

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

CLASS COUNSEL’S MOTION FOR
ATTORNEY FEES, COSTS AND CASE
CONTRIBUTION AWARDS

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

I. INTRODUCTION

Class counsel secured a settlement that is expected to pay class member claims at or near 100%. This remarkable result was not easily obtained. This case has been pending for six years and was effectively dead when it was dismissed in 2018. But Class counsel persevered and their legal theory proved correct when the Ninth Circuit Court of Appeals held, for the first time, that the Affordable Care Act permits disabled insureds to challenge health plan benefit designs that discriminate against them. See Schmitt v. Kaiser Found. Health Plan of Wash., 965 F.2d 945, 954-55 (9th Cir. 2020) (“[T]he ACA allows a claim for discriminatory benefit design notwithstanding that, under [Alexander v.] Choate, [469 U.S. 287 (1985)], the Rehabilitation Act does not”). This case has not only resulted in direct benefits to class members, but to health insureds across the country who experience disability discrimination due to the benefit design of their health plan. This was no cookie-cutter case. Rather, Class counsel developed, advanced and funded the lawsuit with their time and money in the absence of any controlling authority. Class counsel’s risk-taking to benefit individuals who suffer from disability discrimination at the hands of health insurers should be rewarded. For these and other reasons, Class counsel seeks an award of one-third of the \$3,000,000 settlement amount. Class counsel further seeks approval of its litigation costs (including Class counsel’s advance of \$178,166.00 to the Claims Administrator for the cost of class notice) totaling \$374,137.63. They also move for a case contribution award of \$15,000 for each of the named Plaintiffs.

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II. LAW AND ARGUMENT¹

A. The Requested Fees Are Reasonable and Should Be Awarded.

1. Attorney Fees of 33 1/3% of the Common Fund Should Be Awarded.

When a class action settlement creates a common fund, a court has discretion to choose either the percentage-of-the-fund or the lodestar method in calculating a fee award. *Vizcaino v. Microsoft Corp.*, 290 F. 3d 1043, 1047 (9th Cir. 2002); *Stetson v. Grissom*, 821 F. 3d 1157, 1165 (9th Cir. 2016). Typically, courts apply the percentage-of-the-fund method where the settlement involves a common fund. *Kinney v. Nat'l Express Transit Servs. Corp.*, 2018 U.S. Dist. LEXIS 10808, *11 (E.D. Cal. Jan. 22, 2018); *Hester v. Vision Airlines, Inc.* 2014 U.S. Dist. LEXIS 97172, *31-32 (D. Nev. July 17, 2014) (in a common fund case “[t]he percentage method [of calculating a fee award] is favored.”); *Gerstein v. Micron Tech., Inc.* 1993 U.S. Dist. LEXIS 21215, *14 (D. Idaho Sept. 10, 1993). *Accord*, MANUAL FOR COMPLEX LITIGATION (4th), §14.121 (“[T]he factor given the greatest emphasis is the size of the fund created, because ‘a common fund is itself the measure of success ... [and] represents the benchmark from which a reasonable fee will be awarded.’”).

In the Ninth Circuit, 25% of the settlement amount is commonly referred to as the “benchmark” percentage applied to the settlement fund amount in class action common fund cases to determine the attorney fee award. That figure is, however, only a “starting point for analysis,” and “selection of the rate must be supported by findings that take into account all of the circumstances of the case.” *Vizcaino*, 290 F. 3d at 1048. In “most common fund cases the award exceeds that [25%] benchmark.” *Brown v. Papa Murphy’s Holdings Inc.*, 2022 U.S. Dist. LEXS 9209, *5-6 (W.D. Wash. May 2, 2022). *See also Kinney*,

¹ Class counsel incorporate by reference the description of the Settlement Agreement located at Dkt. No. 167, pp. 3-10.

1 2018 U.S. Dist. LEXIS 10808, at *11 (citing *Johnson v. General Mills, Inc.*, 2013 U.S. Dist.
2 LEXIS 90338, at *20 (C.D. Cal. June 17, 2013) (quoting *Vasquez v. Coast Valley Roofing, Inc.*,
3 266 F.R.D. 482, 491 (E.D. Cal. 2010)).

4 Selection of the percentage of the fund to award as attorney fees must be
5 supported by findings that take into account all the circumstances of the case. *Vizcaino*,
6 290 F. 3d at 1048. Factors that the court should consider in selecting the rate include the
7 results obtained for the class, the risk counsel undertook in pursuing the case, the
8 complexity of the issues, and benefits generated for the class beyond the cash settlement
9 fund. *Vizcaino*, 290 F. 3d at 1048-1049. A fee award above 25% is often appropriate and
10 sometimes presumptively correct. See, e.g., *Vasquez v. Coast Roofing, Inc.*, 255 F.R.D. 482,
11 491-92 (E.D. Cal. 2010) (“in most common fund cases, the award exceeds the
12 benchmark.”). The “typical range” of acceptable attorney fee awards in the Ninth
13 Circuit has been characterized as 20%-33% of the total settlement value. *Id.* at 491;
14 *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 448 (E.D. Cal. 2013). Other courts
15 have held that “nearly all common fund awards range around 30%”. *In re Activision*
16 *Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989); see also, *Mauder v. Aurora Loan*
17 *Servs., LLC*, 2015 U.S. Dist. LEXIS 8123, *4 (N.D. Cal. Jan. 21, 2015) (finding 30% fee award
18 reasonable in a mortgage workout class action lawsuit); *In re Pac. Enters. Secs. Litig.*, 47
19 F.3d 373, 379 (9th Cir. 1995) (approving attorney fee award of 33 1/3%); *Morris v. Lifescan,*
20 *Inc.*, 54 Fed. Appx. 663, 664 (9th Cir. Jan. 16, 2003) (approving 33% award).

