reason to believe that the same
 21

22 ⁵ Unfortunately, the normal class action response rate is somewhere between 5% and 8%. *Gascho v.*
 23 *Global Fitness Holdings, LLC*, 822 F.3d 269, 290 (6th Cir. 2017) ("response rates in class actions generally
 24 range from 1 to 12 percent, with a median response rate of 5 to 8 percent"); *Keil v. Lopez*, 862 F.3d 685, 697
 25 (8th Cir. 2017) ("we note that a claim rate as low as 3 percent is hardly unusual in consumer class actions");
 26 *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (citing evidence suggesting that "consumer
 claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns"); *Couser v.*
Comenity Bank, 125 F. Supp. 3d 1034, 1044 (S.D. Cal. 2015) (7.7% rate "higher than average"). *See also* 2
 MCLAUGHIN ON CLASS ACTIONS § 6:24 (14th ed.) (participation rate as low as 3% not unusual in consumer
 class actions).

1 outstanding result will follow. Even if counsel's projections are off – which historically
 2 has not been the case – the settlement amount will provide substantial, immediate, and
 3 significant compensation to claimants. It would do so prior to incurring the risks of class
 4 certification, summary judgment, trial, and appeals.

5 **D. The Settlement Agreement Provisions Governing Attorney Fees and Costs**
 6 **Are Fair and Reasonable**

7 The Settlement Agreement provides that class counsel shall apply for attorney
 8 fees under the common fund/common benefit doctrine. *App. 1*, § 10.1. The Agreement
 9 does *not* contain a “clear sailing” provision – anyone, including the Defendants, can
 10 challenge any fee request. *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1050 (9th Cir. 2019)
 11 (“Although clear sailing provisions are not prohibited, they 'by [their] nature deprive[]
 12 the court of the advantages of the adversary process' in resolving fee determinations and
 13 are therefore disfavored.”) (*quoting Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525
 14 (1st Cir. 1991)).

15 Class counsel intends to seek an award of up to 35% *provided* that their
 16 projections of a 100% recovery for class claimants is accurate. *App. 1*, §10.1. If the fund is
 17 insufficient to fund claimants at 100%, then counsel intends to seek a lower percentage.

18 The court need not presently consider whether 35%, or any other level, is the
 19 appropriate fee award. Rather, the issue is whether the Settlement Agreement as a
 20 whole, including its provision allowing class counsel to apply for an attorney's fee award
 21 is fair and reasonable. Preliminary approval of the Settlement Agreement does not bind
 22 the Court to any provision of attorney fees. *See, e.g., Jones v. GN Netcom, Inc.*, 654 F.3d
 23 935, 945 (9th Cir. 2011) (the Ninth Circuit's rejection of a fee award does not necessitate
 24 invalidation of the trial court's approval of a settlement agreement).

25 The Settlement Agreement also provides for the payment of class counsel's out-
 26 of-pocket costs and expenses. *App. 1*, § 10.2. Like the request for fees, class counsel's
 reimbursement request must also be reviewed and approved by the Court. *Id.*

1 **E. The Settlement Agreement’s Incentive Award Provision Is “Fair, Adequate**
2 **and Reasonable”**

3 The Settlement Agreement also permits class counsel to seek case contribution
4 awards for the named class representatives. *Id.*, §10.3. The Ninth Circuit has established
5 the factors to consider when reviewing incentive awards for named plaintiffs. The Court
6 must consider “the actions the plaintiff has taken to protect the interests of the class, the
7 degree to which the class has benefitted from those actions, the amount of time and effort
8 the plaintiff expended in pursuing the litigation and reasonable fears of workplace
9 retaliation” when determining whether an incentive award is appropriate. *Staton*, 327
10 F.3d at 977, citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). “Because a named
11 plaintiff is an essential ingredient of any class action, an incentive award is appropriate
12 if it is necessary to induce an individual to participate in the suit.” *Cook*, 142 F.3d at 1016
13 (approving a \$25,000 incentive award); see e.g., *Louie v. Kaiser Found. Health Plan, Inc.*,
14 2008 U.S. Dist. LEXIS 78314, 18 (S.D. Cal., Oct. 6, 2008) (preliminary approval of a \$25,000
15 incentive award where named plaintiffs “have protected the interests of the class and
16 exerted considerable time and effort by maintaining three separate lawsuits, conducting
17 extensive informal discovery, hiring experts to analyze discovered data and engaging in
18 day-long settlement negotiations with a respected mediator”).

19 Here, Plaintiffs O.L., through her parents, Mohundro and Schmitt dedicated
20 substantial time, effort, and risk to protect the interests of the class. They gathered and
21 organized documents related to their or their child’s hearing condition. Spoonemore
22 Decl., ¶5. Ms. Mohundro appealed the denials of coverage. *Id.* And Plaintiffs Mohundro
23 and Schmitt, as well as J.L. (Plaintiff O.L.’s mother), were all subject to deposition by
24 Defendants’ counsel. *Id.* They participated in mediation and were involved in all
25 settlement negotiations. *Id.* At this point, the Court need not decide whether such an
26 incentive award should be ordered. The Court should conclude that the provision in the
Settlement Agreement permitting class counsel to seek an incentive award of up to

1 \$15,000 for the parents of O.L., for Plaintiff Schmitt and for Plaintiff Mohundro, for a
2 total of \$45,000, does not render the proposed Settlement Agreement unfair or a product
3 of collusion.

4 **F. The Cy Pres Provision Is Reasonable**

5 Some part of the Settlement Amount may remain after the payments directed by
6 the Settlement Agreement are distributed. None of the initial \$3,000,000 funds will revert
7 to Defendants. *App. 1*, § 6.7. If funds remain after the payment of claims, any attorney
8 fees, litigation costs, and any incentive awards, the remaining funds will be distributed
9 first to the Washington State Communication Access Project, a nonprofit organization
10 dedicated to enabling persons who are hard of hearing to fully enjoy public venues and
11 in honor of John Waldo's dedicated advocacy on behalf of people who are deaf and hard
12 of hearing. See <https://wash-cap.com>. *Id.* If the excess funds exceed \$300,000, then the
13 remainder will be distributed to the Legal Foundation of Washington to further
14 distribute to organizations dedicated to advocacy on behalf of persons who are deaf or
15 hard of hearing. *Id.* These organizations will be required to report to the Court and the
16 parties regarding their use of the cy pres funds. *Id.*

17 Class members will be informed of their right to comment and/or object to these
18 *cy pres* recipients and more generally to the *cy pres* provision to distribute unclaimed
19 funds paid out under the Settlement Agreement. *App. 2*. This is recognized as a proper
20 procedure to award *cy pres* funds. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th
21 Cir. 2009) (Propriety of *cy pres* considered once it is clear that funds will be available); *In*
22 *re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013) ("Class members know
23 there is a possibility of a *cy pres* award and that the Court will select among recipients
24 proposed by the parties at a later date. This knowledge is adequate to allow any
25 interested class member to keep apprised of the *cy pres* recipient selection process. We
26 are confident the Court will ensure the parties make their proposals publicly available

1 and will allow class members the opportunity to object before it makes a selection.”); *In*
2 *re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 37286, *5-6 (N.D. Cal. 2013) (approving
3 settlement agreement, where list of potential cy pres recipients and explanation of the
4 funds’ intended use was provided in the Final Approval Motion as well as posted on the
5 litigation website.).

6 **G. The Settlement Was the Result of Arm’s-Length Negotiations**

7 This case was extensively negotiated at arm’s-length. It involved lengthy
8 mediation with the assistance of mediator Judge Charles Burdell (ret.). This was followed
9 by numerous offers and counter-offers first to reach a summary agreement, followed by
10 another series of proposals and counter-proposals that were required to reach the
11 Settlement Agreement proposed herein. Spoonemore Decl., ¶2. The settlement was the
12 result of a fair, arm’s-length process.

13 **H. There Was Sufficient Discovery**

14 Even a casual look at the docket shows this action’s long history – this was not an
15 early settlement. Filed in 2017, the parties have been battling for years, and significant
16 discovery has occurred throughout that period. Spoonemore Decl., ¶2. Numerous
17 depositions have been taken by class counsel and sufficient data has been received in
18 discovery to make accurate estimates of the total amounts of costs for reimbursement of
19 class members’ out of pocket costs for hearing aids and associated treatment during the
20 class period. *Id.* Discovery was more than sufficient to reach a settlement of this matter.

21 **I. Class Counsel are Experienced in Similar Litigation and Recommend Settlement**

22 Class counsel are very experienced in similar class action litigation, *see* Dkt. No.
23 91, ¶¶ 2-26, and strongly recommend that the Settlement Agreement be approved.
24 Spoonemore Decl., ¶2.
25
26

1 **J. The Proposed Notice, Opportunity to Submit Objections and Fairness**
2 **Hearing Are Sufficient to Safeguard the Interests of Class Members**

3 The Court should also approve the proposed notice material and direct that it be
4 sent to class members according to the process outlined in the Settlement Agreement.
5 *See App. 2, App. 3.* The long-form notice adequately summarizes the Settlement
6 Agreement, informs class members where they can get further information, explains
7 how class members can file objections, including objection to a motion for fees and
8 incentive award, and informs class members of the date and time of the settlement
9 approval hearing. It also explains the process for submitting claims. *Id.* The short-form
10 postcard notice alerts potential class members to this action, and directs them to more
11 detailed information – including the long-form notice.

