

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

E.S., by and through her parents, R.S. and
J.S., and JODI STERNOFF, both on their own
behalf, and on behalf of all similarly situated
individuals,

Plaintiffs,

v.

REGENCE BLUESHIELD; and CAMBIA
HEALTH SOLUTIONS, INC., f/k/a THE
REGENCE GROUP,

Defendants.

NO. 2:17-cv-01609-RAJ

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:
September 25, 2025**

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I. INTRODUCTION

After years of extensive litigation, including a successful appeal to the Ninth Circuit Court of Appeals (*E.S., et al. v. Regence BlueShield, et al.*, 812 F. App'x. 539 (9th Cir. 2020)), the parties have reached a classwide settlement of this dispute. This Motion seeks preliminary approval of the proposed settlement agreement (the "Agreement"), approval of the notices to be sent to potential class members, and the setting of a schedule for a hearing on final approval. This Motion is brought simultaneously with an unopposed motion to certify a settlement class.¹

Plaintiffs E.S, by and through her parents R.S. and J.S., and Jodi Sternoff, each on their own behalf and on behalf of similarly situated insureds, (collectively "Plaintiffs") brought this class action lawsuit against Regence Blue Shield and Cambia Health Solutions, Inc. f/k/a the Regence Group. (collectively, "Regence" or "the Defendants"). Plaintiffs have disabling 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 other Regence Washington insureds with hearing disabilities who require hearing aids and associated services to address their hearing disabilities.

Plaintiffs and the proposed settlement class are or were enrolled in Regence insured health plans in Washington that applied a categorical exclusion of hearing aids and associated treatment or an extreme limitation on coverage of hearing aids and associated services (the "Exclusion"). While the precise language of the Exclusion changed over time, the effect has been consistent – the exclusion of hearing aids and the outpatient services associated with them, or in the case of Regence's extremely limited

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 coverage since 2020 in some health plans, a virtual exclusion. It is that Exclusion that
2 Plaintiffs challenge.

3 The parties engaged in extensive direct negotiations throughout the fall and
4 winter of 2024–2025. After a robust mediation with Louis Peterson, Esq. on April 3, 2025,
5 the parties made significant progress but were unable to reach a settlement at that time.
6 Ongoing assistance from Mr. Peterson was required to continue the discussions, until
7 the parties were able to finally reach a settlement in mid July 2025. The final agreement
8 was fully executed on July 31, 2025. *See* Agreement to Settle Claims (*Appendix 1*).

9 Under the terms of the Agreement, Defendants will provide funds to be used for
10 broad retrospective relief to a settlement class of enrollees in Regence insured health
11 plans in Washington state that contained a hearing aid exclusion or limitation between
12 October 30, 2014 and December 31, 2025.² *See App. 1*, §§ 1.6.1 (defining “Settlement Class
13 Members”), 1.7 (defining “Settlement Class Period”), 1.17 (defining “Reimbursement
14 Claim”). Specifically, the Settlement Agreement establishes a \$3,000,000 settlement fund
15 to pay a *pro rata* (percentage) of valid and approved past claims (whether previously
16 submitted or not) for out-of-pocket expenses Plaintiffs and settlement class members
17 incurred for hearing aids and associated services (e.g., outpatient visits with a licensed
18 audiologist to fit, adjust the auditory profile of, and train patients on the operation of
19 hearing aids). Based on the damages analysis by Plaintiffs’ expert, Frank G. Fox, Ph.D.,
20 and the claims processes in other class actions, class counsel anticipates that the
21 settlement fund will be sufficient to pay all valid and approved claims at approximately
22 30–60%, after payment of attorney fees, litigation costs and class contribution awards,
23

24 ² The settlement class definition excludes enrollees in Regence non-grandfathered large group
25 Washington insured health plans after January 1, 2024, which were required to provide coverage pursuant
26 to RCW 48.43.135 (1). *See App. 1*, § 1.6.1. Although the mandated coverage includes a \$3,000 per ear, every
three years limitation, the parties agree that for the vast majority of people with hearing loss, this
constitutes full coverage. Spoonemore Decl. ¶12.

1 depending upon the number and nature of claims submitted. See Declaration of
2 Richard E. Spoonemore ¶¶10-11 (providing a more detailed analysis). Plaintiffs will
3 report to the Court a more precise *pro rata* payment rate before the fairness hearing in
4 this matter. *Id.*

5 Prospective relief is fully addressed by recent legislative changes. See
6 RCW 48.43.135. Starting in January 1, 2026, all Washington insured health plans must
7 cover hearing aids and associated services, at no less than \$3,000 per ear every three
8 years, coverage that is generally considered sufficient to meet the needs of most insureds
9 with hearing loss. *Id.*; Spoonemore Decl. ¶12.

