

HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN GABRIEL, RUTH BJORKLUND,
and LAUREN GUSTAFSON-OMER each
on his and her own behalf and on behalf of
similarly situated persons,

Plaintiffs,

v.

NATIONWIDE LIFE INSURANCE
COMPANY, an Ohio Corporation,

Defendant.

NO. 09-CV-00508-JCC
(Class Action)

JOINT MOTION TO:

- (1) PRELIMINARILY APPROVE SETTLEMENT AGREEMENT
- (2) APPROVE AND DIRECT NOTICE TO SETTLEMENT CLASS MEMBERS AND
- (3) SCHEDULE A FINAL SETTLEMENT APPROVAL HEARING

Noted For Consideration:
April 23, 2010

I. RELIEF REQUESTED

The parties have reached a settlement in this class action, the terms of which are set out in the proposed Settlement Agreement attached to this motion as

Appendix 1. Pursuant to FRCP 23 (e) the parties jointly move this Court to:

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

1 **II. STATEMENT OF FACTS**

2 **A. General Background**

3 This is an action brought by John Gabriel, Ruth Bjorklund and Lauren
4 Omar, individually and on behalf of all other similarly situated persons, against
5 Nationwide, alleging that Nationwide sold them an unauthorized fixed-indemnity
6 medical plan or plans (the "medical plan") and violated the Washington Consumer
7 Protection Act, RCW 19.84, *et seq.* See Complaint, Dkt. No. 1. Nationwide denied all
8 allegations and raised numerous affirmative defenses. Answer, Dkt. No. 6. Trial was
9 scheduled for October 18, 2010. Minute Order, Dkt. No. 13.

10 The parties engaged in extensive, expedited discovery in order to
11 determine whether an early resolution of the dispute was possible. Hamburger Decl.
12 ¶2. The expedited discovery included disclosure by Nationwide of all premiums paid
13 by or on behalf of proposed class members and all written claims received by
14 Nationwide on behalf of proposed class members. *Id.* ¶3.

15 Initially, Nationwide disclosed that there were 866 individuals covered
16 by the medical plan from April 16, 2003 to July 1, 2009. (The number of proposed class
17 members has increased to 1,037, due to additional data provided for individuals
18 covered by the medical plan through November 23, 2009). *Id.* ¶4. Nationwide also
19 disclosed that the total premiums paid by or on behalf of these individuals was a little
20 more than \$400,000. (With the additional class members the total amount of premiums
21 paid has increased to approximately \$462,000). *Id.* ¶6.

22 Nationwide produced all of the written claims it received on behalf of the
23 866 individuals, which were redacted to comply with privacy laws and pursuant to
24 Court Order. See Stipulation and Order re: Confidential Records, Dkt. No. 7, dated
25 June 18, 2009. Plaintiffs' counsel compiled the claims into a database which revealed
26 that the 866 individuals had approximately \$1.4 million in claims submitted to

1 Nationwide on their behalf. Of those claims, Nationwide paid approximately \$123,000.
2 Hamburger Decl. ¶8. (With the additional class members, the total amount of written
3 claims submitted to Nationwide is approximately \$1.5 million). *Id.* ¶8.

4 On November 20, 2009 (the Friday before the November 23, 2009
5 mediation), Nationwide reached a resolution of the investigation by the Washington
6 Office of the Insurance Commissioner. *Id.* ¶16, *Exh. A*. The Insurance Commissioner
7 found that Nationwide had neglected to file the form for its medical plan with the
8 Insurance Commissioner and that the medical plan, for a period of time, did not
9 expressly provide for several areas of coverage, and for a separate period of time
10 expressed an impermissible limitation on coverage and failed to include a disclosure.
11 *Id.* The Insurance Commissioner, after reviewing claims submitted to Nationwide,
12 concluded that no claims for benefits had been wrongfully denied as a result of the
13 expressed coverage omissions and limitations. *Id.* Nationwide consented to entry of
14 an Order that, *inter alia*, required Nationwide to pay a fine of \$20,000. *Id.*