12 **K. A Final Approval Hearing Should Be Set**

13 Class members with comments, concerns or objections to any aspect of the
14 Settlement Agreement should be provided with an opportunity to submit written
15 material for the Court’s consideration. Class members who wish to appear in person to
16 address the Court with any comments, concerns or objections should also be provided
17 with an opportunity to appear at a hearing before the Court decides whether to finally
18 approve the Settlement Agreement.

19 Class members who wish to appear in person should notify the Court and the
20 parties of their desire to be heard, along with a statement of the issue or issues that they
21 would like to address. The proposed notice and proposed order submitted with this
22 motion require that such notice be given so that the Court and the parties can consider
23 and address the specific issues that class members wish to raise at the hearing. Finally,
24 the Class requests that the Court set a hearing date to consider class members’ comments
25 and to decide whether the Settlement Agreement should be finally approved and
26 implemented.

L. Proposed Scheduling Order

The Class proposes that the Court issue a scheduling order along with preliminary approval of the Settlement Agreement. The proposed Order includes a proposed schedule which includes deadlines for: (1) sending class notice, including following up on any notices that were returned after being sent to their initial address;; (2) Class counsel to file a motion for attorney fees, costs and incentive awards; (3) class members to file comments and objections with the Court; and (4) the filing of a motion for final approval of the Settlement Agreement. Plaintiffs’ counsel has met and conferred with Kaiser’s counsel on the form of the proposed order, and Kaiser does not object to its entry. Spoonemore Decl., ¶6.

VI. CONCLUSION

Plaintiffs respectfully request that the Court:

- (a) preliminarily approve the Settlement Agreement;
- (b) authorize the mailing of notice to the settlement class members; and
- (c) establish a final settlement approval hearing and process.

DATED: December 6, 2023.

I certify that the foregoing contains 5,898 words, in compliance with the Local Civil Rules.

SIRIANNI YOUTZ
SPOONEMORE HAMBURGER PLLC

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Attorneys for Plaintiffs

APPENDIX 1

AGREEMENT TO SETTLE CLAIMS

Schmitt et al., v. Kaiser Foundation Health Plan of Washington et al.,

Case No. 2:17-cv-1611-RSL

This Agreement to Settle Claims (“Agreement”) is between Named Plaintiffs (as defined in Section 1.14), the Settlement Class Members (as defined in Section 1.6), and Defendants (as defined in Section 1.10). Named Plaintiffs and Defendants are referred to collectively as the “Parties.” This Agreement is a full expression of the agreements between the Parties.

RECITALS

Named Plaintiffs allege in the Action (as defined in Section 1.1), among other things, that Defendants violated the Affordable Care Act’s anti-discrimination statute, 42 U.S.C. §18116 and Washington’s health carrier anti-discrimination statute, RCW 48.43.0128 by excluding coverage of medically necessary hearing aids and associated treatment. Defendants categorically deny these allegations and all other assertions by the Named Plaintiffs in the Action that Defendants engaged in, or are liable for, violations of law. The Action, brought in the United States District Court for the Western District of Washington, seeks relief on behalf of a purported class of similarly situated enrollees in Defendants’ Washington insured health plans that contain the same or similar exclusions.

The Parties wish to resolve all claims with respect to coverage of hearing aids and associated treatment for the proposed Settlement Class Members and Named Plaintiffs Mohundro and O.L. through December 31, 2023, and as to Named Plaintiff Schmitt individually through December 31, 2024.

AGREEMENT

1. *Definitions.*

- 1.1 “*Action*” shall mean: *Schmitt et al., v. Kaiser Foundation Health Plan of Washington, et al., No.2:17-cv-1611 RSL* a putative class action pending in the United States District Court for the Western District of Washington.
- 1.2 “*Notice and Claims Processor*” shall mean: a notice and claims administrator selected by Plaintiffs.
- 1.3 “*Case Contribution Award*” shall mean: any monetary amount awarded by the Court in recognition of the Named Plaintiffs’ assistance in the prosecution of this Action and payable pursuant to Section 10.3.
- 1.4 “*Settlement Class Released Claims*” shall mean: any and all claims of any nature whatsoever (including those that were brought or that could have been brought against the Releasees by the Named Plaintiffs on behalf of the Settlement Class Members) relating to the coverage of, or benefits for, Hearing Aids and Related Services received during the Settlement Class Period, including but not limited to

claims for any and all benefits, losses, opportunity losses, damages, attorney fees, costs, expenses, costs of other coverage, contribution, indemnification or any other type of legal or equitable relief, claims under Section 1557 of the Affordable Care Act, 42 U.S.C. §18116, or Washington’s health carrier anti-discrimination statute, RCW 48.43.0128.

- 1.5 “*Class Counsel*” shall mean: Sirianni Youtz Spoonemore Hamburger PLLC.
- 1.6 “*Settlement Class Members*” or “*Settlement Class*” shall mean the following:
 - 1.6.1 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 Employees Health Benefits Act that did not cover Hearing Aids and Associated Services and (2) incurred unreimbursed out-of-pocket expenses in obtaining medically necessary treatment for hearing loss, including Hearing Aids and Associated Services.
- 1.7 “*Settlement Class Period*” shall mean: October 30, 2014 through December 31, 2023 inclusive.
- 1.8 “*Settlement Class Notice Recipients*” shall mean: Individuals who were enrolled in a Washington health insurance plan that has been, is or will be delivered, issued for delivery or renewed by Defendants at any time during the Settlement Class Period that did not cover Hearing Aids and Associated Services.
- 1.9 “*Court*” shall mean: the United States District Court for the Western District of Washington.
- 1.10 “*Defendants*” shall mean: Kaiser Foundation Health Plan of Washington, Inc., Kaiser Foundation Health Plan of Washington Options, Inc., Kaiser Foundation Health Plan of the Northwest Inc., and Kaiser Foundation Health Plan, Inc. Defendants are also collectively referred to as “Kaiser.”
- 1.11 “*Effective Date*” shall mean: the date on which all of the conditions to settlement set forth in Section 2 have been fully satisfied or waived, as set forth in Section 2.1.
- 1.12 “*Final*” shall mean: the Settlement contemplated under this Agreement shall become “Final” as described in Section 2.2.6.
- 1.13 “*Hearing Aids and Associated Services*” shall mean air conduction hearing aids for hearing loss which have been or are fitted by a licensed hearing care provider and the associated care and services related to such hearing aids. This definition excludes over-the-counter hearing aids.

EH per
authorization
of named
plaintiffs

- 1.14 “*Named Plaintiffs*” shall mean: Andrea Schmitt, Elizabeth Mohundro, O [REDACTED] L [REDACTED] by and through her parents, J [REDACTED] and K [REDACTED] L [REDACTED].
- 1.15 “*Named Plaintiffs’ Released Claims*” shall mean: any and all claims of any nature whatsoever (i) that were brought or that could have been brought against the Releasees by the Named Plaintiffs in the Action, (ii) relating to the coverage of, or benefits for Hearing Aids and Associated Services received during the Settlement Class Period including but not limited to claims for any and all benefits, losses, opportunity losses, damages, attorney fees, costs, expenses, costs of other coverage, contribution, indemnification or any other type of legal or equitable relief, claims under ERISA, and claims under the ACA’s anti-discrimination law, 42 U.S.C. §18116 and Washington’s health carrier anti-discrimination law, RCW 48.43.0128 including but not limited to claims for penalties, sanctions, attorney fees, and costs.
- 1.16 “*Named Plaintiff Schmitt Released Claims*” shall mean: any and all claims of any nature whatsoever (i) that were brought or that could have been brought against the Releasees by Named Plaintiff Andrea Schmitt in the Action; (ii) relating to the coverage of, or benefits for Hearing Aids and Associated Services received from October 30, 2014 through December 31, 2024, including but not limited to claims for any and all benefits, losses, opportunity losses, damages, attorney fees, costs, expenses, costs of other coverage, contribution, indemnification or any other type of legal or equitable relief, claims under ERISA, and claims under the ACA’s anti-discrimination law, 42 U.S.C. §18116 and Washington’s health carrier anti-discrimination law, RCW 48.43.0128 including but not limited to claims for penalties, sanctions, attorney fees, and costs. Named Plaintiff Schmitt further agrees not to serve as a class representative in any class action or group action against Kaiser seeking coverage for Hearing Aids or Associated Services.
- 1.17 “*Releasees*” shall mean: Defendants each of their affiliates, subsidiaries, parents, fiduciaries, trustees, recordkeepers, partners, attorneys, administrators, representatives, agents, directors, officers, employees, insurers, reinsurers, predecessors, actuaries, vendors, service providers, agents, assigns, and the successors-in-interest of each of the foregoing. In the case of any individual referenced in the preceding sentence, the “*Releasees*” shall also include the family members, estate, heirs, executors, representatives, and administrators of the estate of such individual.
- 1.18 “*Reimbursement Claim*” shall mean: (i) a claim for reimbursement of uncovered, out-of-pocket expenses incurred by a Settlement Class Member for Hearing Aids and Associated Services received by the Settlement Class Member during the Settlement Class Period, (ii) that is timely submitted by a Settlement Class Member on a Claim Form for reimbursement as a part of and in accordance with the terms of this Settlement Agreement, and (iii) that meets either of the following two sets of criteria:
- 1.18.1 the claim (i) was previously submitted to Defendants and denied, (ii) is verified by sworn attestation of the Settlement Class Member on the Claim