21 A higher percentage is often awarded when the amount of the fund created is
22 relatively small, or less than \$10 million. *Miller v. CEVA Logistics USA, Inc.*, Case No.
23 2:13-cv-01321-TLN-CKD, 2015 U.S. Dist. LEXIS 104704, *18 (E.D. Cal. Aug. 10, 2015)
24 (finding fees of 33 1/3% of a total settlement amount of less than \$10 million reasonable);
25 *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1127 (C.D. Cal. 2008) (“[C]ases of
26 under \$10 million will often result in fees above 25%”); *Hitt v. Cardinal Health 100*, 2017

1 U.S. Dist. LEXIS 235022, *4 (C.D. Cal. Aug. 14, 2017) (“[I]n meal and rest break cases with
2 total settlement amounts less than \$10 million, courts routinely approve percentages at
3 or near 33 per cent.”); *Armes v. Hot Pizzas, LLC*, 2017 U.S. Dist. LEXIS 89920, *18-19
4 (D. Ariz. June 9, 2017) (Fee awards between 30-50 percent generally involve common
5 funds of less than ten million dollars).

6 The factors identified in *Vizcaino* justify increasing the award from the overall
7 benchmark of 25% to 33 1/3% or \$1,000,000:

8 *First*, Class counsel obtained an excellent result for the class in this case by
9 concluding this settlement with Kaiser. Class counsel anticipates that approved and
10 valid class claims will be compensated at or very near to 100%. Dkt. No. 168, ¶3. Indeed,
11 there may well be additional funds remaining for a *cy pres* distribution, even after
12 accounting for payment of \$1,000,000.00 in attorney fees and other costs. *Id.* The
13 settlement was vigorously negotiated over the course of months and represents the best
14 possible result for the class from defendants. *Id.* ¶¶2, 5.

15 Additionally, Class counsel ensured not just that the substantive results for Class
16 members who submit valid claims will be excellent. Class counsel also included
17 procedures into the notice and claims process that make it substantially easier for Class
18 members who previously submitted claims to Kaiser that were denied, to renew those
19 claims to obtain payment under the Settlement. Specifically, Class members with
20 previously denied claims will not be required to submit documentation to support their
21 claims but will receive a form prepopulated with the relevant information they
22 previously provided Kaiser and will only be required to verify the out-of-pocket
23 expenses they actually incurred for hearing aids and associated services during the class
24 period. *Id.* ¶3, Dkt. No. 167-1, §6.1.5.2(b). They can confirm this information online or by
25 postage prepaid return mail. Dkt. No. 168, ¶3; *see*
26 <https://www.kphearingaidsettlement.com/>. This is particularly valuable, given the low

1 response rates typically observed in class actions. Additionally, the Settlement offers
2 reimbursement not just for Class members who previously submitted claims but also for
3 those who never submitted claims but who incurred out-of-pocket expenses for hearing
4 devices and services they obtained during the class period. Dkt. No. 168, ¶4.

5 *Second*, Class counsel undertook significant risk in pursuing these claims. They
6 agreed to pursue the lawsuit on a contingency basis, with no guarantee of success.
7 Hamburger Decl., ¶11.b. They have paid costs and expenses out-of-pocket for which
8 they would have received no reimbursement absent a recovery for the Class. *Id.* They
9 have litigated this case since 2017, including a successful appeal to the Ninth Circuit with
10 no compensation. *Id.* By any measure, this was a highly risky case.

11 *Third*, this case is complex and required a great deal of skill in achieving the
12 settlement. This lawsuit involved issues of first impression in the country. *Id.*, ¶11.c.
13 Although Plaintiffs believe that they would ultimately prove that the hearing loss
14 exclusion was a form of discriminatory benefit design that violates state and federal law,
15 they knew that Defendants had the financial capacity to defend vigorously against these
16 claims and against any class treatment, and that, even after the years of litigation that
17 had already transpired, it might well take several more years before any recovery could
18 be made. *Id.*, ¶11.b.

19 *Fourth*, Class counsel anticipates that the settlement fund is sufficient to award
20 \$1,000,000.00 in attorney fees, payment of all litigation costs and other expenses, while
21 still paying claims at or near their approved valid amounts. Should sufficient valid
22 claims be submitted that would result in a significant *pro rata* reduction, Class counsel
23 will re-evaluate this fee request before submitting their reply briefing. Hamburger Decl.,
24 ¶7.