15 The November 23, 2009 mediation process included extensive, arms-
16 length negotiations, exchanges of numerous mediation briefs addressing the parties'
17 respective factual and legal arguments, and mediation before an impartial mediator,
18 Thomas V. Harris. *Id.* ¶¶2, 17. At the mediation, the parties reached an agreement in
19 principle. *Id.* ¶17. From November 23 until April 23, 2010 when the Agreement was
20 fully executed, the parties negotiated over the specific terms of the settlement. *Id.*

21 **B. Plaintiffs' Position**

22 The following is a non-exhaustive summary of Plaintiffs' factual and legal
23 contentions in this lawsuit.

24 Plaintiffs' allege that Nationwide sold them an unauthorized, illegal
25 health policy. As a result, plaintiffs and other similarly situated individuals are
26 entitled to their choice of equitable remedies: rescission or reformation.

1 **1. Liability**

2 **a. Illegal Contract Claim**

3 Nationwide sold plaintiffs and putative class members illegal,
4 unauthorized health policies. RCW 48.18.100 requires that all insurance policy forms
5 be filed with and approved by the Office of the Insurance Commissioner before being
6 issued, delivered or used. Those policy forms that are submitted must comply with
7 Washington State minimum requirements, mandatory benefits and standard
8 disclosures. Nationwide’s policy was not filed or authorized by the Insurance
9 Commissioner prior to its use in Washington state.

10 Until July 22, 2007, fixed-indemnity policies, like Nationwide’s, were
11 illegal when sold as stand-alone policies in Washington state. *See former*
12 *RCW 48.43.005 (19)(i) (2006)*. Even after that date, fixed-indemnity policies could only
13 be sold if the policies were approved by the Insurance Commissioner *and* if the policies
14 included the standard disclosures required by the Insurance Commissioner.
15 *RCW 48.43.005 (19)(d); (i); 48.21.370; WAC 284-50-440; 284-96-550*. Plaintiffs maintain
16 that the Nationwide medical policy did not meet these requirements when this lawsuit
17 was filed, and did not do so until approximately July 1, 2009.

18 **b. Consumer Protection Act Claim**

19 Use of an unauthorized “fixed-indemnity” plan in violation of the
20 Washington Insurance Code is also a violation of the Washington Consumer Protection
21 Act. “The general rule is that violations of insurance regulations are subject to the
22 Consumer Protection Act.” *Leingang v. Pierce County Med. Bur., Inc.*, 131 Wn.2d 133,
23 152, 930 P.2d 288 (1997); *RCW 19.86.170*. Plaintiffs maintain that Nationwide’s
24 violation of the Insurance Code was a *per se* Consumer Protection Act violation.
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26

1 **2. Damages**

2 Plaintiffs allege that they and the putative class members are entitled to
3 their choice of equitable remedies of rescission or reformation. In a similar case,
4 *Crnkovich v. Columbus Life Ins.*, 118 P.3d 153 (Id. 2001), an insurance beneficiary sued his
5 insurance company for rescission of the policy because the insurer did not possess the
6 certificate of authority from the state insurance commissioner to issue the policy.
7 Idaho's supreme court found that the policy may be "void and unenforceable" when
8 the seller has not obtained the appropriate qualifications to conduct business in the
9 state. *Id.* at 156. "[A]n insurance contract sold in Idaho by a company that is not
10 authorized to conduct insurance business in this state is *either enforceable or voidable*
11 at the option of the insured or beneficiary." *Id.* (emphasis added). Here too, Plaintiffs
12 assert that the remedy for Nationwide's illegal policy was either voiding of the contract
13 and returning the premiums paid (rescission) or enforcement of the contract,
14 incorporating all of the requirements of the Washington Insurance Code applicable to
15 "health plans." *see also* RCW 48.15.510. Plaintiffs also asserted Consumer Protection
16 Act damages, attorneys fees and costs.