10 Accordingly, Plaintiffs move for an Order preliminarily approving the
11 Agreement. In particular, pursuant to Fed. R. Civ. P. 23(e), Plaintiffs hereby move the
12 Court to:

- 13 (a) preliminarily approve the Agreement;
14 (b) authorize sending notice and claims documents to class members; and
15 (c) establish a final settlement approval hearing and process.

16 II. EVIDENCE RELIED UPON

17 Plaintiffs rely on the Declaration of Richard E. Spoonemore and any documents
18 in the record referred to herein. While Defendants do not oppose this motion, they do
19 not necessarily agree with the facts or legal conclusions alleged herein.

20 III. FACTS

21 A. Named Plaintiffs

22 Plaintiffs Sternoff and E.S. are diagnosed with hearing impairments for which
23 they require treatment with hearing aids and associated services. Spoonemore Decl. ¶13.
24 Both were and are enrolled in a Regence non-grandfathered health plan subject to the
25 Affordable Care Act's anti-discrimination law, 42 U.S.C. § 18116 (called "Section 1557"
26 or "§1557). Dkt. No. 54, ¶119. Plaintiffs' Regence health plans, like those of class

1 members, excluded all coverage for hearing aids and related services, when this case was
2 first filed, and then offered only extremely limited coverage for hearing aids.
3 Spoonemore Decl. ¶13. As a direct result, both Plaintiffs paid out of pocket for their
4 hearing aids and related services.

5 **B. Regence's Hearing Exclusion**

6 Regence historically excluded all coverage for hearing treatment, just as it did for
7 treatment of certain other disabilities and chronic health conditions. *Id.* ¶14. Eventually,
8 a narrow exception for cochlear implants (CIs) was added. *Id.* After this lawsuit was
9 filed, in 2020, Regence rewrote its exclusion to exclude all coverage for hearing aids and
10 associated services. *Id.* And in certain health plans, inadequate coverage of up to \$1,000
11 per year was provided for hearing aids. *Id.*

12 Regence admitted that it covered hearing aids as medically necessary in some
13 health plans, conceding that hearing aids can be clinically effective. *See* Dkt. No. 80, ¶71;
14 [https://news.regence.com/blog/expanding-access-to-hearing-aids-helps-people-](https://news.regence.com/blog/expanding-access-to-hearing-aids-helps-people-overcome-much-more-than-hearing-disability)
15 [overcome-much-more-than-hearing-disability](https://news.regence.com/blog/expanding-access-to-hearing-aids-helps-people-overcome-much-more-than-hearing-disability) (last visited 9/5/25). Regence did not
16 proffer any clinical justification for its design and administration of the Exclusion.
17 Spoonemore Decl., ¶18.

18 **C. Procedural Facts**

19 This case was filed on October 30, 2017, on behalf of Plaintiffs E.S., by and through
20 their parents R.S. and J.S., as well as Jodi Sternoff, and similarly situated individuals.
21 Dkt. No. 1. Plaintiffs alleged that Defendants' exclusion of coverage for hearing loss
22 violated Section 1557 of the ACA, 42 U.S.C. § 18116. *Id.*

23 On January 19, 2018, Regence moved to dismiss Plaintiffs' Claims. Dkt. No. 11.
24 After briefing was completed, the Court granted Defendants' Motion to Dismiss. Dkt.
25 No. 22. An appeal was taken and, on July 14, 2020, the Ninth Circuit reversed in part
26 and remanded the case, directing the trial court to allow Plaintiffs to amend their

1 Complaint in accordance with the panel’s decision in *Schmitt v. Kaiser Health Plan of*
2 *Wash.*, 965 F.3d 945 (9th Cir. 2020). *See E.S. v. Regence Blueshield*, 812 F. App’x. 539 (9th
3 Cir. 2020).

4 On October 13, 2020, Plaintiffs filed their Amended Complaint, and added a claim
5 that Regence’s creation and implementation of the Hearing Loss Exclusion violated
6 RCW 48.43.0128 and breached Regence’s insurance contracts with their insureds. Dkt.
7 No. 32, ¶¶126-129.