1 **2. The Requested Fee Award Represents a 15% Reduction from**
 2 **Class Counsel’s Lodestar.**

3 After applying the percentage-of-the-fund approach to award attorney fees in
 4 class action cases, district courts then sometimes use the lodestar method as a cross-check
 5 on the reasonableness of the proposed percentage figure. *Vizcaino*, 290 F. 3d at 1043, 1050
 6 n.5. To be clear, “[t]he Court is not required to conduct a lodestar cross-check.” *Benson v.*
 7 *Doubledown Interactive, LLC*, 2023 U.S. Dist. LEXIS 97758, *8 (W.D. Wash. June 1, 2023)
 8 (citing *Farrell v. Bank of Am. Corp., N.A.*, 827 F. Appx. 628, 631 (9th Cir. 2020)). But if it
 9 does, the “primary basis of the fee award remains the percentage method” while the
 10 cross-check is simply a “reasonableness” perspective on that percentage. *Vizcaino*, 290
 11 F.3d at 1050.

12 **a. Class Counsel’s Hourly Rates Are Reasonable.**

13 The lodestar is determined by “multiplying the number of hours reasonably spent
 14 on the litigation by a reasonable hourly rate.” *McCown v. City of Fontano Fire Dept.*, 565
 15 F.3d 1097, 1102 (9th Cir. 2009). Actual rates charged by lawyers constitute strong
 16 evidence of reasonableness. *Rosie D. v. Patrick*, 593 F.Supp.2d 325, 330 (D. Mass. 2009);
 17 *see also Tomazzoli v. Sheedy*, 804 F.2d 93, 98 (7th Cir. 1986). The current hourly rates for
 18 partners Mr. Spoonemore (32 years of experience) and Ms. Hamburger (31 years of
 19 experience), and John Waldo (36 years of experience) are \$750/hour. The hourly rates
 20 for Ann Merryfield and Daniel Gross, both with 30 years or more of experience, are
 21 \$695/hour. *See Hamburger Decl.*, ¶¶3-4. These rates are well in line with the rates for
 22 Seattle attorneys with similar experience. *Id.*

23 The reasonableness of Class counsel’s rates is confirmed by Wolters Kluwer’s
 24 “Real Rate Report,” which is an analysis of actual law firm rates, trends, and practices.
 25 *See Hamburger Decl., Exh. C.* Due to its extensive database, its reports are recognized as
 26 being the best guideposts for legal rates. *Sarabia v. Ricoh United States, Inc.*, 2023 U.S. Dist.

1 LEXIS 85742, at *23–24 (C.D. Cal., May 1, 2023).² According to the Real Rate Report,
 2 Class counsel’s normal hourly rates, ranging from \$695 to \$750, are well within a
 3 reasonable range (between the median and third quartile) given that all Class counsel
 4 have 30 or more years of experience. Hamburger Decl., *Exh. C*; Dkt. No. 91, ¶¶2-31.

5 ***b. Class Counsel’s Hours Worked Were Reasonable.***

6 When calculating counsel’s lodestar, the hours spent on the case include time
 7 “reasonably expended in pursuit of the ultimate result achieved in a manner that an
 8 attorney traditionally is compensated by a fee-paying client for all time reasonably
 9 expended on a matter.” *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983). As a general rule,
 10 “the court should defer to the winning lawyer’s professional judgment as to how much
 11 time he was required to spend on the case; after all, he won, and might not have, had he
 12 been more of a slacker.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008);
 13 *Campbell v. Catholic Cmty. Servs.*, 2012 U.S. Dist. LEXIS 190096, *12 (W.D. Wash. Aug. 8,
 14 2012).

15 When performing the lodestar cross-check, detailed cataloging of hours spent is
 16 not necessary, and declarations from attorneys attesting to their experience and
 17 qualifications, their hourly rates, and the hours expended have been found sufficient. *In*
 18 *re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1176 (S.D. Cal. 2007), citing *In re Rite*
 19 *Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) (“The lodestar cross-check
 20 calculation need entail neither mathematical precision nor bean-counting.”); *Schiller v.*
 21 *David’s Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776, *57 (E.D. Cal. June 11, 2012) (an
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 25 ² “Courts have found that the Real Rate Report is “a much better reflection of true market rates than
 26 self-reported rates in all practice areas.” *Hicks v. Toys ‘R’ Us-Del., Inc., No.*, 2014 U.S. Dist. LEXIS 135596, at
 *4 (C.D. Cal. Sept. 2, 2014); *Eksouzian v. Albanese*, 2015 U.S. Dist. LEXIS 189545, at *8 (C.D. Cal. Oct. 23, 2015)
 (Real Rate Report is a “much better barometer of the reasonable rates”).

1 “exhaustive cataloging and review of counsel’s hours” is not necessary when performing
2 a lodestar cross-check).

3 For purposes of the lodestar cross-check here, Class counsel has provided its time
4 and expense ledgers for the Lawsuit, redacted for attorney-client privilege and work
5 product confidentiality, and submitted with this Motion. Hamburger Decl., *Exh. A*. Class
6 counsel has also already submitted declarations attesting to their experience and
7 qualifications. *See* Dkt. No. 91, ¶¶2-31. The total amount of time documented by Class
8 counsel is slightly more than 1600 hours. *See* Hamburger Decl., ¶2, *Exh. A*.

