

The Honorable Robert S. Lasnik

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

CLASS'S MOTION FOR FINAL
APPROVAL OF SETTLEMENT
AGREEMENT

**Note on Motion Calendar:
April 18, 2024 at 11:00 a.m.
(Fairness Hearing)**

I. INTRODUCTION

1
2 This was a long and hard-fought case of first impression that included a successful
3 appeal to the Ninth Circuit, *see Schmitt, et al. v. Kaiser Foundation Health Plan of*
4 *Washington*, 965 F.3d 945 (9th Cir. 2020), as well as multiple rounds of dispositive and
5 class certification briefing. The Settlement Agreement, if approved, will pay valid claims
6 incurred over a nine-year class period. For most Washington enrollees, coverage going
7 forward is now statutorily mandated.

8 Notice was remarkably successful, reaching an estimated 99.6% of class members.
9 Enlund Decl., ¶3. Over 900 claims have been received, while only five individuals opted
10 out. No class member objected to the settlement or to class counsel's requested attorney
11 fees and litigation costs. Based on preliminary reports from the Claims Processor, class
12 counsel believes that all valid claims will be paid at approximately 45% of the total
13 amount expended (without deduction for copayments, deductibles, or other cost-
14 sharing requirements that class members would have been required to pay in the
15 ordinary course). Spoonemore Decl., ¶¶7-9 (chart of anticipated claims and payouts);
16 Enlund Decl., ¶¶12-13. With the average claim exceeding \$1,300, class members will
17 receive a sizable recovery. This settlement is an unqualified success and should be
18 approved.

19 The Class now moves for final approval of the Settlement Agreement, attorney
20 fees, litigation costs, case contribution awards, and the cost of class notice and claims
21 administration.

II. FACTS

22
23 The Class provided a full description of the lengthy history of the case and the
24 Settlement Agreement in Docket No. 167, Plaintiffs' Unopposed Motion for Preliminary
25 Approval of Settlement Agreement, etc., pp. 3-10. In brief, the Settlement Agreement
26 provides for Kaiser to pay \$3 million into a Qualified Settlement Fund to be used to pay

1 class members' valid claims for hearing aids and related services incurred during the
2 Class Period (October 30, 2014–December 31, 2023), court-approved attorney fees,
3 litigation costs, case contribution awards, cost of class notice and claims administration
4 as well as taxes.

5 **A. Class Notice**

6 On December 11, 2023, the Court preliminarily approved the Settlement
7 Agreement, and on December 13, 2023, the Court amended the Order for preliminary
8 approval. Dkt. Nos. 171, 173. The Order appointed Epiq Class Action & Claims Solutions,
9 Inc. (“Epiq”) as Claims Processor. *Id.* Consistent with the Court’s Order, Epiq provided
10 class notice to class members via email, short-form postcard notice, and long-form class
11 notice. *See* Dkt. No. 174. A reminder to file claims was also sent to all class members who
12 had previously submitted a claim to Kaiser. *Id.*, ¶4.

13 A total of 358,207 general email notices were delivered to approximately 56% of
14 the addresses to be notified. With subsequent efforts, more than 40,940 additional email
15 addresses received email notice, bringing the total notice via email up to 78%. *Id.*, ¶¶14–
16 15. The remaining 221,362 email addresses that were undeliverable and for whom a valid
17 physical address could be located, were mailed a postcard notice. *Id.*, ¶16.

18 Additionally, 237,748 postcard notices were sent to notice recipients who did not
19 have an email address but had a valid mailing address. Also, a long-form, pre-populated
20 claims package was sent to 586 class members who had previously submitted claims for
21 hearing aids to Kaiser. Claims packages were also mailed to claimants who requested
22 one. *Id.*, ¶¶17–21.

23 The Claims Processor and class counsel established web pages to provide
24 information to class members about the settlement. *Id.*, ¶¶25–26;
25 <https://www.symslaw.com/kaiserhearingaids>. The Epiq website has been visited over
26 19,000 times. Enlund Decl., ¶4.

1 **B. Motion for Attorney Fees, Litigation Costs and Case Contribution Awards**

2 On March 7, 2024, class counsel filed its Motion for Award of Attorney Fees,
3 Litigation Costs and Case Contribution Awards. Dkt. No. 175. Class counsel sought
4 payment of one-third of the Settlement Fund, or \$1,000,000, representing at least a 15%
5 reduction from its lodestar, in addition to litigation costs totaling \$374,137.63 and case
6 contribution awards of \$15,000 per named Plaintiff for a total of \$45,000.

7 **C. No Objections to the Settlement or Class Counsel's Proposed Attorney
8 Fees, Litigation Costs and Case Contribution Awards were Received**

9 The deadline for objections was April 4, 2024. *See* Dkt. No. 173, ¶13. No objections
10 or comments were received. Enlund Decl., ¶10. While five individuals submitted opt-
11 out forms, it is not clear whether any of those individuals were actual class members.
Enlund Decl., ¶9.