17 **C. Nationwide's Position**

18 The following is a non-exhaustive summary of Nationwide's factual and
19 legal contentions in this lawsuit. Nationwide is an authorized life and disability
20 insurer in the State of Washington and other States. Beginning in 2005, Nationwide
21 offered the medical plan to employers in various states. Nationwide did not sell this
22 policy to employers in Washington. Nationwide never sold or marketed the plan to a
23 Washington business or organization and never marketed the medical plan as an
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1 individual policy.¹ However, the medical plan had been sold to twenty-two employers
2 located outside the State of Washington that employed Washington residents. Because
3 it did not subjectively recognize it was covering Washington residents, Nationwide did
4 not file the medical plan with the Office of the Insurance Commissioner (“OIC”). The
5 OIC investigated Nationwide’s coverage of employees in Washington under the
6 medical plan. OIC determined that by not filing the medical plan, Nationwide violated
7 the Washington Insurance Code. OIC also determined that the medical plan, as
8 written, conflicted with Washington law in that it did not provide certain benefits
9 mandated for disability plans in Washington, expressed certain limitations that
10 conflicted with Washington law, and failed to include a disclaimer. OIC reviewed the
11 data for claims submitted by covered employees and determined that none of the
12 claims submitted by covered employees would have been covered had the medical
13 plan complied in all respects with Washington law. Nationwide agreed to pay a
14 \$20,000 fine.

15 Nationwide, while acknowledging its technical statutory violations,
16 disputes that any Washington resident was harmed. Each insured received the benefit
17 of their bargain – fixed-indemnity coverage in the event that certain medical-related
18 events occurred. Nonetheless, Plaintiffs, without adequate basis in law or fact, attempt
19 to turn a technical statutory violation into a windfall by either rescinding the contract
20 or reforming the contract in a manner that fundamentally re-writes it. The Plaintiffs’
21 sought reformation of the policy on behalf of some of the Class. The sole reformation
22 to which the insureds were entitled (1) addresses exclusively the minor coverage
23 omissions identified by the OIC; (2) already occurred automatically by operation of law

24
25 ¹ Nationwide obtained approval of its fixed-indemnity policy in Washington subsequent to the
26 OIC’s investigation and the initiation of this class action lawsuit.

1 under RCW 48.18.510, and, (3) as determined by OIC, did not result in any insured
2 being wrongfully denied coverage by Nationwide. In other words, the class incurred
3 no damages. The Plaintiffs' contention that the policy should be reformed to provide
4 comprehensive health insurance (such as the "Basic Health Plan") - something the
5 fixed-indemnity plan was never intended to provide - is not supported by the law and
6 is contrary to both OIC's conclusions and the widespread issuance of such policies by
7 other insurers.

8 Alternatively, the Plaintiffs sought rescission of the policy on behalf of
9 Class Members. While "illegality" can, under some circumstance, provide for
10 rescission of a contract, that principle is inapplicable to Plaintiffs' claim. First, the
11 principle has no application to situations where - as here - a statute already imposes a
12 penalty for failure to comply with statutory requirements. Second, the principle has no
13 application where - as here - Plaintiffs claim violation of a mere "business statute or
14 regulation."²

15 Even assuming Plaintiffs could prove a legal basis for common law or
16 statutory rescission, Plaintiffs' rescission of the contract would be prospective only.
17 Tender of the benefits of a contract is a prerequisite to maintaining an action for
18 rescission. *See Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 974 (1997) ("Tender back of
19 premiums paid is a condition precedent to [the insurer] maintaining an action to
20

21 ² In *Ritter v. Shotwell*, 63 Wn.2d 601, 606 (1964), the parties contracted for insurance at a specified
22 rate, but the insurer failed to file its rate with the commissioner, as required by statute. *See id.* at 603, 606.
The Supreme Court concluded that:

23 It is obvious that the private contract violated regulations of the insurance
24 code. However, we have found no provision in the code which would
25 nullify their act. ... It would seem that the established rule should be
applied that "... a contract which violates a statutory regulation of
business is not void unless made so by the terms of the act."