9 This amount of time spent on the litigation by Class counsel was reasonable. The
10 lodestar includes time spent researching the facts and issues, reviewing documents and
11 publicly available information, communicating with the Class Representatives, drafting
12 and amending complaints and related motions (e.g., motions and replies on motions to
13 amend), opposing Kaiser’s multiple motions to dismiss, drafting appellate briefing and
14 participating in appellate argument, drafting and opposing motions for summary
15 judgment, preparing discovery requests, analyzing issues and strategy, assisting
16 plaintiffs’ expert witnesses and deposing Kaiser’s experts, mediating and negotiating
17 with Kaiser, drafting and revising the terms of settlement and the ultimate settlement
18 agreement, moving for class certification and approval of the settlement, and
19 communicating with class members, including working with the claims administrator to
20 create web pages that inform members of the efforts to obtain recovery from the
21 defendants and how to submit a claim for reimbursement under the Settlement. *Id.*

22 The time reported does not include the considerable time Class counsel will spend
23 in seeking final approval of the settlement, submitting a reply brief in support of this
24 motion, and overseeing the distribution of the settlement fund. Moreover, Class counsel
25 has already received and responded to calls or emails from dozens of class members in
26 response to the class notice, and they anticipate they will have to spend additional time

1 assuring the payment of claims to class members. See Hamburger Decl., ¶¶6, 10. None
 2 of this time is included in the lodestar. The work spent by Class counsel on this highly
 3 successful class action is thus eminently reasonable.

4 *c. Calculating and Determining the Reasonableness of a*
 5 *Lodestar Multiplier.*

6 Once a lodestar figure is arrived at, a lodestar multiplier may then be applied to
 7 the resulting amount to adjust it up or down, depending on the complexity of the case,
 8 the risks involved, and the length of the litigation. *Vizcaino*, 290 F.3d at 1051. A cross-
 9 check that is less than four times the lodestar passes the reasonableness test. *Id.*
 10 (multiplier of 3.65 is “within the range of multipliers applied in common fund cases”);
 11 *Mejia v. Walgreen Co.*, 2021 U.S. Dist. LEXIS 56150, *23–24 (E.D. Cal. March 23, 2021)
 12 (multipliers between 3 and 4 routinely approved); *Miller*, 2015 U.S. Dist. LEXIS 104704
 13 at *21 (“Multipliers in the 3-4 range are common in lodestar awards for lengthy and
 14 complex class action litigation.”) Indeed, the Ninth Circuit has approved multipliers of
 15 up to seven. *Steiner v. Am. Broad Co.*, 248 Fed. Appx. 780, 783 (9th Cir. Aug. 29, 2007). No
 16 multiplier is obtained here; rather the lodestar cross-check reveals that the percentage of
 17 the fund approach results in a **15% reduction** from Class counsel’s lodestar. This fact
 18 supports the reasonableness of the percentage fee award.

19 **B. Litigation Costs of \$374,137.63 Should Be Awarded**

20 Litigation costs are recoverable in a class action settlement. *Staton v. Boeing Co.*,
 21 327 F.3d 938, 974-75 (9th Cir. 2003); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362,
 22 1366 (N.D. Cal. 1996) (“Reasonable costs and expenses incurred by an attorney who
 23 creates or preserves a common fund are reimbursed proportionately by those class
 24 members who benefit by the settlement.”). The prevailing view is that expenses are
 25 awarded in addition to the fee percentage. A. Conte, ATTORNEY FEE AWARDS, §§2.08, 2.19
 26 (3d ed. 2012); *In re Businessland Sec. Litig.*, 1991 U.S. Dist. LEXIS 8962, *6 (N.D. Cal.

1 June 18, 1991) (collecting cases). Reimbursement of the costs is subject to the Court's
 2 determination of relevance and reasonableness. *Id.* Costs compensable include
 3 "nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ.
 4 P. 23(h). Attorneys generally may recover reasonable expenses that would typically be
 5 billed to paying clients in non-contingency matters. *Harris v. Marhoefer*, 24 F.3d 15, 19
 6 (9th Cir. 1994). The types of costs awarded in class actions include filing fees, copying,
 7 postage, document storage, travel, experts, transcripts, computer research, mediator
 8 fees, and the cost of the class administrator. *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d
 9 998, 1024 (E.D. Cal. 2019).

10 Counsel in this case have incurred a total of \$374,137.63 in out-of-pocket expenses
 11 in the lawsuit. Hamburger Decl., ¶8. This amount includes filing fees, cost of service of
 12 summons, expert witness fees, deposition expenses, the cost of the mediator, and
 13 advancing a portion of the class notice costs to the claims administrator among other
 14 costs. Each of these costs was necessary to arrive at the common fund settlement and
 15 should be reimbursed from the common fund.