8 On December 11, 2020, Regence moved to dismiss the Plaintiffs’ Amended
9 Complaint. Dkt. No. 37. On January 31, 2022, the Court granted the Motion based on the
10 conclusion that Plaintiffs had failed to adequately plead a claim of “proxy”
11 discrimination under Section 1557. Dkt. No. 41, p. 16. At the same time, the Court
12 dismissed with prejudice Plaintiffs’ state law breach of contract claim based on an
13 alleged violation of the State’s insurance anti-discrimination law RCW 48.43.0128. Dkt.
14 No. 41, pp. 16–19. The Court, however, granted leave to amend the federal claim. *Id.*

15 **D. Discovery and Settlement Negotiations**

16 During the years since this case was commenced, the parties exchanged
17 substantial informal discovery and engaged in extensive motions practice including four
18 motions to dismiss, and an appeal to the Ninth Circuit. *See* Dkt. Nos. 11, 22, 27, 32, 41,
19 45, 53, 54, 68; Spoonemore Decl. ¶¶3-4, 9. After Regence responded to the first round of
20 formal discovery, but before it completed its document production, the parties agreed to
21 exchange substantial data related to damages and additional informal discovery
22 pursuant to ER 408 in order to engage in settlement discussions. *Id.*

23 On April 3, 2025, the parties engaged in a mediation facilitated by Louis Peterson,
24 Esq. *Id.*, ¶5. At the conclusion of the mediation, the parties agreed to continue to
25 negotiate and attempt to reach agreement on all of the terms of the Settlement, but for
26 the financial terms. *Id.* By May 27, 2025, the parties had reached agreement on the

1 proposed Settlement, excluding the financial terms. *Id.*, ¶6. With Mr. Peterson’s
 2 continued assistance, the parties succeeded at coming to an agreement on the financial
 3 terms of the Agreement, by mid July 2025, and the Agreement was fully executed on July
 4 31, 2025. *Id.*; see *App. 1*.

5 IV. OVERVIEW OF THE SETTLEMENT AGREEMENT

6 This “Overview” section provides a summary of the key terms of the proposed
 7 Settlement Agreement. The “Law and Argument” section of this brief then addresses
 8 why the Court should preliminarily approve the agreement and authorize the class
 9 notice package to be sent.

10 A. The Agreement Provides for Retrospective Relief for Insureds Who 11 Required Hearing Aids and Associated Services

12 The Settlement Agreement provides for a \$3,000,000.00 fund from which
 13 payments will be made for class members’ claims for uncovered hearing aids and
 14 associated services during the class period. *App. 1*, ¶¶1.19, 6.2.1.1, 6.2.1.2.

15 Based on an informal expert analysis conducted by Dr. Fox that was shared with
 16 Regence, and class counsel’s experience with other class action settlements, Plaintiffs’
 17 counsel anticipates that the Settlement Amount will be sufficient to ensure coverage of
 18 claims at 30–60% of the qualified claims submitted. Spoonemore Decl. ¶¶10-11. *See, e.g.,*
 19 *Schmitt v. Kaiser Found. Health Plan of Wash.*, No. 2:17-cv-1611-RSL, 2024 U.S. Dist. LEXIS
 20 71166, at *7 (W.D. Wash. Apr. 18, 2024) (in sister litigation with similar settlement fund,
 21 claims were estimated to be paid at 44-45% of total *unadjudicated* claims); *Id.*, Dkt.
 22 No. 188 (final *pro rata* percentage paid was 50.78%).

23 In consultation with Defendants’ counsel, Plaintiffs’ counsel solicited and selected
 24 a bid from Epiq (see <https://www.epiqglobal.com/en-us>) to serve as the Notice and
 25 Claims Processor to administer the \$3,000,000 settlement amount to be paid to settlement
 26 class members and to cover specified claims administration and litigation costs, fees, and
 incentive awards. *App. 1*, §§ 1.2, 2.2.3.1, 6.1.1–6.1.6. Epiq served as the Claims Processor

1 of the similarly structured *Schmitt* Settlement Fund, and is able to efficiently and
2 effectively perform similar duties here. Spoonemore Decl. ¶7.

3 The Claims Processor will process and pay two types of claims: (1) denied claims
4 that were previously submitted and denied by Regence and (2) claims never previously
5 submitted to Regence for payment during the class period. *Id.*, ¶¶1.17, 1.17.1, 1.17.2.

6 Class members with previously denied claims will not be required to submit
7 documentation to support their claims but will only be required to verify the out-of-
8 pocket expenses they actually incurred for hearing aids and associated services during
9 the class period. *Id.*, ¶6.4.1.2(b). They will access an online pre-populated claim form
10 that they can confirm, or for class members who are unable to access the online form,
11 written pre-populated claim forms will be provided. Verification of expenditure is
12 necessary to confirm that the class member suffered an out-of-pocket loss, *e.g.*, secondary
13 insurance did not pay, the provider did not waive some charges, or that the services were
14 actually obtained and not forgone after a preauthorization denial.