12 **D. Preliminary Claims Data**

13 The Claims Processor has conducted a preliminary review of submitted claims,
14 and the data indicates that 913 unique claims have been made claiming expenditures of
15 \$2,725,397.33. Enlund Decl., ¶¶12-13. Of this sum, \$2,695,629.29 were submitted before
16 the deadline. *Id.*

17 **III. LAW AND ARGUMENT**

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

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

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

3 Factors to be considered by the Court should include:

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

10 *Staton*, 327 F.3d at 959. *See* ECF No. 54, pp. 11-16 (addressing factors).

11 “In most situations, unless the settlement is clearly inadequate, its acceptance and
12 approval are preferable to lengthy and expensive litigation with uncertain results.” *Nat’l
13 Rural Telecomms. Coop., v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (quoting 4
14 A. Conte & H. Newberg, *NEWBERG ON CLASS ACTIONS*, § 11:50 at 155 (4th ed. 2002)).

15 **B. All Factors Support Final Approval of the Settlement Agreement**

16 **1. No Objections**

17 The absence of objections establishes a strong presumption in favor of approval.
18 *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 529. Where, as here, the class is “silent”
19 regarding the terms of the Settlement Agreement, “the lack of objection of the Class
20 Members favors approval of the Settlement Agreement.” *In re Omnivision Techs., Inc.*, 559
21 F. Supp. 2d 1036, 1043 (N.D. Cal. 2007) (three objectors appeared out of 57,630 potential
22 class members); *see, e.g., Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 577 (9th Cir. 2004) (45
23 objections out of 90,000 notices sent); *Rodriguez v. West Publ. Corp.*, 2007 U.S. Dist. LEXIS
24 74767, at *33 (C.D. Cal. Sept. 10, 2007) (54 objections out of 376,000 notices). Here, there
25 are no objections to date. Enlund Decl., ¶10. This factor weighs strongly in favor of
26 approval.

1 **2. Class Members with Valid, Approved Claims Will Receive**
2 **Substantial Compensation**

3 If litigation continued, class members were faced with several more years of
4 litigation. Kaiser is ably represented by experienced class action counsel, and it is clear
5 that absent a settlement, Kaiser was prepared to pursue this case to judgment and, if
6 necessary, through the appellate courts. Kaiser mounted a vigorous challenge to class
7 certification and on the merits. The litigation, already pending since October 2017, was
8 certain to take years to reach final judgment. The Settlement Agreement ensures that
9 substantial compensation for out-of-pocket expenses for hearing aids and related
10 services is available for class members without further delay. Class members can expect
11 that they will receive around 45% of their approved claims, for an average of \$1,335 per
12 claim. Despite the claims being subject to a *pro-rata* deduction, there are a number of
13 factors to consider: (1) if submitted to Kaiser, claims would have been subject to various
14 co-payments, deductibles, and other cost-sharing arrangements such that “full”
15 reimbursement is likely closer to 80% of the amount spent; (2) many claims for hearing
16 aids submitted by class members exceeded \$3,000, the dollar limit under Hugo’s Law,
17 the new Washington hearing aid statute; (3) the notice process reached a remarkable
18 99.6% of class members, which drove more claims; (4) settlement was obtained prior to
19 class certification; and (5) this was a case of first impression that advanced novel theories
20 of recovery (that were initially dismissed before being revived on appeal).

21 Common fund settlements where only a fractional recovery is obtained are often
22 approved. *See Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 628 (9th Cir. 1982) (“It
23 is well-settled law that a cash settlement amounting to only a fraction of the potential
24 recovery will not *per se* render the settlement inadequate or unfair.”); *see, e.g., In re*
25 *Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555 (C.D. Cal. June 10, 2005) (approving a
26 settlement fund that compensated class members at 36% of their losses). Here, class

1 counsel believes that settlement is preferable to the risks and delay involved with
2 continued litigation.

3 **3. Strength of Plaintiff Class’s Case, Risk, Expense, and Duration of**
4 **Further Litigation**

5 Class counsel believes that, on the substantive merits, the case was strong. But the
6 class faced possibly years of litigation and further appeal before a final judgment could
7 be reached. The case involved questions of federal and state insurance regulation,
8 consumer protection law, damages calculations, and class certification issues that would
9 have required adjudication by the Court. In sum, the case could involve expensive,
10 motion-intensive litigation just to obtain a judgment, which could be appealed by Kaiser.
11 Despite the strength of the case, class counsel anticipated that it could take years before
12 any benefit could be realized from the litigation.