16 **C. A Case Contribution of \$15,000 For Each Class Representative Is
 17 Appropriate and Should Be Awarded.**

18 Case Contribution awards—also called "enhancement" or "incentive"
 19 awards—are typical in class action cases, *Rodriguez v. West Publ'g Corp.*, 563 F. 3d 948,
 20 958-959 (9th Cir. 2009), and are in the court's discretion to award. *In re Mego Fin. Corp.*
 21 *Sec. Litig.*, 213 F. 3d 454, 463 (9th Cir. 2000). "Because a named plaintiff is an essential
 22 ingredient of any class action, an incentive award is appropriate if it is necessary to
 23 induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th
 24 Cir. 1998) (affirming a \$25,000 incentive award). *See also, Louie v. Kaiser Found. Health*
 25 *Plan, Inc.*, No. 08-cv-0795-IEG-RBB, 2008 U.S. Dist. LEXIS 78314, *18 (S.D. Cal. Oct. 6,
 26 2008) (preliminary approval of a \$25,000 incentive award where named plaintiffs "have
 protected the interests of the class and exerted considerable time and effort by

1 maintaining three separate lawsuits, conducting extensive informal discovery, hiring
2 experts to analyze discovered data and engaging in day-long settlement negotiations
3 with a respected mediator”).

4 In determining whether to approve a case contribution award, courts may
5 consider the following factors: (1) the risk to the class representative in commencing suit,
6 both financial and otherwise; (2) the notoriety and personal difficulties encountered by
7 the class representative; (3) the amount of time and effort spent by the class
8 representative; (4) the duration of the litigation; and (5) the personal benefit (or lack
9 thereof) enjoyed by the class representative as a result of the litigation. *Van Vranken v.*
10 *Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (awarding \$50,000 to class
11 representative). Incentive awards are especially appropriate in health care class actions
12 because named plaintiffs not only invest their time and effort to support the litigation,
13 but they also sacrifice their “personal and medical privacy” for the benefit of the class.
14 *McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 479-480 (D.N.J. 2008) (awarding each
15 representative plaintiff \$60,000); *Roches v. Cal. Physicians’* 2018 U.S. Dist. LEXIS 250754,
16 *19 (N.D. Cal. July 5, 2018) (case contribution awards of \$20,000 to each named plaintiffs).

17 Contribution awards of \$5,000 per plaintiff are presumptively reasonable, but
18 higher amounts may well be granted depending on the facts. *Richardson v. THD At-Home*
19 *Servs.*, 2016 U.S. Dist. LEXIS 46784 (E.D. Cal. April 5, 2016) (awarding \$15,000 to named
20 plaintiff). *See also, Chu v. Wells Fargo Invs., LLC*, No. C05-4526 MHP, 2011 U.S. Dist. LEXIS
21 15821, *14 (N.D. Cal. Feb. 15, 2011) (\$10,000 enhancement award to each named plaintiff
22 was within the acceptable range for a settlement amount of \$6.9 million and 2,752 noticed
23 class members); *Reed v. Balfour Beatty Rail, Inc.*, 2023 U.S. Dist. LEXIS 128546, *24 (C.D.
24 Cal. June 22, 2023) (awarding \$10,000 service fee to a named plaintiff who risked
25 suffering reputational risks by placing his criminal history at issue).

1 Courts also consider what percentage of the common fund would be taken up by
2 a proposed case contribution award in determining whether the award is reasonable. *See*
3 *Sandoval v. Tharaldson Employee Management*, 2010 U.S. Dist. LEXIS 69799 (C.D. Cal.
4 June 15, 2010) (noting that incentive award not exceeding 1% of total settlement was fair
5 and reasonable); *Acosta v. Evergreen Moneysource Mortg. Co.*, 2019 U.S. Dist. LEXIS 198728,
6 *53 (E.D. Cal. Nov. 14, 2019) (awarding named plaintiff \$10,000 incentive award that
7 represented 2.85% of gross settlement amount); *Kater v. Churchill Downs, Inc.*, 2021 U.S.
8 Dist. LEXIS 26734, *7 (W.D. Wash. Feb. 11, 2021) (approving incentive awards of \$10,000
9 each to two named plaintiffs and \$50,000 to a third whose contributions went much
10 beyond those usually offered by a class representative); *Ikuseghan v. MultiCare Health*
11 *Sys.*, 2016 U.S. Dist. LEXIS 109417, *7 (W.D. Wash. Aug. 16, 2016) (ordering \$15,000
12 incentive award and finding it reasonable).

13 Each of the Class Representatives made a significant contribution in time toward
14 the settlement in this case. Throughout the course of the litigation, the Class
15 Representatives have been actively involved. Dkt. No. 168, ¶5. They each agreed to
16 pursue the defendants here on behalf of a class, even though they might have reached a
17 better result for themselves had they pursued their claims individually. They each
18 understood and signed agreements recognizing that they owed a fiduciary duty to all
19 other class members, and were responsible for monitoring the litigation, communicating
20 with Class counsel, and acting in the best interests of the class. Dkt. Nos. 93-96
21 (Declarations of Plaintiffs Schmitt, Mohundro, J.L. and K.L. in support of Motion for
22 Class Certification).