15 For claims that were not previously submitted to Regence, a class member can
16 make a claim by filling out an online claim form. A claim need only include certain basic
17 elements of *prima facie* proof, such as the fact that the hearing aid was prescribed or
18 recommended by a hearing professional and purchased within the class period, along
19 with an identification of the hearing aid type and the amount they paid for the hearing
20 aid and associated services. *Id.*, ¶¶6.4.1.1, 1.17.1, 1.17.2. To receive reimbursement for
21 out-of-pocket expenses for hearing aids and associated services, class members must also
22 verify that their claims were not covered by other insurance and have not been paid or
23 reimbursed by another person or entity. *Id.*, ¶6.4.2.3.

24 The Notice and Claims Processor shall send all Regence enrollees during the class
25 period either an email with the long form Notice, or if no email is available, by U.S. Mail
26 a postcard with the short form Notice of the proposed settlement. The Notices will direct

1 the class members to the online claim form and related instructions, and will explain
 2 how class members may obtain physical copies of such documents. *Id.*, ¶¶2.2.2–2.2.3.2.³
 3 The long form notice will also be available to all class members online, and can be mailed
 4 with a physical copy of the claim form and instructions to class members at their request.

5 The Notice and Claims Processor will review all claims for their inclusion and
 6 verification of the above information. *Id.*, ¶¶6.4.2, 6.4.2.1–6.4.2.3, 6.4.5.1. The Claims
 7 Processor will also confirm that the class member was enrolled in a Regence Washington
 8 insured plan that contained an Exclusion during the class period and at time of services
 9 provided. *Id.* The Processor must provide a class member who has a deficient claim
 10 form an opportunity to cure any problems and shall provide class counsel with notice of
 11 the claim’s deficiency; Class counsel is empowered to assist the class member in curing
 12 or otherwise making any claim. *Id.*, ¶¶6.4.3, 6.4.4. Any dispute concerning whether a
 13 claim should be granted or denied is subject to binding arbitration before (ret.) Judge
 14 Paris Kallas. *Id.*, ¶¶6.4.5.1, 6.4.7.

15 Class members who previously submitted claims will view an online pre-
 16 populated claim form that in which they need only verify that they paid the listed
 17 claim(s) (as opposed to secondary insurance paying), and that the amount they paid is
 18 the same as indicated on the pre-populated claim form. Those Class members can also
 19 file for additional reimbursement under the claims process by including additional
 20 charges that they may not have submitted. Some individuals may have stopped
 21 submitting claims after denial, and this process permits them to seek sums in addition

22
 23 ³ Class members for whom Defendants have an email address, from the class member’s current or
 24 prior enrollment in a Regence plan, shall initially be sent the Settlement Notice and Claims packet via
 25 email, consonant with Fed. R. Civ. P. 23(c)(2)(B). *App. 1*, ¶2.2.3.1. If Defendants have no email address for
 26 a class member, or if the emailed notice is returned undelivered, the Claims Processor shall send the class
 member the short-form notice via U.S. Mail. *Id.*; *Appendix 2b*. 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 to the amount on the pre-populated form. Individuals with claims who never submitted
2 them will be eligible for payment from the settlement fund upon submission of a claim
3 form verifying the elements of the claim. The proposed notice and claims process is
4 functionally identical to those approved by the Court in *Schmitt, et al. v. Kaiser Found.*
5 *Health Plan of Wash., et al.*, No. 2:17-cv-0611-RSL, Dkt. No. 171 (W.D. Wash. Dec. 11, 2023),
6 *as amended by Schmitt*, No. 2:17-cv-0611-RSL, Dkt. No. 173 (W.D. Wash. Dec. 13, 2023).
7 Spoonemore Decl. ¶8. *See also Z.D. v. Grp. Health Coop.*, 2014 U.S. Dist. LEXIS 14376, at
8 *3 (W.D. Wash. Feb. 5, 2014); *R.H. v. Premera BlueCross*, 2014 U.S. Dist. LEXIS 108503
9 (W.D. Wash. Aug. 6, 2014) (similar claims processes in settlement of health insurance
10 disputes).

11 **B. Pro Rata Reduction**

12 Based on Plaintiffs' counsel's experience in the *Schmitt* settlement process,
13 Plaintiffs' counsel does not anticipate that all valid and approved claims will be paid in
14 full. If there are insufficient funds to pay all claimants in full after fees, costs, incentive
15 awards, and specified expenses are paid, then all such claimants will receive a *pro rata*
16 (percentage) distribution of their approved claimed amount. *App. 1*, ¶¶6.5. 6.7. Based on
17 Plaintiffs' counsel's past experience in similar health care class action settlements,
18 particularly in *Schmitt*, counsel believes that qualifying class member claimants will
19 receive *pro rata* reimbursement at 30–60% of their claims. Spoonemore Decl. ¶¶10-11 (in
20 *Schmitt*, the reimbursement was at about 50% of approved claims). Plaintiffs' counsel
21 will report a more specific anticipated *pro rata* rate in advance of the fairness hearing. *Id.*