13 **4. Stage of Discovery and Proceedings**

14 This litigation was settled after years of litigation, and extensive formal and
15 informal discovery. Dkt. No. 168, ¶2. Numerous depositions were taken, and sufficient
16 data had been exchanged by the parties to make accurate estimates of the total amounts
17 required to ensure that the Settlement Fund was sufficiently large to substantially
18 compensate class members. *Id.* The class had obtained all the discovery it needed to settle
19 the case and much of what it needed to litigate the case, and was prepared to do so.

20 **5. Views of Counsel**

21 Class counsel strongly supports final approval of the Settlement Agreement.
22 Given the risks of continued litigation and the dire need of many class members to
23 receive financial compensation for their hearing aid-related expenses sooner, rather than
24 later, this settlement makes good sense. Spoonemore Decl., ¶10. Class counsel strongly
25 recommends approval. *Id.*

1 **C. Payment of Attorney Fees, Litigation Costs, and Case Contribution Awards**

2 No objections from class members were received regarding class counsel's
3 request for attorney fees of \$1,000,000, litigation costs of \$374,137.63, and case
4 contribution awards to each named Plaintiff of \$15,000 for a total of \$45,000. Given the
5 excellent outcome in the Settlement Agreement, the attorney fees, litigation costs, and
6 case contribution awards are reasonable and should be awarded.

7 **D. Authorization of Adjudication and Payment of Late-Filed Claims**

8 The Class requests that the Court order acceptance, adjudication, and payment of
9 valid claims received from class members from April 5, 2024, through May 4, 2024, to
10 accommodate the delay in sending notices to individuals whose email notices "bounced"
11 and were sent a postcard notice later than the rest of the class members receiving
12 postcard notice.

13 The Court has the inherent equitable authority to modify the terms of its Orders
14 when justice requires. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 380, 112 S. Ct. 748,
15 (1992) (courts have "flexibility in administering consent decrees"); *Sys. Fed'n No. 91 Ry.*
16 *Emps.' Dep't v. Wright*, 364 U.S. 642, 651, 81 S. Ct. 368 (1961); *New York v. Microsoft Corp.*,
17 531 F. Supp. 2d 141, 169 (D.D.C. 2008). Courts may modify judicially mandated deadlines
18 for court-approved settlements to allow the consideration of late-filed claims. *See, e.g., In*
19 *re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977) (late filed claims permitted
20 by the trial court if they were "timely set in motion" by the deadline); *Zients v. La Morte*,
21 459 F.2d 628, 630 (2d Cir. 1972) (the court's "traditional equity powers" permits the
22 modification of orders to allow processing of late claims); *Welch & Forbes, Inc. v. Cendant*
23 *Corp. (In re Cendant Corp. Prides Litig.)*, 233 F.3d 188, 191 (3d Cir. 2000).

24 Accordingly, Plaintiffs, on behalf of the Class, move the Court to order the Claims
25 Processor to accept and adjudicate claims received through May 4, 2024.
26

E. Final Report and Cy Pres Distribution

The Court should further order that class counsel provide a final report to the Court regarding claims processing and disbursement of funds by no later than 30 days after the Claims Processor has processed and paid all valid claims. Dkt. No. 167-1, ¶6.7.

IV. CONCLUSION

Plaintiffs, on behalf of the Class, respectfully request that the Court:

- (a) finally approve the Settlement Agreement;
- (b) authorize the disbursement of the Settlement Fund to pay approved claims, consistent with the approved Settlement Agreement;
- (c) order the Claims Processor to accept, adjudicate and pay all valid late-filed claims received by May 4, 2024;
- (d) order the Claims Processor to pay attorney fees of \$1,000,000 and litigation costs of \$374,137.63 to class counsel, Sirianni Youtz Spoonemore Hamburger PLLC;
- (e) order the Claims Processor to pay the case contribution awards of \$15,000 to each named Plaintiff, Andrea Schmitt, Elizabeth Mohundro, and O.L. by and through her parents J.L. and K.L., in addition to any claims to which each named Plaintiff is entitled under the Settlement Agreement, ¶6; and
- (f) order class counsel to submit a final report regarding the distribution of the Settlement Fund.

1 DATED: April 11, 2024.

2 *I certify that the foregoing contains 2,329 words,*
3 *in compliance with the Local Civil Rules.*

4 SIRIANNI YOUTZ
5 SPOONEMORE HAMBURGER PLLC

6 /s/ Richard E. Spoonemore

7 Eleanor Hamburger (WSBA #26478)

8 Richard E. Spoonemore (WSBA #21833)

9 Daniel Gross (WSBA #23992)

10 3101 Western Avenue, Suite 350

11 Seattle, WA 98121

12 Tel. (206) 223-0303; Fax (206) 223-0246

13 Email: ehamburger@sylaw.com

14 r Spoonemore@sylaw.com

15 dgross@sylaw.com

16 Attorneys for Plaintiffs and the Class