23 They each scoured their files, emails, and papers and provided Class counsel with
24 relevant documents and information to assist in the drafting of the complaints. Dkt. No
25 168, ¶5; Hamburger Decl., ¶9. They reviewed the complaints and provided feedback. *Id.*;
26 Dkt. No 168, ¶5. Plaintiffs Schmitt, Mohundro and J.L. were each subjected to lengthy

1 depositions that required time off from work. Hamburger Decl., ¶9. They each provided
2 assistance in responding to and opposing the various dispositive motions. *Id.* They each
3 were on call to participate in the mediation. Dkt. No 168, ¶5. They each carefully
4 considered the proposed settlement terms and executed the initial settlement term sheet
5 and the final long form Settlement Agreement with Kaiser. *Id.*

6 Indeed, the Class Representatives went above and beyond what is typically
7 required in this kind of litigation. Hamburger Decl., ¶9. Plaintiffs called in from
8 camping trips, overseas vacations and took time off from work, repeatedly, in order to
9 support the case. *Id.* At all relevant times, these named plaintiffs thought carefully and
10 conscientiously about the impact of the settlement on absent class members; they each
11 did their best to alert their own formal and informal networks about the settlement
12 claims process, and were ideal plaintiffs at every stage of the litigation. *Id.*

13 Finally, the total Case Contribution request here for all Class
14 Representatives—\$45,000—is just 1.5% of the settlement fund, well within the amounts
15 found by courts to be reasonable. *See Sandoval*, 2010 U.S. Dist. LEXIS 69799 at *26-27, and
16 *Acosta*, 2019 U.S. Dist. LEXIS 198728 at *53 above (finding, respectively, that 1% and
17 2.85% of the settlement amount was reasonable). The proposed case contribution awards
18 of \$15,000 to each named Plaintiff should be ordered by the Court.

19 III. CONCLUSION

20 The Court should award attorney fees of \$1,000,000, litigation costs of \$374,137.63
21 to Class counsel, and award \$15,000 in Case Contribution awards to Andrea Schmitt,
22 Elizabeth Mohundro, and O.L. by and through her parents J.L. and K.L.

1 DATED: March 7, 2024.

2 *I certify that the foregoing contains 4,155 words,*
3 *in compliance with the Local Civil Rules.*

4 SIRIANNI YOUTZ
5 SPOONEMORE HAMBURGER PLLC

6 /s/ Eleanor Hamburger

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The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREA SCHMITT; ELIZABETH
MOHUNDRO; and O.L. by and through her
parents, J.L. and K.L., each on their own
behalf, and on behalf of all similarly situated
individuals,

Plaintiffs,

v.

KAISER FOUNDATION HEALTH PLAN OF
WASHINGTON; KAISER FOUNDATION
HEALTH PLAN OF WASHINGTON
OPTIONS, INC.; KAISER FOUNDATION
HEALTH PLAN OF THE NORTHWEST; and
KAISER FOUNDATION HEALTH PLAN,
INC.,

Defendants.

NO. 2:17-cv-1611-RSL

[PROPOSED]
ORDER GRANTING PLAINTIFFS'
MOTION FOR ATTORNEY FEES,
COSTS, AND CASE CONTRIBUTION
AWARDS

THIS MATTER came before the Court on Plaintiffs' Motion for Attorney Fees, Costs, and Class Representative Case Contribution Awards. The Court has considered Class Counsel's Motion for Attorney Fees, Costs, and Case Contribution Award, the Declaration of Class Counsel, Eleanor Hamburger in support of the Motion, all exhibits

1 attached thereto, and the files and records in this case. Based on this evidence and the
2 relevant law, the Court makes the following findings and conclusions:

3 **I. BACKGROUND AND PROCEDURAL POSTURE OF THE CASE**

4 On December 11, 2023, the Court certified a settlement class and preliminarily
5 approved an agreement of a class-wide settlement of claims against Defendants Kaiser
6 Foundation Health Plan of Washington, Kaiser Foundation Health Plan of Washington
7 Options, Inc., Kaiser Foundation Health Plan of the Northwest; and Kaiser Foundation
8 Health Plan, Inc. (collectively, "Kaiser"). Dkt Nos. 170 and 171. The Court then issued an
9 Amended Order Approving Settlement Agreement on December 13, 2023. Dkt. No. 173.
10 The Settlement Agreement resolves all claims against Kaiser on behalf of a class of
11 present or former Kaiser members with disabling hearing loss who paid for hearing aids
12 and associated care during the class period. That Settlement Agreement creates a
13 common settlement fund of \$3,000,000 out of which class members' valid claims
14 submitted in compliance with the settlement procedure will be paid. Dkt. No. 167-1, at
15 §6. The Settlement Agreement also allowed the Plaintiffs to seek an attorney fee award
16 of up to 35% of the settlement amount, reimbursement of actual litigation costs, and a
17 Case Contribution award of up to \$15,000 for each of the named Plaintiffs, subject to the
18 Court's review and approval and paid from the Settlement Fund. *Id.*, at §10. Settlement-
19 related notice costs, claims administrator costs, and taxes will be paid out of the
20 Settlement Fund as well. *Id.*, at §6.3.