22 **C. Cy Pres Distribution**

23 In the unlikely event that there are funds remaining after the payment of claims,
24 those funds will be distributed to the Washington State Communication Access Project,
25 a nonprofit organization dedicated to enabling persons who are hard of hearing to fully
26 enjoy public venues (<https://wash-cap.com>) and in honor of John Waldo, one of

1 Plaintiffs' counsel who passed away in September 2023. Mr. Waldo dedicated his career
 2 to advocacy on behalf of people who are deaf or hard of hearing. See [https://hearingloss-
 3 wa.org/in-deeply-respectful-memory-of-hearing-loss-hero-john-waldo-esq/](https://hearingloss-wa.org/in-deeply-respectful-memory-of-hearing-loss-hero-john-waldo-esq/) (last
 4 visited 9/4/25). See *App. 1*, ¶6.6. If the funds available for *cy pres* exceed \$300,000 then
 5 the funds above \$300,000 will go to the Legal Foundation of Washington to be distributed
 6 to charitable organizations that provide advocacy on behalf of people who are deaf or
 7 hard of hearing. *Id.* Any organization receiving *cy pres* funds must report to the Court
 8 and the parties as to how the funds were used. *Id.*

9 **D. Plaintiffs' Releases**

10 If approved (and in return for the benefits under the Settlement Agreement), the
 11 named Plaintiffs and settlement class members will release Defendants from any and all
 12 claims brought or that could have been brought in this litigation against Defendants
 13 relating to coverage of or benefits for hearing aids and associated services by members
 14 of the settlement class.

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

16 The Agreement provides that class counsel shall apply for attorney's fees under
 17 the common fund/common benefit doctrine, in an amount up to, but not exceeding, 35%
 18 of the Settlement Amount, which is subject to review and approval by the Court. *Id.*,
 19 ¶¶6.3, 10.1. The Agreement also contemplates that class counsel shall apply to the Court
 20 for reimbursement of litigation costs, including the cost of class notice, to be paid out of
 21 the Settlement Amount. *Id.*, ¶¶6.3, 10.2. A case contribution award of \$15,000 for each
 22 of the Named Plaintiffs, totaling \$30,000, shall be requested from the Court to be paid
 23 out of the Settlement Amount. *Id.*, ¶10.3.

24 **V. LAW AND ARGUMENT**

25 This motion requests three separate items: (1) that the Court preliminarily
 26 approve the Settlement Agreement; (2) that the Court approve the written notices and

1 claim forms; and (3) that the Court set a schedule for distribution of notices and claim
2 forms, dates for opt-outs, comments and objections and a final approval hearing.

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

4 Compromise of complex litigation is encouraged and favored by public policy. *In*
5 *re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *In re Pac. Enters. Sec. Litig.*, 47
6 F.3d 373, 378 (9th Cir. 1995). Federal Rule of Civil Procedure 23 governs the settlement
7 of certified class actions and provides that “[t]he claims, issues, or defenses of a certified
8 class may be settled, voluntarily dismissed, or compromised only with the court’s
9 approval.” Fed. R. Civ. P. 23(e). The Court must consider the settlement as a whole,
10 “rather than the individual component parts,” to determine whether it is fair and
11 reasonable. *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003); *see Hanlon v. Chrysler*
12 *Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (“The settlement must stand or fall in its
13 entirety”).

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

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

1 *Id.*

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

14 As part of the Court’s deliberations on whether to grant preliminary approval, it
15 should consider factors including:

16 [T]he strength of plaintiffs’ case; the risk, expense, complexity, and
17 likely duration of further litigation; the risk of maintaining class
18 action status throughout the trial; the amount offered in settlement;
19 the extent of discovery completed, and the stage of the proceedings;
20 the experience and views of counsel; the presence of a governmental
21 participant; and the reaction of the class members to the proposed
22 settlement.