Form that it was not covered by other health insurance and has not been paid by or reimbursed by another payor, insurer, entity, plan, or person other than the Settlement Class Member (or family member of that Settlement Class Member); and (iii) is verified by sworn attestation of the Settlement Class Member on the Claim Form that it was paid by the Settlement Class Member (or a family member of that Settlement Class Member) submitting the claim for reimbursement and/or the Settlement Class Member continues to owe the unpaid amount;

1.18.2 the claim (i) was not previously submitted to the Defendants for consideration; (ii) is verified by sworn attestation of the Settlement Class Member on the Claim Form that it is an uncovered out-of-pocket expense that was incurred by the Settlement Class Member during the Settlement Class Period while the Settlement Class Member submitting the claim was covered by Defendants' plan; (iii) is verified by sworn attestation of the Settlement Class Member on the Claim Form that it was not covered by other health insurance and has not been paid or reimbursed by another payor, insurer, entity, plan, or person other than the Settlement Class Member (or family member of that Settlement Class Member); and (iv) is verified by sworn attestation of the Settlement Class Member on the Claim Form that it was paid by the Settlement Class Member submitting the claim for reimbursement (or family member of that Settlement Class Member), and/or the Settlement Class Member continues to owe the unpaid amount.

1.19 "Settlement" shall mean: the settlement to be consummated under this Agreement.

1.20 "Settlement Amount" shall mean: \$3,000,000.

1.21 "Taxes" shall mean: any and all taxes, fees, levies, duties, tariffs, imposts, and other charges of any kind (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any governmental authority.

1.22 "Claim Form" shall mean: the claim form issued to Settlement Class Members, and described in Section 6.5.1, in connection with the Class Notice described in Sections 2.2.2 and 2.2.3.

1.23 "CAFA Notice" shall mean: the notice of the proposed settlement in compliance with the requirements of the Class Action Fairness Act, 28 U.S.C. § 1715.

2. *Conditions to Effectiveness of the Settlement.*

2.1 *General.* The Settlement provided for in this Agreement shall become effective when each and every one of the following conditions in Sections 2.2 and 2.3 have been fully satisfied or waived as set forth in Section 7.1.

2.2 *Court Approval.* The Settlement contemplated under this Agreement shall be approved by the Court as provided in this Agreement. The Parties agree jointly to

recommend to the Court that it approve the terms of the Agreement and the Settlement contemplated hereunder. The Parties agree to promptly take all steps and efforts contemplated by the Agreement, including facilitating or completing the following:

2.2.1 *Certification of Settlement Class.* The Court shall have certified the Settlement Class for settlement purposes only. Class Counsel shall make a motion for certification of the Settlement Class under Federal Rule of Civil Procedure 23(b)(3) as part of the motions to approve this Agreement. In agreeing to the certification of this class for settlement purposes, Defendants do not admit that the Named Plaintiffs could have met the requirements for class certification for this particular class under Rule 23 in the normal course of the litigation.

2.2.2 *Motion for Preliminary Approval and Notices.* The Court shall have preliminarily approved the Agreement (“Preliminary Approval Order”) and authorized the issuance of notices (“Settlement Class Notices”) to the Settlement Class Notice Recipients. Class Counsel shall make a motion for preliminary approval, for authorization to send the Settlement Class Notices, and for approval of and continuing jurisdiction over the proposed settlement claims process (“Preliminary Motion”). The Settlement Class Notices shall be in a form agreed upon by the Parties and submitted for approval by the Court with the Preliminary Motion and shall include prominent references to resources, including toll-free phone number, where Settlement Class Members can obtain more information. In the event that the Parties do not agree upon the form of Settlement Class Notices, they will “meet and confer” to attempt to resolve the dispute. If they are unable to resolve the dispute after the conference, then the Court will decide the content of the Settlement Class Notices. The Preliminary Motion shall include a proposed form of Preliminary Approval Order that shall be agreed upon by the Parties. In the event that the Parties do not agree upon the proposed form of Preliminary Approval Order, they will meet and confer to attempt to resolve the dispute. If they are unable to resolve the dispute after the conference, the Parties may submit competing forms of the order to the Court. The Court must approve the form of the Settlement Class Notices.

2.2.3 *Settlement Class Notice.*

2.2.3.1 By the date and in the manner set forth in this Section 2.2.3.1 (or in any different manner set forth by the Court in its Preliminary Approval Order), Defendants shall provide the necessary information to the Notice and Claims Processor provided that the Notice and Claims Processor has entered into Kaiser’s HIPAA compliant Business Associate Agreement and Data Security Addendum so that the Notice and Claims Processor may deliver the Court-approved notice to the Settlement Class Notice Recipients. For those Settlement Class Notice Recipients for whom Defendants

have an e-mail address in Kaiser's enrollment system, the Settlement Class Notice shall be sent by e-mail to the e-mail address that Defendants have in their enrollment system for the Settlement Class Notice Recipient. For those Settlement Class Notice Recipients for whom Defendants do not have a current email address on file, a Settlement Class Notice shall be sent by e-mail to the last known e-mail address of the Settlement Class Notice Recipient, and if there is no last known e-mail address, then the short-form postcard sized notice shall be sent by direct first-class United States mail to the last address (if any) for that Settlement Class Notice Recipient in the records of Defendants, forwarding requested. Notice to a current or former subscriber shall be deemed notice to each Settlement Class Notice Recipient who was covered by Defendants through that subscriber. If an e-mail is sent to a Settlement Class Notice Recipient pursuant to this Section 2.2.3.1 and the e-mail is returned as undeliverable, the postcard sized notice shall be sent to the last known address of that Settlement Class Notice Recipient by direct first-class United States mail to the last address (if any) for that Settlement Class Notice Recipient in the records of Defendants, forwarding requested.

2.2.3.2 Not later than the date when the Preliminary Motion is filed, Class Counsel and/or the Notice and Claims Processor shall create a webpage that contains at least the following material:

- a. A description of the Action, including a summary of the litigation.
- b. The Settlement Class definition.
- c. A timeline and schedule of events, including deadlines for submitting claims and objecting.
- d. How to contact Class Counsel for additional information.
- e. Settlement documents, or links to documents, including:
 - i. Settlement Class Notice;
 - ii. Instructions to Claim Forms;
 - iii. Claim Forms;
 - iv. Motions for preliminary approval; and
 - v. All court orders on preliminary approval.
- f. Litigation documents, or links to documents, including:

- i. Plaintiffs' Complaint and any materials filed with the Complaint.
- g. Updates. The webpage shall be updated as the following become available:
 - i. Class Counsel's application(s) for attorney fees, costs, and Case Contribution Award (with all supporting materials); and
 - ii. Motion(s) for Final Approval of the Settlement (including any objections and Class Counsel's response to those objections).

2.2.4 *Fairness Hearing.* On the date set by the Court in its Preliminary Approval Order, the Parties shall participate in a hearing ("Fairness Hearing") during or after which the Court will determine by order (the "Final Order") whether: (i) the proposed Settlement between the Parties is fair, reasonable, and adequate and should be approved by the Court; (ii) dismissal of the Action with prejudice and without costs or fees should be entered ("Dismissal"); (iii) the requirements of Rule 23 and due process have been satisfied in connection with the distribution of the Settlement Class Notice; (iv) to approve the payment of attorney fees and costs to Class Counsel and a Case Contribution Award as set forth in this Agreement pursuant to Sections 10.1, 10.2, and 10.3; and (v) that notice to the appropriate state and federal officials has been provided as required by CAFA through the mailing of the CAFA Notice and that Defendants have satisfied their obligations pursuant to 28 U.S.C. § 1715. The Parties covenant and agree that they will reasonably cooperate with one another in obtaining an acceptable Final Order at the Fairness Hearing that contains the terms described in this section and will not do anything inconsistent with obtaining such a Final Order.