21 Plaintiffs filed this Motion for an award of attorney fees, litigation costs, and case
22 contribution payments on March 7, 2024, in compliance with the schedule the Court
23 specified in its order granting preliminary approval. Dkt. No. 171, ¶17. This matter is
24 now ripe for adjudication.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *Class Counsel's Requested Fees Are Reasonable.*

Where a class action settlement creates a common fund, as has been done here, the Court has discretion to choose either the percentage-of-the-fund or lodestar method in calculating the fee award. *Vizcaino v. Microsoft Corp.*, 290 F. 3d 1043, 1047 (9th Cir. 2002). Typically, however, courts apply the percentage-of-the-fund method where the settlement involves a common fund. *Kinney v. Nat'l Express Transit Servs. Corp.*, Case No. 2:14-cv-01615-TLN-DB, 2018 U.S. Dist. LEXIS 10808, *11 (E.D. Cal. Jan. 22, 2018); *Gerstein v. Micron Tech., Inc.* 1993 U.S. Dist. LEXIS 21215, *14 (D. Idaho Sept. 10, 1993). *Accord*, MANUAL FOR COMPLEX LITIGATION (4th), § 14.121 (“[T]he factor given the greatest emphasis is the size of the fund created, because ‘a common fund is itself the measure of success ... [and] represents the benchmark from which a reasonable fee will be awarded.’”). The Court adopts the percentage-of -the-fund method here, and finds that allocating 33 1/3% of the common fund towards attorney fees is reasonable. *See In Re: Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, *60 (C.D. Cal. June 10, 2005) (awarding 33 1/3% because of “exceptional result” in obtaining settlement for just 23% of class members’ losses and citing cases awarding 33 1/3% or more for recoveries ranging from 10% to 17% of class members’ losses). In finding 33 1/3% to be a reasonable percentage, the Court has considered the following facts:

1. **An Award of Attorney Fees Amounting to 33 1/3% of the Settlement Fund is Reasonable.**

(a) The Settlement’s Highly Beneficial Results. Class Counsel obtained an excellent result through this settlement. The Settlement provides a substantial monetary benefit for the Class, by creating a \$3 million fund for the reimbursement of class members’ claims for their out-of-pocket expenditures on hearing aids and related services over an approximately 9-year period. Dkt. No. 167-1, §6. The Settlement offers

1 such reimbursement regardless of whether an otherwise eligible class member
 2 previously made a claim to Kaiser for coverage of services related to hearing loss. *Id.*
 3 Significantly, the Settlement provides a streamlined process for filing a claim, sending
 4 prior claimants pre-populated claim forms they can verify online. *Id.*, at § 6.5.1.2.

5 (b) Risk in Taking on the Litigation. Class counsel undertook a
 6 significant risk in bringing this class action lawsuit on a contingent basis. The case was
 7 heavily litigated by both parties for over six years, during which Class counsel paid
 8 substantial expenses out of pocket and devoted similarly substantial work on the Class's
 9 behalf, for which counsel would not be entitled to reimbursement absent a recovery.
 10 Hamburger Decl. ¶¶ 11.b.

11 (c) Complexity of the case. This case is complex, turning on issues of
 12 first impression regarding the extent to which Sec. 1557 of the Affordable Care Act and
 13 Washington State anti-discrimination law provide claims and rights of action to attack
 14 potentially discriminatory health insurance benefit design. *See, e.g., Schmitt, et. al. v.*
 15 *Kaiser Found. Health Plan of Wash.*, 965 F.2d 945, 954-55 (9th Cir. 2020). The case required
 16 a concomitant great deal of skill in achieving the settlement.

17 Based on these factors, the Court finds that a 33 1/3% allocation of funds from the
 18 common fund towards Class Counsel's attorney fees is reasonable. *See Vizcaino*, 290 F.3d
 19 at 1048-1049 (listing factors for consideration in making reasonableness determination).

20 **2. *The Lodestar Cross-Check Supports a Fee Award of 33 1/3% of the***
 21 ***Common Fund.***

22 The Court also finds that 33 1/3% of the common fund constitutes reasonable
 23 attorney fees even after performing and considering a lodestar cross-check. A lodestar
 24 cross-check is not required by governing law or the Settlement Agreement. *See Benson v.*
 25 *Doubledown Interactive, LLC*, 2023 U.S. Dist. LEXIS 97758, *8 (W.D. Wash. June 1, 2023)
 26 (*citing Farrell v. Bank of Am. Corp., N.A.*, 827 F. Appx. 628, 631 (9th Cir. 2020)); *see generally*

1 Dkt. No. 167, *App. 1*. However, it can provide a useful perspective on the reasonableness
2 of fees otherwise resulting from a percentage of the common fund calculation. *Vizcaino*,
3 290 F.3d at 1050.

4 The lodestar is determined by “multiplying the number of hours reasonably spent
5 on the litigation by a reasonable hourly rate.” *McCown v. City of Fontano Fire Dept.*, 565
6 F.3d 1097, 1102 (9th Cir. 2009). Based on Class counsel’s declaration and fee ledgers, the
7 lodestar amount is \$1,185,268.75. That lodestar rate is then compared to the percentage
8 fee award amount, in this case, \$1,000,000. The percentage award sought by Class
9 counsel represents a 15% reduction from their lodestar, further endorsing the
10 reasonableness of the percentage-based calculation of Class Counsel’s fees.