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

1 In this case, the parties negotiated extensively at arm's length, both independently
2 and with the help of Mr. Peterson, to arrive at a comprehensive Settlement Agreement
3 that will provide reimbursement for significant back benefits to Plaintiffs and the class
4 stretching back to October 30, 2014 through the end of this calendar year. Changes in
5 Washington law have resolved the prospective coverage at issue. *See* RCW 48.43.135.
6 Accordingly, the settlement does not need to include prospective relief. The settlement
7 is patently fair and adequate and was not the result of collusion between the parties. *See*
8 *also App. 1, ¶4.2* (Settlement was the result of arm's length negotiations); *see also Schmitt,*
9 *2024 U.S. Dist. LEXIS 71166, at *9.*

10 **B. Plaintiffs' Case Is Strong, But the Risk that Litigation Could Go on for Even**
11 **More Years Was Also High**

12 Plaintiffs believe that their claims under the ACA were very strong and that they
13 would have prevailed on summary judgment or at trial. The proposed settlement
14 reflects a position of strength. It provides for reimbursement of class members' claims
15 for what is likely to be 30–60% of their out-of-pocket expenses related to back benefits,
16 as well as payment of attorney fees, litigation costs, settlement expenses, and an
17 incentive award for named Plaintiffs. Spoonemore Decl. ¶¶10-11. This resolution
18 achieves a complete resolution of the class's claims for past costs incurred for the
19 wrongly excluded hearing aids and associated services without further delay and
20 without incurring additional attorney fees and costs that further litigation, including
21 appeals, that likely would have followed trial in this matter. Here, compensation for past
22 uncovered benefits sooner is far more valuable than the possibility of additional
23 monetary damages after more years of litigation. This is particularly true here where the
24 class claims stretch back about 11 years.

25 Also, this case required the adjudication of several issues of first impression,
26 including some on which this Court did not reach the same conclusion as did another
court in this District. This inevitably injects uncertainty into proceeding with litigation

1 and a possible appeal. Plaintiffs allege that Defendants' exclusion of coverage of Hearing
2 Aids and Associated Services discriminates against class members with hearing
3 disabilities, in violation of Section 1557 of the Affordable Care Act, and Washington state
4 law barring discrimination in insurance benefit design, found in RCW 48.43.0128. Dkt.
5 No. 65, ¶¶127-136. Since the ACA took effect in 2010, there has been limited litigation
6 alleging disability discrimination claims under Section 1557 and Class counsel is aware
7 of only two other cases besides *Schmitt* involving claims that hearing aid coverage
8 exclusions violated Sec. 1557, both brought by Plaintiffs' counsel. *See Delessert v. Kaiser*
9 *Found. Health Plan, Inc.*, No. 2:24-cv-02087-JNW, 2025 U.S. Dist. LEXIS 168139 (W.D.
10 Wash. Aug. 28, 2025); *Stanic Rasin v. Cigna Health and Life Insurance Co.*, No. 2:25-cv-
11 00407-CDS-DJA (U.S. Dist. of Nev.). Moreover, no reported appellate case analyzes the
12 meaning or application of RCW 48.43.0128. Plaintiffs' counsel are steadfastly convinced
13 that these statutes are best interpreted and applied to forbid discriminatory exclusions
14 of hearing aid coverage, such as those imposed on class members in this case. However,
15 the paucity of caselaw applying these statutes, particularly in the present context, creates
16 uncertainty regarding the result at trial. It also increases the likelihood of an appeal by
17 Regence, even if Plaintiffs were to prevail at trial. The Settlement Agreement's promise
18 of prompt and likely substantial reimbursement for class members' hearing aids and
19 associated treatments more than outweighs any potential benefit from taking the case to
20 trial.

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

22 The Settlement Fund of \$3,000,000 is fair, adequate, and reasonable. Based upon
23 class counsel's experience with similar cases in which they represented classes in
24 challenges to health insurance service exclusions, class counsel believes that the
25 Settlement Fund amount is sufficient to pay all claims of settlement class members at a
26 rate of 30–60%. *See Spoonemore Decl.* ¶¶10-11. In *Schmitt*, the reimbursement percentage

1 paid was 50.78%.⁴ *Id.* Class counsel will report the expected *pro rata* payment rate to the
 2 Court before the fairness hearing. *Id.*⁵ Even if counsel's projections are off—which
 3 historically has not been the case—the settlement amount will provide substantial,
 4 immediate, and significant compensation to claimants. It would do so without incurring
 5 the risks of class certification, summary judgment, trial, and appeals which could delay
 6 final resolution of this litigation many more years.

7 **D. The Settlement Agreement Provisions Governing Attorney Fees and Costs**
 8 **Are Fair and Reasonable**

9 The Settlement Agreement provides that class counsel shall apply for attorney
 10 fees under the common fund/common benefit doctrine. *App. 1*, § 10.1. The Agreement
 11 does *not* contain a “clear sailing” provision—anyone, including the Defendants, can
 12 challenge any fee request. *Roes v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1050 (9th Cir. 2019)
 13 (“Although clear sailing provisions are not prohibited, they 'by [their] nature deprive[]
 14 the court of the advantages of the adversary process' in resolving fee determinations and
 15 are therefore disfavored.”) (*quoting Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525
 16 (1st Cir. 1991)).