2.2.5 *Motion for Final Approval.* On the date set by the Court in its Preliminary Approval Order, Named Plaintiffs shall have filed a motion ("Final Approval Motion") for a Final Order which contains the terms described in Section 2.2.4. The Parties shall confer and agree on the terms of the proposed Final Order that Named Plaintiffs will submit to the Court with the Final Approval Motion.

2.2.6 *No Appeal or Appeal is Final.* If the Settlement is approved in a Final Order, this Settlement will be Final and Effective on the date: (i) that time for appeal of the Final Order has expired, if no appeal has been taken; or (ii) if there has been an appeal, (a) that the appeal has been decided by all appellate courts without causing material change in the Final Order, or (b) that the Final Order has been upheld on appeal without material change and

is no longer subject to appellate review by further appeal or writ of certiorari.

2.3 *No Termination.* The Settlement shall not have terminated pursuant to Section 8.

3. Releases.

3.1 *Releases of the Releasees.* Upon the Effective Date, Named Plaintiffs, on their own behalf and, to the full extent permitted by law, on behalf of the Settlement Class Members, absolutely and unconditionally release and forever discharge Releasees from any and all Settlement Class Released Claims (whether known or unknown and whether supported or unsupported) that Named Plaintiffs or the Settlement Class have, ever had, or will have (whether directly, indirectly, derivatively, or in any other capacity) through December 31, 2023. Provided, however, that claims relating to denials, exclusions, or limitations of coverage of Hearing Aids and Associated Services prescribed or received after December 31, 2023, are not released on or after January 1, 2024, with the exception of Named Plaintiff Schmitt, who releases such claims through December 31, 2024.

3.2 *Class's Covenant Not to Sue.* Named Plaintiffs and Settlement Class Members shall be conclusively deemed to have covenanted not to sue Releasees for any and all Settlement Class Released Claims and shall forever be enjoined and barred from asserting any Settlement Class Released Claims. This in no way applies to any action taken by the Named Plaintiffs or Settlement Class Members to enforce the terms of the Agreement or to assert claims that are not released under Section 3.1.

3.3 *Defendants' Releases of Named Plaintiffs, the Settlement Class, and Class Counsel.* Upon the Effective Date of Settlement, Defendants, to the full extent permitted by law, absolutely and unconditionally release and forever discharge the Named Plaintiffs, the Settlement Class Members, and Class Counsel from any and all claims based on the institution or prosecution of the Action. Notwithstanding the foregoing, claims relating to the breach of this Agreement are not released

3.4 *Defendants' Covenant Not to Sue.* Defendants shall be conclusively deemed to have covenanted not to sue Named Plaintiffs, the Settlement Class Members, and Class Counsel for any and all released claims relating to institution or prosecution of the Action. This in no way applies to any action taken by Defendants to enforce the terms of the Agreement.

4. Representations and Warranties.

4.1 *The Named Plaintiffs.* Named Plaintiffs represent and warrant that they have not assigned or otherwise transferred any interest in any Named Plaintiffs' Released Claims against any Releasees, and further covenant that they will not assign or otherwise transfer any interest in such claims.

- 4.2 *The Parties.* The Parties, and each of them, represent and warrant as follows: (i) they are voluntarily entering into this Agreement as a result of arm's-length negotiations; (ii) in executing this Agreement, they are relying upon their own judgment, belief, and knowledge, and the advice and recommendations of their own counsel, concerning the nature, extent, and duration of their rights and claims under this Agreement and regarding all matters which relate in any way to the subject matter of this Agreement; (iii) they have carefully read the contents of this Agreement; (iv) they have made such investigation of the facts pertaining to the Settlement, this Agreement, and all of the matters pertaining to the Settlement and Agreement, as they deem necessary or appropriate (including the value of the Settlement Class Released Claims, and in the case of Named Plaintiffs, the value of the Named Plaintiffs' Released Claims); (v) this Agreement is signed freely by each person executing this Agreement on behalf of each party; and (vi) each individual executing this Agreement on behalf of any other person has the authority to do so.
- 4.3 *Settlement Class Members.* As a condition of receiving any monetary payment pursuant to this Agreement (and in addition to the other requirements set forth in Section 8.5), a Settlement Class Member must represent and warrant, on the Claim Form submitted with respect to his or her claim, that he or she (i) has not assigned or otherwise transferred any interest in any Settlement Class Released Claims against any Releasees; (ii) will not assign or otherwise transfer any interest in any Settlement Class Released Claims; and (iii) the out-of-pocket expenses submitted as part of the claims process have not been paid by any other entity, payor, plan, or person, apart from a family member.
5. ***No Admission of Liability.*** The Parties understand and agree that this Agreement embodies a compromise and settlement of disputed claims, and that nothing in this Agreement shall be deemed to constitute an admission of any liability or wrongdoing by any of the Releasees. Neither the fact nor the terms of this Agreement shall be offered or received in evidence in any action or proceeding for any purpose, except in an action or proceeding to enforce this Agreement or arising out of or relating to the Final Order and motions for preliminary and final approval.
6. ***Reimbursement Claims Processing.***
- 6.1 *Settlement Fund.*
- 6.1.1 The Parties agree that the Notice and Claims Processor shall establish a trust that shall be the "Settlement Fund" for purposes of this Agreement. No later than the date of the Preliminary Approval Order, the Parties may agree in writing that the Settlement Fund shall be established as, and treated at all times as, a "qualified settlement fund" within the meaning of Treas. Reg. § 1.468B-1, *et seq.* The Settlement Fund shall be established no later than fourteen (14) days after the date of the Preliminary Approval Order.

- 6.1.2 References in this Agreement to actions and responsibilities of the Notice and Claims Processor shall be to those actions and responsibilities it shall take in its position as administrator of the Settlement Fund.
 - 6.1.3 If the Settlement Fund is established as a qualified settlement fund, the Parties agree that for purposes of Section 468B of the Internal Revenue Code of 1986, as amended (the “Code”) and the Treasury Regulations promulgated thereunder, RTX shall be treated as the “transferor” within the meaning of Treasury Regulation §1.468B-1(d)(1), and that the Notice and Claims Processor shall be the “administrator” of the Settlement Fund within the meaning of Treas. Reg. §1.468B-2(k)(3).
 - 6.1.4 If the Settlement Fund is established as a qualified settlement fund, the Parties agree the Notice and Claims Processor shall, in establishing the Settlement Fund, make any such elections as necessary or advisable to carry out the “relation back election” (as defined in Treas. Reg. §1.468B-1(j)(2)(i)) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Notice and Claims Processor to timely and properly prepare and deliver the necessary documentation for signature by all necessary Parties, and to cause the appropriate filing to occur.
 - 6.1.5 If the Settlement Fund is established as a qualified settlement fund, the Parties intend that the transfers to the trust described in this paragraph will satisfy the “all events test” and the “economic performance” requirement of Code §461(h)(1) and Treas. Reg. §1.461-1(a)(2).
 - 6.1.6 The Notice and Claims Processor shall be responsible for filing tax returns for the Settlement Fund, if appropriate, including application for employer identification numbers in accordance with Treas. Reg. §1.468B-2(k)(4). All tax expenses shall be paid out of the Settlement Fund; in all events, the Releasees shall not have any liability or responsibility for any Taxes or tax expenses or the filing of any tax returns or other documents with the Internal Revenue Service or any other state or local taxing authority. Taxes and tax expenses shall be paid out of the Settlement Fund in a timely manner without prior order from the Court, and the Notice and Claims Processor shall be obligated to withhold from distribution any funds necessary to pay such amounts.
- 6.2 *Payment of Settlement Amount.* Defendants shall not be required to pay any amounts under this Agreement directly to Named Plaintiffs, Settlement Class Members, or Class Counsel. Defendants shall not be required to pay any amounts to the Settlement Fund under this Agreement, except as stated in this Section 6.2. Defendants shall cause the Settlement Amount to be paid to the Settlement Fund as follows:

6.2.1 Within thirty (30) days of the Preliminary Approval Order, Class Counsel and Defendants shall cause such portion of the Settlement Amount to be paid into the Settlement Fund that is necessary to effectuate the Class Notice as directed by the Preliminary Approval Order. Defendants shall pay into the Settlement Fund a portion of the Settlement Amount equal to one half of the amount necessary to effectuate Class Notice, up to a maximum of Two Hundred Thousand Dollars (\$200,000). Plaintiffs/Class Counsel shall pay into the Settlement Fund an amount equal to one half of the amount necessary to effectuate Class Notice, up to Two Hundred Thousand Dollars (\$200,000), plus any and all additional amounts necessary if total Class Notice costs exceed Four Hundred Thousand Dollars (\$400,000); and

Within fifteen (15) business days of the Effective Date, Defendants shall cause the remaining amount (\$3 million less the amount Defendants paid under Section 6.2.1) of the Settlement Amount to be paid into the Settlement Fund.