11 **B. *Payment of Litigation Costs.***

12 Litigation costs are recoverable in a class action settlement. *Staton v. Boeing Co.*,
13 327 F.3d 938, 974-75 (9th Cir. 2003); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362,
14 1366 (N.D. Cal. 1996). The Settlement in this matter specifically authorizes the award of
15 litigation costs, subject to court review and approval. Dkt. No. 167-1, § 10.2. Class
16 Counsel has provided a ledger of the costs they paid out of pocket on this litigation,
17 amounting to \$374,137.63. The Court has reviewed the costs and finds them to constitute
18 reasonable expenditures for the items and services on which they were incurred, as well
19 as reasonable overall.

20 **C. *The Requested Case Contribution Awards are Reasonable.***

21 Case contribution awards are typical in class action cases, *Rodriguez v. West Publ’g*
22 *Corp.*, 563 F. 3d 948, 958-959 (9th Cir. 2009), and are in the court’s discretion to award. *In*
23 *re Mego Fin. Corp. Sec. Litig.*, 213 F. 3d 454, 463 (9th Cir. 2000). The Settlement agreement
24 authorizes an award of \$15,000 to each of the named Plaintiffs, for a total of \$45,000. Dkt.
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26

1 No. 167, *App. 1*, § 10.3. Plaintiffs and the Class seek an award of \$15,000 for each class
2 representative.

3 In determining whether to approve a case contribution award, courts may
4 consider the following factors: (1) the risk to the class representative in commencing suit,
5 both financial and otherwise; (2) the notoriety and personal difficulties encountered by
6 the class representative; (3) the amount of time and effort spent by the class
7 representative; (4) the duration of the litigation; and (5) the personal benefit (or lack
8 thereof) enjoyed by the class representative as a result of the litigation. *Van Vranken v.*
9 *Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

10 The Plaintiffs' proposed incentive awards satisfies these criteria. First, each of the
11 Class Representatives made a significant contribution in time (and intrusion into their
12 lives) toward the prosecution of this case over a period of years, and its eventual
13 settlement. Hamburger Decl., ¶9. The Class Representatives have been actively involved
14 in every aspect of the case, throughout its years-long lifespan. *Id.*; Dkt. No. 168, ¶5. They
15 each agreed to pursue the defendants here on behalf of a class, even though they might
16 have reached a better result for themselves had they pursued their claims individually.
17 They each understood and signed agreements recognizing that they owed a fiduciary
18 duty to all other class members, and were responsible for monitoring the litigation,
19 communicating with Class Counsel, and acting in the best interests of the class. Dkt. Nos.
20 93-96 (Declarations of Plaintiffs Schmitt, Mohundro, J.L. and K.L. in support of Motion
21 for Class Certification). Indeed, Plaintiff Schmitt agreed to a special release related to
22 her future claims in order to get the settlement approved. *See* Dkt. No. 167-1, § 1.16.

23 Additionally, courts often consider the relative size of a case contribution award
24 compared with the common fund from which it is drawn to determine the incentive
25 award's reasonableness. *See Sandoval v. Tharaldson Employee Management*, No. EDCV 08-
26 482-VAP, 2010 U.S. Dist. LEXIS 69799 (C.D. Cal. June 15, 2010) (noting that incentive

1 award not exceeding 1% of total settlement was fair and reasonable); *Acosta v. Evergreen*
2 *Moneysource Mortg. Co.*, No. 2:17-cv-00466-KJM-DB, 2019 U.S. Dist. LEXIS 198728, *53
3 (E.D. Cal. Nov. 14, 2019) (awarding named plaintiff \$10,000 incentive award that
4 represented 2.85% of gross settlement amount). Class Counsel's proposed total award of
5 \$45,000 between all three class representatives would amount to 1.5% of the Settlement
6 Fund, supporting a finding of its reasonableness.

7 Based on the caselaw governing such awards, the sizable efforts the named
8 Plaintiffs reasonably expended in this manner on behalf of themselves and the Class, and
9 the relatively modest amount requested as incentive awards compared with the total
10 Settlement Fund, the Court finds that the requested \$15,000 case contribution payment
11 for each of the named Plaintiffs is reasonable and should be awarded to them.

12 III. ORDER

13 It is, therefore, ORDERED ADJUDGED AND DECREED that:

14 1. Class counsel is awarded 33 1/3% of the gross amount of the Settlement
15 Fund (\$3,000,000) created in this matter as attorney fees. Such fees (\$1,000,000) shall be
16 paid from the common Settlement Fund.

17 2. Class counsel be reimbursed \$374,137.63 in costs to be paid from the
18 common Settlement Fund. And,

19 3. Class Representatives Andrea Schmitt, Elizabeth Mohundro, and O.L., by
20 and through their parents J.L. and K.L., are awarded \$15,000 each, or \$45,000 total, as
21 case contribution awards, to be paid from the common Settlement Fund.

22 It is so ORDERED this _____ day of _____, 2024.

23
24
25 _____
26 Robert S. Lasnik
United States District Judge

1 Presented by:

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4 /s/ Eleanor Hamburger

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