17 Class counsel may seek an award of up to 35% *See App. 1*, §10.1. *See, e.g., Schmitt*,
 18 2024 U.S. Dist. LEXIS 71166 at *9 (awarding 33 1/3% of the common fund due to
 19 plaintiffs' counsel's “excellent result”). At this stage, the Court need not presently
 20 consider whether 35%, or any other level, is the appropriate fee award. Rather, the issue

21 ⁴ In *Schmitt*, the Claims Administrator received over 900 claims, which was higher than expected.
 22 Spoonemore Decl. ¶11. Given the similar claims process, we anticipate a proportionately similar response
 23 rate in this case (which has a larger number of class members), if the settlement is approved as proposed.
 24 *Id.*

25 ⁵ The settlement fund created in *Schmitt* was also \$3,000,000. Spoonemore Decl. ¶11. The number of
 26 class members in *E.S.* is likely to be larger than the settlement class was in *Schmitt*. However, the proposed
E.S. spans eleven years, and includes many fairly old claims. Older claims are likely to have a lower
 response rate than more recent ones. *Id.* Additionally, Regence provided limited hearing aid coverage in
 some plans, which may reduce the amounts ultimately approved. *Id.* These and other distinctions make
 it difficult for Class counsel to estimate the *pro rata* payment more precisely at this point.

1 is whether the Agreement as a whole, including its provision allowing class counsel to
2 apply for an attorney's fee award is fair and reasonable. Preliminary approval of the
3 Agreement does not bind the Court to any provision of attorney fees. *See, e.g., Jones v.*
4 *GN Netcom, Inc.*, 654 F.3d 935, 945 (9th Cir. 2011) (the Ninth Circuit's rejection of a fee
5 award does not necessitate invalidation of the trial court's approval of a settlement
6 agreement).

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

10 **E. The Settlement Agreement's Incentive Award Provision Is "Fair, Adequate
11 and Reasonable"**

12 The Settlement Agreement also permits class counsel to seek case contribution
13 awards for the named class representatives. *Id.*, § 10.3. The Ninth Circuit has established
14 the factors to consider when reviewing incentive awards for named plaintiffs. The Court
15 must consider "the actions the plaintiff has taken to protect the interests of the class, the
16 degree to which the class has benefitted from those actions, the amount of time and effort
17 the plaintiff expended in pursuing the litigation and reasonable fears of workplace
18 retaliation" when determining whether an incentive award is appropriate. *Staton*, 327
19 F.3d at 977, citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). "Because a named
20 plaintiff is an essential ingredient of any class action, an incentive award is appropriate
21 if it is necessary to induce an individual to participate in the suit." *Cook*, 142 F.3d at 1016
22 (approving a \$25,000 incentive award); *see, e.g., Louie v. Kaiser Found. Health Plan, Inc.*,
23 2008 U.S. Dist. LEXIS 78314, 18 (S.D. Cal. Oct. 6, 2008) (preliminary approval of a \$25,000
24 incentive award where named plaintiffs "have protected the interests of the class and
25 exerted considerable time and effort by maintaining three separate lawsuits, conducting
26 extensive informal discovery, hiring experts to analyze discovered data and engaging in
day-long settlement negotiations with a respected mediator").

1 Here, Plaintiffs E.S., through her parents, and Sternoff dedicated substantial time,
2 effort, and risk to protect the interests of the class. They gathered and organized
3 documents related to their or their child's hearing condition. Spoonemore Decl. ¶16.
4 They appealed the denials of coverage. *Id.* They participated in mediation and were
5 involved in all settlement negotiations. *Id.* At this point, the Court need not decide
6 whether such an incentive award should be ordered. The Court should conclude that
7 the provision in the Settlement Agreement permitting class counsel to seek an incentive
8 award of up to \$15,000 for the parents of E.S. and for Plaintiff Sternoff, for a total of
9 \$30,000, does not render the proposed Settlement Agreement unfair or a product of
10 collusion.

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

12 At present, Plaintiffs' counsel does not expect any funds to remain after the
13 payments directed by the Settlement Agreement are distributed. *Id.*, ¶10. If there are
14 excess funds, none will revert to Defendants. *App. 1*, § 6.6. Any remaining funds after
15 the payment of claims, attorney fees, litigation costs, and incentive awards, will be
16 distributed first to the Washington State Communication Access Project, a nonprofit
17 organization dedicated to enabling persons who are hard of hearing to fully enjoy public
18 venues. *Id.*; see <https://wash-cap.com>. If the excess funds exceed \$300,000, then the
19 remainder will be distributed to the Legal Foundation of Washington to further
20 distribute to organizations dedicated to advocacy on behalf of persons who are deaf or
21 hard of hearing. *Id.* These organizations will be required to report to the Court and the
22 parties regarding their use of the *cy pres* funds. *Id.*