26 *Id.* at 606.

1 rescind an insurance policy on the ground of fraud or misrepresentation.”). Plaintiffs
2 have received valuable coverage under the medical plan, a benefit that cannot be
3 retendered to Nationwide.

4 With regard to Plaintiffs’ CPA claims, those also would fail. Nationwide
5 engaged in no deceptive conduct. And Plaintiffs received the benefits for which they
6 bargained under the contracts. Because Plaintiffs received the benefits for which they
7 bargained, they have no cognizable damages and their CPA claims fail.

8 * * * * *

9 The parties recognize the substantial risks inherent to each in proceeding
10 further in this litigation. The parties believe that the settlement agreement
11 appropriately reflects those risks.

12 **III. OVERVIEW OF SETTLEMENT AGREEMENT**

13 The key provisions of the proposed Settlement Agreement are as follows:

14 **A. Settlement Fund**

15 The Settlement Agreement provides for the establishment of a Settlement
16 Fund of \$1 million. Nationwide’s payment of that amount into the Settlement Fund
17 represents Nationwide’s sole financial obligation under the Settlement Agreement.
18 The Settlement Fund shall be used to (1) reimburse settlement class members based
19 upon the remedy each elects (either rescission or reformation, as described below);
20 (2) pay for the costs of administering the notice and claims process, including dispute
21 resolution and verification; (3) pay attorneys’ fees and costs in an amount approved by
22 the Court; (4) pay incentive awards to the Class representatives, if such awards are
23 approved by the Court, and (5) if there are any surplus funds, provide *per capita*
24 disbursements to class members.

1 **B. Settlement Class is Established**

2 The Settlement Class and Class period is defined as:

3 All individuals who were covered by Nationwide Life
4 Insurance Company under a fixed-indemnity policy between
5 April 16, 2003, and November 23, 2009, and who were
6 Washington residents at the time in which they enrolled or
7 re-enrolled in the Nationwide policy.

8 The parties estimate that approximately 1,037 individuals meet the settlement class
9 definition. Plaintiffs' Motion for Certification of the proposed Settlement Class was
10 filed on April 9, 2010. Defendant will not oppose the certification of the proposed
11 Settlement Class.

12 **C. Election of Remedies—Reformation or Rescission**

13 **1. Individual Coverage**

14 Settlement Class members with individual coverage may elect their
15 preferred remedy: (a) the *Rescission Remedy* - *i.e.*, reimbursement of up to, but not
16 exceeding, 100 percent of the premiums paid by them or on their behalf to Nationwide
17 for a medical plan; or (b) the *Reformation Remedy* - *i.e.*, an amount up to, but not
18 exceeding, 100 percent of their actual out-of-pocket expenses for medical services that
19 would be covered under the Basic Health Plan rendered to them and their dependents
20 between the dates of April 16, 2003 and November 23, 2009, inclusive, less an implied
21 \$1,500 annual deductible. The Reformation Remedy will not reimburse Class members
22 for the cost of medical services to the extent Nationwide provided payments under the
23 fixed-indemnity policy, or if such costs were covered by other insurance, Medicare or
24 Medicaid, waived, written off, deemed charity care or otherwise not collected or
25 collectable by Class members' medical providers.

26 If Class members do nothing, they will be deemed to have elected the
Rescission Remedy.

1 **2. Family Coverage**

2 Settlement Class members who were or are enrolled in a Nationwide
3 medical policy as a family (*i.e.*, one member of the family was insured through
4 Nationwide as part of his or her employment and opted to also insure his or her spouse
5 and/or dependent children under the plan) will have special election procedures. If
6 any class member who has family coverage submits a claim for the Reformation
7 Remedy, then all of his or her family members will be determined to have opted for
8 Reformation. Should any dispute arise regarding the proper payment of claims to
9 Class members who had Family Coverage, such dispute will be referred to the
10 Settlement’s dispute resolution process.