6.3 *Settlement Amount is Payment for Claims, Attorney Fees and Costs, Case Contribution Award and the Cost of Claims Administration and Notice.* The Settlement Fund shall cover the cost of class notice, claims administration, attorney fees as set forth in Section 10.1, litigation costs as set forth in Section 10.2, the case contribution award as set forth in Section 10.3, arbitration costs as set forth in Section 6.5.7, costs associated with copying and delivery of the Settlement Class Notice, payments to Settlement Class Members for valid and approved Reimbursement Claims as set forth in Section 6.5, and any Taxes due on the Settlement Fund. Defendants and Releasees shall not be liable for any Taxes that any person may owe due to the receipt of any portion of the Settlement Fund.

6.4 *Distribution of Settlement Fund.* The Settlement Fund will be used to pay the items identified in Section 6.3.

6.5 *Claims Processing.* Reimbursement Claims shall be processed as follows:

6.5.1 *Submission of Claims.* Claim forms will be made available to Settlement Class Members.

6.5.1.1 *Elements of Claim.* The Claim Form shall require the Settlement Class Member (or his or her designee) to indicate and verify by sworn attestation (i) the purchase of Hearing Aid(s) and Associated Treatment based on the prescription or recommendation of a licensed hearing professional; (ii) the date(s) purchased (at least month/year but also day if reasonably available); (iii) the name(s) and contact information of the licensed hearing professional who recommended and/or administered the associated treatment; (iv) a description of the unreimbursed Hearing Aid(s) (ie brand and model) and Associated Treatment, if any; (v) the unreimbursed charges or debt incurred associated with the Hearing Aid(s) and

Associated Treatment; and (v) each of the items to be verified by sworn attestation on the Claim Form as required under Section 1.18.1 or Section 1.18.2, as applicable. The Claim Form shall also include the representations and warranties required under Section 4.3.

6.5.1.2 *Documentation Required.* The following documentation will be required for a Reimbursement Claim to be considered valid:

- a. The unreimbursed charges or debt incurred associated with Hearing Aid(s) and Associated Treatment, which can be evidenced by cancelled checks, credit card account statements, provider ledgers, invoices stamped "paid," checking account statements, signed letters from the provider or the provider's employer documenting the amount paid or debt incurred (so long as the letter connects payments/debt with the purchased Hearing Aid(s) or the dates of service of Associated Treatment) or other evidence of similar reliability.
- b. Class Members who previously submitted Claims for Hearing Aid(s) and Associated Services to Kaiser will not be required to resubmit documentation, but shall be required to verify the out-of-pocket expenses actually incurred. Kaiser will cooperate with the Notice and Claims Administrator to verify these claims.

6.5.2 *Review of Claim Forms.* In addition to other processes described in this Agreement (e.g., Section 6.5.5), the Notice and Claims Processor shall follow the following process in reviewing Claim Forms and approving the amounts of any Reimbursement Claims:

6.5.2.1 The Notice and Claims Processor shall review the Claim Forms to confirm that the items indicated in Sections 6.5.1 are present in the Claim Form and accompanying proof of claims.

6.5.2.2 The Notice and Claims Processor shall also confirm that the Settlement Class Member was enrolled under the Plan during the Settlement Class Period and covered by this Agreement.

6.5.2.3 The Notice and Claim Processor also shall receive verification from the Settlement Class Member or his/her designee that the claims were actually incurred by the Settlement Class Member (or a family member of that Settlement Class Member) submitting the claim for reimbursement and that the claims were not covered by other health insurance and have not been paid by or reimbursed by another payor,

insurer, entity, plan, or person other than the Settlement Class Member (or family member of that Settlement Class Member).

- 6.5.3 *Opportunity to Cure.* In the event of a deficiency of proof, the Notice and Claims Processor shall provide the Settlement Class Member with an explanation of the deficiency and a reasonable opportunity to cure the deficiency.
- 6.5.4 *Assistance in Perfecting Claim.* A copy of all deficiency notices with personally identifiable information removed or redacted and a unique number identifier assigned by the Notice and Claims Processor shall also be provided to Class Counsel, who may assist the Settlement Class Member in curing any problems with the Settlement Class Member's claim via communication with, or through, the Notice and Claims Processor or with the Settlement Class Member directly, provided the Settlement Class Member provides the Notice and Claims Processor with HIPAA-compliant authorization to release his or her contact information and other personal health information to Class Counsel or if he or she contacts Class Counsel directly.
- 6.5.5 *Disposition of Reimbursement Claims.*
- 6.5.5.1 The Notice and Claims Processor shall provide the Settlement Class Member and counsel for the Parties with notice of the disposition of each claim submitted by Settlement Class Members. The notice will provide each Settlement Class Member and counsel for the Parties with information on how to appeal the decision of the Notice and Claims Processor to the Arbitrator and a deadline of at least thirty (30) days to submit an appeal to the Notice and Claims Processor. The Notice and Claims Processor will provide any appeal materials received to counsel for the Parties within two (2) business days of receipt of the materials. Class Counsel may assist the Settlement Class Member with the appeal. The Notice and Claims Processor and the Parties' counsel will work in good faith to present the appeals together to the Arbitrator in a reasonable time after all appeals have been received or the deadline for submitting the last appeal has passed.
- 6.5.5.2 Payment on a claim may not be made until the Settlement Agreement is Final and Effective.
- 6.5.5.3 Within fourteen (14) days of any payment, the Notice and Claims Processor shall notify counsel for the Parties of the fact of payment, the date of payment, and the amount of payment.

- 6.5.6 *Compliance.* Counsel for the Parties shall be provided with information by the Notice and Claims Processor in order to confirm and ensure compliance with the requirements of this Agreement.
- 6.5.7 *Arbitration.* Consistent with the timeframes in Section 6.5.5.1, Defendants, Class Counsel, or a Settlement Class Member may challenge the decision of the Notice and Claims Processor. Any dispute over whether a claim is valid or not with respect to the payment of Reimbursement Claims shall be submitted for final and binding arbitration before Judge George Finkle (ret.) at JDR in Seattle, Washington. The type and manner of the arbitration (in-person, by phone, or on the papers) shall be determined by the arbitrator in his sole discretion. Expenses of the arbitrator shall be paid by the Notice and Claims Processor from the Settlement Amount. If for any reason Judge Finkle becomes unavailable to arbitrate any of the claims, the Parties will agree in writing to a different arbitrator.
- 6.5.8 *Payment of Valid Reimbursement Claims.* Subject to termination pursuant to Section 10, the Notice and Claims Processor shall pay all approved Reimbursement Claims from the Settlement Amount through the Settlement Fund consistent with the timeframe set forth in Section 6.5.5.
- 6.5.9 *Payment to Settlement Class Members or Designees.* Payment of valid and approved Reimbursement Claims shall be made to the Settlement Class Member or his or her designee if the Settlement Class Member notifies the Notice and Claims Processor in writing to make such a payment to his or her designee.
- 6.6 *Pro Rata Distribution.* If, (i) after payment of the cost of notice and claims administration, attorney fees as set forth in Section 10.1, litigation costs as set forth in Section 10.2, the case contribution award as set forth in Section 10.3, arbitration costs as set forth in Section 6.5.7, costs associated with copying and delivery of the Settlement Class Notices, and any Taxes due on the Settlement Fund; and (ii) after taking into account any court-approved or agreed holdback for expenses incurred but not yet paid, Taxes, and estimated administrative expenses necessary to complete the activities of and close the Settlement Fund; (iii) insufficient funds remain in the Settlement Fund to pay all valid and approved Reimbursement Claims in full; then (iv) each such valid and approved Reimbursement Claim shall be reduced and paid on a *pro rata* basis with all other valid and approved Reimbursement Claims from the amount remaining in the Settlement Fund after taking into account clauses (i) and (ii) of this Section.
- 6.7 *Cy pres Distribution.* If, after the payment of all items identified in Section 6.3, funds remain in the Settlement Fund, then the remaining funds up to \$300,000 will be distributed to the Washington State Communication Access Project (Wash-CAP), a nonprofit organization dedicated to enabling persons who are hard of hearing to fully enjoy public venues and in honor of John Waldo's dedicated advocacy on behalf of people who are deaf and hard of hearing. See <https://wash->

cap.com/. Any additional cy pres funds shall be distributed to the Legal Foundation of Washington to be further distributed to charitable organizations dedicated to ensuring that persons who are hard of hearing have full access to public venues. A final report shall be submitted to the Court by Class Counsel a reasonable time after the Parties are notified by the Notice and Claims Processor that the last claim has been paid and/or the last appeal determined by the Arbitrator. Wash-CAP and, if applicable, Legal Foundation of Washington shall provide a report on the use of cy pres funds to the parties' counsel and the court upon the expending of all cy pres funds or one year from receipt of the funds, whichever is soonest.

6.8 *Payment of Claims for Named Plaintiffs.* Named Plaintiffs shall submit their Reimbursement Claims in the same manner as Settlement Class Members, pursuant to Section 6.5. Named Plaintiffs' valid claims will be subject to *pro rata* reduction, if required under Section 6.6.