23 Class members will be informed of their right to comment and/or object to these
24 *cy pres* recipients and more generally to the *cy pres* provision to distribute unclaimed
25 funds paid out under the Settlement Agreement. *App. 2*. This is recognized as a proper
26 procedure to award *cy pres* funds. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th

1 Cir. 2009) (Propriety of *cy pres* considered once it is clear that funds will be available); *In*
 2 *re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013) (“Class members know
 3 there is a possibility of a *cy pres* award and that the Court will select among recipients
 4 proposed by the parties at a later date. This knowledge is adequate to allow any
 5 interested class member to keep apprised of the *cy pres* recipient selection process. We
 6 are confident the Court will ensure the parties make their proposals publicly available
 7 and will allow class members the opportunity to object before it makes a selection.”); *In*
 8 *re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 37286, *5-6 (N.D. Cal. 2013) (approving
 9 settlement agreement, where list of potential *cy pres* recipients and explanation of the
 10 funds’ intended use was provided in the Final Approval Motion as well as posted on the
 11 litigation website.).

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

13 This case was extensively negotiated at arm’s length over many months. *App. 1*,
 14 ¶4.2. It involved mediation with the assistance of Louis Peterson, Esq. This was followed
 15 by extensive negotiations first to reach a long-form agreement without a financial
 16 component, followed by mediated process to reach agreement on the amount of the
 17 settlement fund, ultimately agreeing upon \$3,000,000. Spoonmore Decl. ¶¶5-6, 10-11.
 18 The settlement was the result of a fair, arm’s-length process.

19 **H. There Was Sufficient Discovery**

20 Even a casual look at the docket shows this action’s long history – this was not an
 21 early settlement. Filed in 2017, the parties have been battling for years, during which
 22 time significant informal and some formal discovery occurred. Spoonmore Decl. ¶3.
 23 Plaintiffs’ counsel has further benefited from serving as Plaintiffs’ counsel in *Schmitt*,
 24 which provided a broader and deeper understanding of the key issues in this case in the
 25 insurance, legal and medical contexts than might otherwise have been garnered without
 26 more discovery. Moreover, significant claims data and other informal discovery was

1 produced by Regence as part of the parties' settlement negotiations to estimate the total
2 amounts of costs for reimbursement of class members' out of pocket costs for hearing
3 aids and associated treatment during the class period. *Id.* The Parties' exchange of
4 relevant information was more than sufficient to reach a settlement of this matter.

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

7 Class counsel are very experienced in similar class action litigation, and strongly
8 recommend that the Settlement Agreement be approved. Spoonemore Decl. ¶¶17, 19-
9 32.

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

12 The Court should also approve the proposed notice material and direct that it be
13 sent to class members according to the process outlined in the Settlement Agreement.
14 *See App. 2(a)-(b).* The long-form notice adequately summarizes the Agreement, informs
15 class members how to get further information, explains how class members can file
16 objections, including objections to a motion for fees and incentive award, and informs
17 class members of the date and time of the settlement approval hearing. It also explains
18 the process for submitting claims online and offers a written option for submitting
19 claims. *App. 2(a).* The short-form postcard notice alerts potential class members to this
20 action, and directs them to more detailed information—including the long-form notice.
21 *App. 2(b).* The parties have also agreed upon the claim forms and instructions to be used
22 by the Claims Processor, which are provided to the Court as a courtesy. *See App. 2(c)-
23 (f).*

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

25 Class members with comments, concerns, or objections to any aspect of the
26 Settlement Agreement should be provided with an opportunity to submit written
material for the Court's consideration. Class members who wish to appear in person to

1 address the Court with any comments, concerns or objections should also be provided
2 with an opportunity to appear at a hearing before the Court decides whether to finally
3 approve the Settlement Agreement.

4 Class members who wish to appear in person should notify the Court and the
5 parties of their desire to be heard, along with a statement of the issue or issues that they
6 would like to address. The proposed notice and proposed order submitted with this
7 motion require that such notice be given so that the Court and the parties can consider
8 and address the specific issues that class members wish to raise at the hearing. Finally,
9 the Class requests that the Court set a hearing date to consider class members' comments
10 and to decide whether the Settlement Agreement should be finally approved and
11 implemented.

12 **L. Proposed Scheduling Order**

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

22 **VI. CONCLUSION**

23 Plaintiffs respectfully request that the Court:

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

1 DATED: September 25, 2025.

2 *I certify that the foregoing contains 6,437 words,*
3 *in compliance with the Local Civil Rules.*

4 SIRIANNI YOUTZ
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