11 **3. Settlement Class Members Who Received the May 2009**
12 **OIC-Approved Disclosure Form from Nationwide**

13 Approximately 175 Settlement Class Members received a disclosure form
14 from Nationwide in May 2009. The form complied with the requirements of
15 RCW 48.21.370; WAC 286-50-440; 286-96-550. The form specifically stated that the
16 Nationwide medical policy was not comprehensive health care insurance and would
17 not cover most hospital and other medical expenses. Hamburger Decl. ¶22, *Exh. B*.

18 For the purposes of settlement, the Class Members to whom the
19 disclosure form was mailed are presumed to have received the form. *Id.* ¶22. The
20 parties also assumed that, after receiving the disclosure form, those Class Members had
21 sufficient notice and time to cancel their Nationwide medical policy or otherwise
22 obtain other comprehensive health care coverage by June 30, 2009. *Id.* ¶23. Thus, the
23 parties agreed that Class Members who received the disclosure form in May 2009 and
24 remained enrolled on the Nationwide medical policy as of July 1, 2009 may not obtain
25 either a refund of their premiums or reimbursement for medical expenses incurred on
26 or after July 1, 2009. *Id.* The Settlement Agreement, Class Notice and Claims Forms

1 reflect this limitation. Class Members who were mailed a disclosure form by
2 Nationwide but who did not receive it, will be able to use the dispute resolution
3 procedure in the Settlement Agreement to pursue claims for premiums or medical
4 expenses incurred on or after July 1, 2009 until November 23, 2009. *Id.*

5 **D. Attorney Fees / Costs / Incentive Award**

6 The proposed Settlement Agreement provides that attorney fees and
7 costs will be paid out of the Settlement Fund with the amount of fees to be determined
8 by the Court.

9 The named plaintiffs in this case will request incentive payments to be
10 determined by the Court and paid out of the Settlement fund. Such incentive
11 payments represent the time, effort, and risk each undertook in pursuing these class
12 claims against Nationwide.

13 **E. Release**

14 The release in the proposed Settlement Agreement provides for a full
15 release of Nationwide from all obligations and liability arising out of claims by the
16 Class, to the extent that such claims were or could have been asserted against
17 Nationwide with respect to the sale, marketing or administration of any fixed-
18 indemnity plans during the Class period.

19 **IV. LAW AND ARGUMENT**

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

22 Under Fed. R. Civ. P 23(e), a class action may be settled only with the
23 approval of the Court. *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 623
24 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). The parties request that the Court
25 preliminarily approve their proposed settlement subject to further review once class
26 members are given notice and an opportunity to submit written objections. The parties

1 are confident that through this procedure, this Court will be satisfied that the
2 settlement should be finally approved.

3 Rule 23(e) is explicit. It states that “[t]he court must approve any
4 settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a
5 certified class.” *Id.* Ordinarily, approval of a class action settlement involves a two-
6 step process. Manual for Complex Litigation, Fourth (2004), §21.632 at 320. First,
7 counsel submits the proposed terms of settlement, and the Court makes a preliminary
8 fairness evaluation. *Id.* at 320-21. The substantive terms of the settlement, the
9 procedures for implementing it and the impact on affected parties require scrutiny to
10 ensure fairness. *Id.* If the preliminary evaluation of the proposed settlement does not
11 disclose any grounds to doubt its fairness or other obvious objections, then the Court
12 should direct that notice under Rule 23(e) be given to the class describing the
13 settlement and their opportunity to present argument and evidence in support of or in
14 opposition to the settlement. *Id.* §21.633 at 321-22.