7. *Effective Date of Settlement.*

7.1 *Effective Date.* This Agreement shall be fully effective and binding on the date on which all of the conditions to the Settlement set forth in Section 2 have been fully satisfied or expressly waived by the Parties in writing.

7.2 *Disputes Concerning the Effective Date of Settlement.* If the Parties disagree as to whether each and every condition set forth in Section 2 has been satisfied or waived, they shall promptly confer in good faith and, if unable to resolve their differences within ten (10) business days thereafter, shall present their dispute for mediation and/or arbitration under Section 12.1.

8. *Termination of Agreement to Settle Claims Due to Lack of Approval.*

8.1 *Court Rejection.* With the exception of approval of the form of the Settlement Class Notices or cy pres distribution, if the Court declines, in whole or in part, to preliminarily or finally approve the Settlement as written, then this Agreement shall automatically terminate and thereupon become null and void. In the event the Court approves a settlement that differs from the terms in this Agreement (whether material or immaterial), in whole or in part, or does not afford Defendants and other Releasees a complete release, then either Defendants or Class Counsel may, in their sole and absolute discretion, terminate this Agreement by delivering a notice of termination to counsel for the opposing party within fifteen (15) court days of the Court's order.

8.2 *Court of Appeals Reversal.* If the Court of Appeals reverses the Court's order approving the Settlement, then, provided that no appeal or other request for review is then pending from such a ruling before the Court of Appeals or the United States Supreme Court, this Agreement shall automatically terminate and thereupon become null and void on the 31st day after issuance of the mandate of the Court of Appeals.

- 8.3 *Supreme Court Reversal.* If the Supreme Court of the United States reverses the Court's order approving the Settlement, then this Agreement shall automatically terminate and thereupon become null and void on the 31st day after issuance of the Supreme Court's mandate.
- 8.4 *Pending Appeal.* If an appeal is pending of an order declining to approve the Settlement, this Agreement shall not be terminated until final resolution of dismissal of any such appeal, except by written agreement of the Parties.
9. ***Consequences of Termination.*** If the Agreement is terminated and rendered null and void for any reason, then the following shall occur:
- 9.1 *Reversion of Action.* The Action shall revert to its status as of September 15, 2023, and the fact and terms of this Agreement shall not be used in the Action for any purpose.
- 9.2 *Releases and Terms Void.* All Releases given or executed pursuant to this Agreement shall be null and void, and none of the terms of the Agreement shall be effective or enforceable.
- 9.3 *Termination and Liquidation of the Settlement Fund.* No later than ten (10) days after the date of termination of the Agreement, the Notice and Claims Processor shall terminate the Settlement Fund and pay to Defendants all funds then remaining in the Settlement Fund up to the amount of Defendants' payment made pursuant to Section 6.2.1, with remaining funds, if any, to be returned to Class Counsel only after Kaiser is fully reimbursed. If the funds remaining in the Settlement Fund are insufficient to fully reimburse Defendants for their payment made pursuant to Section 6.2.1, then within 30 days of termination, Class Counsel shall pay Defendants the amount necessary to fully reimburse Defendants for the amount they paid under Section 6.2.1.
10. **Attorney Fees, Litigation Expenses, and Case Contribution Awards.**
- 10.1 *Attorney Fees.* Class Counsel shall apply for attorney's fees under the common fund/common benefit doctrine in an amount up to, but not exceeding, 35% of the Settlement Amount, which is subject to review and approval by the Court.
- 10.2 *Litigation Costs.* Class Counsel's out-of-pocket litigation costs, including costs of Class Notice, shall be reimbursed out of the Settlement Amount, subject to the Court's review and approval.
- 10.3 *Case Contribution Award.* Subject to review and approval by the Court, a Case Contribution Award of \$15,000.00 for each Named Plaintiff shall be paid out of the Settlement Amount for a total of \$45,000.00.
11. ***Media.*** The Named Plaintiffs shall not discuss or comment on the Settlement Agreement on social media or in/on any other news and/or media format, including but not limited to

formats such as Law360. Nothing in this provision restricts the Named Plaintiffs from communicating with class members or the Court about the Settlement.

12. *Miscellaneous.*

- 12.1 *Dispute Resolution.* The Parties agree that any dispute regarding the terms, conditions, releases, enforcement, or termination of this Agreement shall be resolved by a mutually agreed upon mediator in Seattle, Washington through mediation and, if mediation is unsuccessful, through binding arbitration before Judge George Finkle (ret.) at JDR in Seattle, Washington. If Judge Finkle is unavailable, the Parties shall arbitrate before another mutually agreed upon arbitrator.
- 12.2 *Governing Law.* This Agreement shall be governed by the laws of State of Washington without regard to conflict of law principles, unless preempted by federal law.
- 12.3 *Amendment.* Before entry of the Preliminary Approval Order, this Agreement may be modified or amended only by written agreement signed by or on behalf of all Parties. Following entry of the Preliminary Approval Order, this Agreement may be modified or amended only by written agreement signed on behalf of all Parties and approved by the Court.
- 12.4 *Waiver.* The provisions of this Agreement may be waived only by an instrument in writing executed by the waiving party. The waiver by any party of any breach of this Agreement shall not be deemed to be or construed as a waiver of any other breach (whether prior, subsequent, or contemporaneous) of this Agreement.
- 12.5 *Construction.* None of the Parties hereto shall be considered to be the drafter of this Agreement or any provision thereof for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause the provision to be construed against the drafter thereof.
- 12.6 *Principles of Interpretation.* The following principles of interpretation apply to this Agreement:
- 12.6.1 *Headings.* The headings in this Agreement are for reference purposes only and do not affect in any way the meaning or interpretation of this Agreement.
- 12.6.2 *Singular and Plural.* Definitions apply to the singular and plural forms of each term defined.
- 12.6.3 *References to a Person.* References to a person include references to an entity, and include successors and assigns.
- 12.6.4 *Sections.* A reference to a section in this Agreement also refers to any subsections within that section.

- 12.7 *Survival.* All representations, warranties, and covenants set forth in this Agreement shall be deemed continuing and shall survive the Effective Date of Settlement.
- 12.8 *Entire Agreement.* This Agreement contains the entire agreement among the Parties relating to this Settlement and supersedes any and all prior verbal and written communications regarding the Settlement.
- 12.9 *Counterparts.* This Agreement may be executed by exchange of executed faxed or PDF signature pages, and any signature transmitted in such a manner shall be deemed an original signature. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which, when taken together, shall constitute one and the same instrument.
- 12.10 *Binding Effect.* This Agreement binds and inures to the benefit of the Parties, their assigns, heirs, administrators, executors, and successors-in-interest, affiliates, benefit plans, predecessors, and transferees, and their past and present shareholders, officers, directors, agents, and employees.
- 12.11 *Further Assurances.* Each Party agrees, without further consideration, and as part of finalizing the Settlement hereunder, that they will in good faith promptly execute and deliver such other documents and take such other actions as may be necessary to consummate the subject matter and purpose of this Agreement.
- 12.12 *Tax Advice Not Provided.* No opinion or advice concerning the Tax consequences of the Settlement Agreement has been given or will be given by counsel involved in the Action to the Settlement Class, nor is any representation or warranty in this regard made by virtue of this Agreement. The Tax obligations of the Settlement Class and the determination thereof are the sole responsibility of each Settlement Class Member, and it is understood that the Tax consequences may vary depending on the particular circumstances of each Settlement Class Member.
- 12.13 *Authority.* The Parties have executed this Agreement on the dates acknowledged below, and each signatory hereby certifies that they are authorized to sign this Agreement on behalf of their respective parties.
13. ***Dismissal with Prejudice.*** In the event the Final Order does not include a Dismissal of the Action, Class Counsel shall file a Dismissal with the Court within sixteen (16) business days of the Effective Date.

SIGNATURES:

(ADD KAISER SIGNATURES)

By: _____

Its: _____

Dated: _____



Andrea Schmitt, individually and on behalf
of the proposed Settlement Class

Dated: 11/27/23 _____

Elizabeth Mohundro, individually and on
behalf of the proposed Settlement Class

Dated: _____

K [redacted] L [redacted] on behalf of O [redacted] L [redacted],
individually and on behalf of the proposed
Settlement Class

Dated: _____

Jamilya L [redacted] on behalf of O [redacted]
L [redacted], individually and on behalf
of the proposed Settlement Class

Dated: _____

SIGNATURES:

(ADD KAISER SIGNATURES)


By: _____

Its: _____

Dated: _____

Andrea Schmitt, individually and on behalf
of the proposed Settlement Class

Dated: _____



Elizabeth Mohundro, individually and on
behalf of the proposed Settlement Class

Dated: 11/21/2023

K [redacted] L [redacted] on behalf of C [redacted] L [redacted],
individually and on behalf of the proposed
Settlement Class

Dated: _____

J [redacted] L [redacted] on behalf of C [redacted]
L [redacted], individually and on behalf
of the proposed Settlement Class

Dated: _____

SIGNATURES:

(ADD KAISER SIGNATURES)

By: _____

Its: _____


Dated: _____

Andrea Schmitt, individually and on behalf
of the proposed Settlement Class


Elizabeth Mohundro, individually and on
behalf of the proposed Settlement Class

Dated: _____

Dated: _____



K [redacted] L [redacted] on behalf of C [redacted] L [redacted],
individually and on behalf of the proposed
Settlement Class



J [redacted] L [redacted] on behalf of C [redacted]
L [redacted], individually and on behalf
of the proposed Settlement Class

Dated: November 21, 2023

Dated: November 21, 2023

KAISER FOUNDATION HEALTH PLAN OF WASHINGTON, INC.

By: Angela Dowling
Angela Dowling (Dec 5, 2023 14:56 PST)

Its: Regional President

Dated: Dec 5, 2023

KAISER FOUNDATION HEALTH PLAN OF WASHINGTON OPTIONS, INC.

By: Angela Dowling
Angela Dowling (Dec 5, 2023 14:56 PST)

Its: Regional President

Dated: Dec 5, 2023

KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST, INC.

By: jeffrey a collins
jeffrey a collins (Dec 4, 2023 12:24 PST)

Its: Region President

Dated: Dec 4, 2023

KAISER FOUNDATION HEALTH PLAN, INC.

By: Kimberly Horn
Kimberly Horn (Dec 5, 2023 15:38 PST)

Its: EVP, Group President

Dated: Dec 5, 2023

APPENDIX 2

United States Federal District Court
 Western District of Washington at Seattle
Schmitt et al. v. Kaiser Foundation Health Plan of Washington, Inc. et al.
 Cause No. 2:17-cv-1611-RSL

ATTENTION: DID YOU PURCHASE A HEARING AID BETWEEN OCTOBER 30, 2014 AND DECEMBER 31, 2023 THAT WAS NOT COVERED BY KAISER?

A SETTLEMENT AGREEMENT MAY AFFECT YOUR RIGHTS.

A court authorized this notice. This is not a solicitation from a lawyer.

- Three individuals who needed hearing aids sued Kaiser Foundation Health Plan of Washington, Inc., Kaiser Foundation Health Plan of Washington Options, Inc., Kaiser Foundation Health Plan of the Northwest and Kaiser Foundation Health Plan, Inc. in a class action lawsuit. Kaiser excluded hearing aids and associated services in their insurance policies, but the individuals maintained that such exclusions violated the law and were not enforceable.
- The three individuals, called the “Named Plaintiffs,” and Kaiser have reached a settlement agreement in which Kaiser will pay \$3,000,000 to a settlement fund to reimburse class members for uncovered expenses for hearing aids and associated services incurred from October 30, 2014 through December 31, 2023. You may be able to file a claim for unreimbursed expenses for these services.
- The U.S. District Court for the Western District of Washington has granted preliminary approval of the Agreement and ordered this notice. Notice is provided to all Kaiser enrollees in Washington health insurance plans that did not include the hearing aid coverage at issue in this case, anytime from October 30, 2014 through December 31, 2023.

Your Legal Rights In This Lawsuit	
You may comment on the proposed agreement.	You have the right to object to or comment on the agreement. The Court will decide whether to approve or reject the proposed agreement after a final hearing currently scheduled for _____ at the United States Courthouse, 700 Stewart Street, Suite 15128, Seattle, WA 98101. You may submit written comments or objections to be considered by the Court no later than _____. You should not call the Court.
You may make a claim.	You may submit a claim if you qualify as a class member and incurred out-of-pocket costs that were unpaid or unreimbursed for hearing aids and associated services between October 30, 2014 and December 31, 2023. Claims must be submitted by _____. Claim forms were either included with the mailing of this notice or can be accessed at _____.
You may do nothing.	If you do nothing, your claims will be released. If the agreement is approved, and you qualify as a class member, any claims you have against Kaiser regarding coverage for hearing aids and associated services from October 30, 2014 to December 31, 2023, will be released.
You may ask to be excluded.	Get out of this lawsuit. Get no benefits from it. Keep the right to file your own lawsuit. If you ask to be excluded, you will not receive any money from this lawsuit, but you may file your own lawsuit against Kaiser for the same legal claims.

Questions? Call 1-XXX-XXX-XXXX or visit _____

FREQUENTLY ASKED QUESTIONS

1. Why did I get this notice?

You received this notice because you (or a member of your family) are or were an enrollee in a Kaiser health insurance plan that did not include coverage for hearing aids and associated services from October 30, 2014 to December 31, 2023. **You are not a class member simply because you got this notice.** If you are not in the class, you can disregard this notice.

Only people who meet the following definition are in the 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 Benefit 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.

2. What is this lawsuit about?

The Named Plaintiffs claim that Kaiser discriminated against them and other insureds with hearing loss when by excluding coverage of hearing aids and associated services. They claimed that this exclusion violated state and federal health insurance anti-discrimination laws. They also alleged that Kaiser breached their health insurance contracts by creating and applying the exclusions. Kaiser denied all claims.

3. Why is the lawsuit a class action?

This lawsuit was filed as a class action because hundreds or thousands of Kaiser enrollees are in the same position as the Named Plaintiffs. The three Named Plaintiffs agreed to serve as Class Representatives on behalf of those persons.

4. What does the proposed Settlement Agreement provide?

The main points of the Agreement are described below. You can read the entire proposed agreement at _____. It will only go into effect if the Court approves it.

Questions? Call 1-XXX-XXX-XXXX or visit _____

◆ **\$3,000,000 Settlement Fund**

The agreement requires Kaiser to pay \$3,000,000 into a settlement fund to reimburse valid and approved unpaid charges for hearing aids and associated services incurred by class members between October 30, 2014 and December 31, 2023, attorneys' fees, litigation costs to class counsel, arbitration costs, taxes, claims administration and class notice costs, and case contribution awards to the Named Plaintiffs.

◆ **Claims Process for or Unreimbursed Hearing Aids and Associated Services.**

A class member will be eligible for payment upon submission of a claim and certification form that includes:

1. the date(s) the member received hearing aid(s) and/or associated services (month/year);
2. the names of provider(s) who sold the member the hearing aid(s) and/or provided the associated services, as well as the provider(s)' addresses and phone numbers, if available;
3. the unreimbursed charges or debt incurred;
4. documentation showing the payments made or debt incurred for the hearing aid(s) and/or associated services (unless that information was previously provided to Kaiser); and
5. a signed certification form attesting that the information provided is true and correct.

Documents that provide proof of charges may include (but are not limited to) canceled checks, credit card account statements, checking account statements, provider ledgers or signed letters from the provider documenting the amount paid or debt incurred. **Class members who previously submitted a claim for a hearing aid or associated services to Kaiser that was denied do not need to resubmit supporting documents.** Those class members will receive a pre-populated claims form that they must verify to receive payment.

A claims processor will review the claims to confirm that all of the required information is included with the claim form. If a class member submits a claim form that does not have the information needed to make a valid claim for reimbursement, then the claims processor will provide the class member with notice and an opportunity to correct any problems with the claim, and class counsel may assist class members in making their claims.

◆ **Attorneys' Fees, Litigation Costs and the Costs of Claims Administration**

Class counsel may apply for attorneys' fees to be paid out of the settlement fund. Class counsel can seek a fee up to, but not exceeding, 35% of the fund and will make a motion for an award of fees on or before _____. This motion will be posted on the webpage, _____, by _____. Litigation costs, arbitration costs, costs for claims administration, class notice costs incurred and any taxes due will be paid from the fund. Class counsel's application for attorneys' fees and litigation costs will not be paid without the Court's review and approval.

◆ **Case Contribution Awards**

The Court may also order up to \$15,000 for each Named Plaintiff as a case contribution award to be paid from the settlement fund. This award is to compensate Named Plaintiffs for the time, effort and risk they undertook to pursue the claims in this case.

Questions? Call 1-XXX-XXX-XXXX or visit _____

♦ **Comment on, Support, or Object to Settlement Agreement, Award of Attorneys' Fees, Litigation Costs and Case Contribution Awards.**

You may object to, support or comment on the settlement agreement, as well as any request for attorneys' fees, litigation costs and case contribution. Your comments must be received by the Court by no later than _____. On or before _____, Class Counsel will post its request for award of attorneys' fees, costs and incentive awards on _____. You may also request a copy of the request directly from Class Counsel.

♦ **How Much Could I Get Paid?**

Class counsel expects, but does not guarantee, that the \$3,000,000 will be sufficient to pay all class members' valid and approved claims at 100% after payment of attorneys' fees, litigation costs, incentive awards, arbitration costs, taxes, and administration costs.

If insufficient funds remain to pay all class members who filed valid and approved claims at 100% after the payment of attorneys' fees, litigation costs, incentive awards, arbitration costs, taxes, and administration costs, then all class members will receive a *pro rata* (percentage) distribution of their approved claimed amount.