15 **B. The Proposed Settlement was Reached Through Arms-Length**
16 **Negotiations and is Fundamentally Fair, Adequate and Reasonable**

17 Under Rule 23(e) a court may only approve a settlement that is
18 “fundamentally fair, adequate and reasonable.” *In re Hanlon v. Chrysler Corp.*, 150 F.3d
19 1011, 1026 (9th Cir. 1998). See Manual for Complex Litigation, Fourth, §21.62. Because
20 voluntary conciliation and settlement are the preferred means of dispute resolution, a
21 court must make this determination without turning the settlement hearing into a trial
22 on the merits. *Officers for Justice*, 688 F.2d at 625. At the same time, however, a court
23 must be satisfied that the settlement is not the product of fraud or overreaching by, or
24 collusion between, the negotiating parties. *Id.* In particular, a court must see to it that
25 the rights of all class members are given due regard. *Id.* at 624.
26

1 In reviewing class settlements, the issue is “not whether [the settlement]
2 could be better, but whether it is fair, reasonable and adequate and free from
3 collusion.” *Hanlon*, 150 F.3d at 1027. Courts may not delete, modify or substitute
4 provisions, so the settlement stands or falls in its entirety. *Id.* at 1026.

5 To determine whether to approve a settlement, the Court may look at a
6 number of factors, including:

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

15 *Id.* at 1026. The relative importance of any particular factor, however, depends on the
16 nature of the claims advanced, the type of relief sought, and the unique facts and
17 circumstances presented by each individual case. *Id.* See Manual for Complex
18 Litigation, §21.62.

19 As shown by the declarations of parties’ counsel, a number of factors
20 demonstrate that the proposed settlement is not the product of collusion and is
21 fundamentally fair, adequate, and reasonable. *First*, the parties have vigorously
22 litigated this matter. Plaintiffs’ counsel undertook extensive pre-litigation discovery
23 and advocacy. Plaintiffs’ counsel involved the Washington Office of the Insurance
24 Commissioner more than a year prior to filing the lawsuit. The Office of the Insurance
25 Commissioner’s investigation and ultimate findings played a significant role in this
26 case. Much of the informal discovery relied upon by Plaintiffs’ counsel was provided
in advance of this litigation through public disclosure requests to the Office of the
Insurance Commissioner. Hamburger Decl. ¶25. Thus, although the case is settling

1 relatively early in the litigation, it has been thoroughly investigated and the claims and
2 defenses fully vetted.

3 *Second*, once the lawsuit was filed, the parties engaged in extensive
4 expedited discovery. *Id.* ¶¶2-3. The parties exchanged extensive information
5 regarding the Nationwide policies, the premiums paid by or on behalf of putative class
6 members and the claims submitted to Nationwide on behalf of the putative class
7 members. *Id.* Plaintiffs' counsel believes that a substantial portion of the reformation
8 or rescission remedy sought by Plaintiffs in the litigation will be funded through the
9 settlement. *Id.* ¶21. Moreover, the Settlement Agreement provides relief to the
10 Settlement Class if, in the settlement claims process, the actual claims submitted to
11 Nationwide are ultimately found to be significantly more than has been certified by
12 Nationwide. *See Appendix 1*, Settlement Agreement, ¶17.

13 *Third*, a significant amount of time and effort was spent negotiating the
14 settlement. Both parties provided mediation briefs, exhaustively exploring the relative
15 strengths and weaknesses of their positions. After the mediation on November 23,
16 2009, the parties continued to negotiate regarding the details of the settlement
17 agreement, involving give and take on both sides. Hamburger Decl. ¶¶2-3, 17.

18 *Fourth*, the named Plaintiffs and all other members of the settlement class
19 are afforded the same choice of relief under the Settlement Agreement. There is
20 nothing in the proposed Settlement Agreement to suggest that there was any fraud,
21 overreaching, or collusion in the settlement negotiations. *Id.* ¶¶18-19.