If excess funds remain after all payments described in the Agreement are made, then those excess funds up to \$300,000 shall be donated to the Washington State Communication Access Project, a nonprofit organization dedicated to enabling persons who are hard of hearing to fully enjoy public venues. Any remaining excess funds shall be donated to the Legal Foundation of Washington to distribute to charitable organizations dedicated to advocacy on behalf of people who are deaf or hard of hearing.

♦ **Release of Claims**

Class members will release Kaiser from all claims related to the hearing aids and associated services that were or could have been brought in the lawsuit. This means that if you have any actual or potential claims arising out of Kaisers' alleged failure to pay, those claims will be resolved as part of the agreement, and your right to payment for any damages related to hearing aid coverage will be governed exclusively by the agreement for the period between October 30, 2014, and December 31, 2023.

5. When will the Qualified Settlement Fund be available?

For class members to receive payments from the settlement fund, the Court must first finally approve the agreement after a fairness hearing. If any class member appeals that decision by the Court, a final decision on any appeal(s) must be made before these funds will be available.

6. How can I respond to the proposed Settlement Agreement?

♦ **You May Make a Claim.**

If you incurred out-of-pocket costs in purchasing a hearing aid and/or receiving associated services, then you may make a claim to be paid back for those expenses. Please review the claims forms and instructions on how to claim your share of the settlement.

Questions? Call 1-XXX-XXX-XXXX or visit _____

United States Federal District Court
Western District of Washington at Seattle
Schmitt et al. v. Kaiser Foundation Health Plan of Washington, Inc. et al.
Cause No. 2:17-cv-1611-RSL

♦ **You May Exclude Yourself, or Opt-Out, of the Agreement.**

You may elect to exclude yourself, or opt-out, of the settlement. If you elect to opt-out, then you may not make a claim or get any benefits from the settlement. If you opt-out, your claims against Kaiser for hearing aids and associated services during the class period will not be released. To opt out please go to _____ and follow the instructions, or write to _____ indicating that you wish to opt out of the agreement, along with your signature.

♦ **You May Comment on, Object to, or Support the Proposed Agreement.**

The Court will hold a hearing on the proposed Agreement to consider comments and approve or reject the Agreement. The Court currently has scheduled a hearing for _____ at _____. The hearing will be located at United States Courthouse, 700 Stewart Street, Suite 15128, Seattle, WA 98101. The hearing date, time, and location can change without further notice. Please contact class counsel if you want to confirm the date and time of the hearing as that date approaches.

You may attend the hearing, and may choose to bring a legal representative at your own expense. If you plan to come to the hearing to comment on, the Agreement in person, you must send the Court a written letter informing them by _____. If you choose to submit written comments or appear at the hearing, your letter must be mailed to:

Schmitt v. Kaiser Foundation Health Plan of Washington Settlement Hearing
United States Courthouse
700 Stewart Street, Suite _____
Seattle, WA 98101

The Court must receive any such letters no later than _____ or they will not be considered. All communications with the Court must be in writing, and class members should not attempt to call the Court. You are not required to submit comments.

7. What happens if I do nothing at all?

You are not required to take action. If the Court approves the settlement, any claims you have against Kaiser regarding coverage for hearing aids and associated services that could have been brought in this lawsuit will be released.

8. Where can I get more information?

For information about your rights related to the lawsuit, you may refer to the information at _____, or call _____.

Questions? Call 1-XXX-XXX-XXXX or visit _____

APPENDIX 3

Kaiser Hearing Aid Settlement

Did you pay for hearing aids or associated medical services while covered by Kaiser between October 30, 2014, and December 31, 2023? If so, you may have a claim in a class action lawsuit that settled. This card describes your rights in that lawsuit and how you can obtain more information, file a claim, or take other action.

A court authorized this notice.

This is not a solicitation from a lawyer.

<<BARCODE>>
<<NAME LINE 1>>
<<NAME LINE 2>>
<<ADDRESS LINE 1>>
<<ADDRESS LINE 2>>
<<CITY, STATE >
<<COUNTRY>>

Why Did I Get this Notice?

You received this notice because you might be eligible to participate in a \$3 million settlement if you paid for hearing aids or associated medical care while covered under a health insurance plan issued by Kaiser between October 30, 2014, and December 31, 2023. Not all individuals who received this notice are members of the class. You must meet the class definition to be a member of the class. The class definition can be found here:

_____.

What Can I Do Because of This Settlement?

If you're part of this group, you can: (1) Ask for money (file a claim) as part of this settlement, (2) Decide not to participate in this case or the settlement (opt-out), (3) Remain in this case but object to the settlement, or (4) Do nothing, which means you will (a) receive no money and (b) give up any claims you have against Kaiser related to the issues in this case.

How do I Learn More About This?

You can get more information about the case and your choices at _____ **or** email _____.

How Much Money Could I Get?

If you are a class member and file an eligible claim, you may be eligible for up to 100% of the costs you paid for hearing aids and associated services from October 30, 2014 through December 31, 2023. Please see _____ for details.

How do I Make a Claim?

- (1) The best and fastest way is to go online at _____ and follow the instructions;
- (2) Or email us at _____ with your name and address;
- (3) Or call 1-800-_____ to obtain more information.

When Do I Need to Do Something?

If you want to file a claim **or** if you want to opt out and not participate in this settlement, you must submit your request online at _____ or by mail on or before _____, 2024.

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-01611-RSL

[PROPOSED] 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
6 that: (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/or the short-form postcard notice explaining how to access the Class Notice and
9 Claim 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 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 short-form postcard notice.

17 8. The Notice and Claims Processor shall complete its emailing/ 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
20 a 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, or by direct U.S. mail using the short form postcard notice, to the Class Notice
6 Recipients, in addition to web-based notice, is the best notice practicable under the
7 circumstances and complies with the requirements of Federal Rule of Civil Procedure
8 23, due process, and 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
14 _____, 2024 at _____ a.m./p.m. at the United States Courthouse, 700 Stewart
15 Street, Suite 13206, Seattle, WA 98101 [at least 120 days after date of this Order].

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
18 _____, 2024 [at least 14 days before the Fairness Hearing].

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
22 Class Member must describe the nature of his or her comment or objection. Written
23 notice of intent to appear must be filed with the Court and mailed to counsel by
24 _____, 2024 [at least 14 days before the Fairness Hearing].

1 15. A Motion for Final Approval of the Agreement, together with any
2 supporting declarations or other documentation, must be filed no later than _____, 2024
3 [at least 5 days before the Fairness Hearing]. Class Counsel shall also mail the Motion
4 for Final Approval to all Class Members who object to the Agreement or file written
5 notice with the Court that they intend to appear at the Fairness Hearing.

6 16. Claims by Class Members must be received by the Notice and Claims
7 Processor no later than _____, 2024 [at least 14 days before the Fairness
8 Hearing].

9 17. Class Counsel shall file any motion for an award of attorneys' fees or
10 reimbursement of expenses or costs and any motion for an Incentive Award on behalf of
11 a Named Plaintiff no later than _____, 2024 [at least 40 days before the Fairness
12 Hearing]. Class Counsel shall post this motion on the web page within three days of its
13 filing with the Court.

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

24 19. Neither Defendants nor Defendants' counsel shall have any responsibility
25 for the distribution of the Qualified Settlement Fund, or any application for attorneys'
26

1 fees or reimbursement of expenses or for a Case Contribution Award for any Named
2 Plaintiff submitted by Class Counsel, and such matters will be considered separately
3 from the fairness, reasonableness, and adequacy of the Agreement.

4 20. All reasonable expenses incurred by the Notice and Claims Processor in
5 sending the Class Notice, as well as administering the Qualified Settlement Fund, shall
6 be paid as set forth in Section 6.2 of the Agreement.

7 21. Pending final determination of whether the Agreement should be
8 approved, (a) all proceedings in this Action unrelated to the Agreement shall be stayed,
9 and (b) neither Named Plaintiffs nor any Class Member, either directly, representatively,
10 derivatively, or in any other capacity, shall commence or prosecute against any of the
11 Releasees any action or proceeding in any court or tribunal asserting any of the Class
12 Released Claims.

13 22. The Court reserves the right to adjourn the date of the Fairness Hearing
14 without further notice to Class Members, and it retains jurisdiction to consider all further
15 applications arising out of or connected with the Agreement. The Court may approve
16 the Agreement, with such modifications as may be agreed to by the Parties, if
17 appropriate, without further notice to Class Members.

18 It is so ORDERED this _____ day of _____, 2023.

19
20
21
22 _____
23 Robert S. Lasnik
24 United States District Judge
25
26

1
2 Presented by:

3 SIRIANNI YOUTZ
4 SPOONEMORE HAMBURGER PLLC

5 /s/ Richard E. Spoonemore

6 Eleanor Hamburger (WSBA #26478)

7 Richard E. Spoonemore (WSBA #21833)

8 Daniel S. Gross (WSBA #23992)

9 3101 Western Avenue, Suite 350

10 Seattle, WA 98121

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15 Attorneys for Plaintiffs