22 *Fifth*, the settlement provides both the reformation and rescission relief
23 that Plaintiffs sought when they filed this action. To the extent that Plaintiffs have
24 made concessions, these are justifiable given the risk, uncertainty and additional delay
25 that would be involved in taking this matter to trial. *Id.* ¶20.

1 *Sixth*, Plaintiffs' counsel who are experienced in this type of litigation and
2 who have vigorously litigated this matter, believe that the proposed Settlement
3 Agreement is fundamentally fair, adequate and reasonable. *Id.* ¶21

4 **C. The Proposed Notice, Opportunity to Submit Objections and**
5 **Fairness Hearing are Sufficient to Safeguard the Interests of Class**
6 **Members**

7 The Court should also approve the proposed notice to class members,
8 and direct that this notice be mailed to each class member. By providing notice and an
9 opportunity to object, the Court can satisfy itself that the interests of absent class
10 members have been protected. *Officers for Justice*, 658 F.2d at 624.

11 Rule 23(e) requires that notice of any proposed settlement being given to
12 class members to ensure that the rights of the absent class members are protected and
13 fully considered in the negotiation and approval of the settlement. *Officers for Justice*,
14 688 F.2d at 624. Notice of a class settlement must fairly apprise class members of the
15 subject matter of the suit, the proposed terms of the settlement, and the class members'
16 opportunity to be heard. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 962 (9th Cir.
17 2009); *Torrison v. Tucson Elec. Power. Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993).

18 Here, the proposed notice adequately summarizes the proposed
19 settlement, informs class members where they can get further information, explains
20 how class members can opt out or file objections, and informs class members of the
21 date and time of the settlement approval hearing. Any interested class member or their
22 guardian will have an opportunity to consult with Plaintiffs' counsel or an attorney of
23 their own choosing. Those who wish can get more information about the proposed
24 settlement from class counsel. Lastly, should any objections of substance be made, the
25 Court can provide the objector with an opportunity to be heard at the final approval
26 hearing.

1 **D. A Final Approval Hearing Should Be Set**

2 Finally, class members with comments, concerns, or objections to any
3 aspect of the proposed Settlement Agreement should be provided with an opportunity
4 to submit written material for the Court's consideration. Class members who wish to
5 appear in person to address the Court with any comments, concerns or objections
6 should also be provided with an opportunity to appear at a hearing before the Court
7 decides whether to finally approve the proposed Settlement Agreement.

8 Class members who wish to appear in person should notify the Court
9 and the parties of their desire to be heard, along with a statement of the issue or issues
10 that they would like to address. The proposed notice and proposed order submitted
11 with this motion requires that such notice be given, so that the Court and the parties
12 can consider and address the specific issues that class members wish to raise at the
13 hearing. Finally, the class requests that the Court set a hearing date in June of 2003 to
14 consider class members' comments and to decide whether the proposed Settlement
15 Agreement should be finally approved and implemented.

16 **E. Proposed Scheduling Order**

17 The parties propose that the Court issue a scheduling order along with
18 preliminary approval of the settlement agreement. The parties' proposed Order
19 includes a proposed schedule which includes deadlines for (1) notice to the settlement
20 class members to be sent; (2) settlement class members to opt-out of the class;
21 (3) Plaintiffs' counsel to file for attorneys fees and Plaintiffs' incentive payments;
22 (4) comments and objections from settlement class members to be filed with the Court;
23 (5) the parties to file their joint motion for final approval of the settlement agreement.

24 **V. CONCLUSION**

25 The parties respectfully request that the Court enter the proposed Order
26 preliminarily approving the proposed Settlement Agreement, authorizing Sirianni

1 Youtz Meier and Spoonemore to provide notice of the proposed Settlement Agreement
2 to the settlement class members, and setting a hearing to consider any comments or
3 objections by class members.

4 DATED: April 23, 2010.

5 SCHWABE, WILLIAMSON
6 & WYATT, P.C.

SIRIANNI YOUTZ
MEIER & SPOONEMORE

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