

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)

PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES, COSTS AND
INCENTIVE AWARDS

**Noted for Consideration:
August 5, 2010**

I. OVERVIEW

Class counsel seeks a fee award of 25% of the net benefit to Class members, the exact dollar amount to be determined when all Class members' claims are finalized. The percentage of the net recovery sought—25%—is the benchmark amount established by the Ninth Circuit for fee awards in common fund cases. Class counsel also seek reimbursement of \$24,278.55, the out-of-pocket expenses and costs incurred in this litigation prior to settlement. Finally, the Class seeks a \$15,000 incentive award for each named plaintiff for his or her time, effort, and risk in

1 prosecuting this case. Class counsel's fees, costs and incentive awards must come from
2 the \$1 million common fund established as a result of the proposed Settlement
3 Agreement.¹

4 The creation of a \$1 million dollar settlement fund from which Class
5 members can seek either reimbursement of the premiums paid on their behalf or
6 coverage of uncovered medical bills is an exceptional outcome. This litigation was
7 based upon a novel and untested legal theory under Washington state law: whether
8 employees and their families who received coverage through a Nationwide policy sold
9 out-of-state to their employers could sue Nationwide for breach of contract and
10 consumer protection violations under Washington law, and seek rescission and
11 reformation damages. Class counsel's legal position became even thornier after the
12 Washington Office of the Insurance Commissioner ("OIC") issued a factual finding
13 that, while Nationwide had operated illegally in Washington state, it had properly
14 denied coverage for the medical expenses at issue in this lawsuit. The OIC's factual
15 finding undermined a substantial portion of the damages sought by the Class.

16 The Settlement fund is more than sufficient to refund all Class members
17 100% of the premiums paid on their behalf to Nationwide. Claims for medical
18 expenses, however, may exceed the Settlement Fund. After the July 30, 2010 deadline
19 for the submission of claims, Class counsel will report whether the claims for medical
20 expenses will permit payment of all claims at 100%.

21 In what follows, we will: (a) provide factual background relevant to this
22 motion; (b) discuss the law governing fee awards in this common fund case; (c) explain
23 an appropriate percentage fee award in light of the results achieved (an estimated 100%

24
25 ¹ Class counsel's costs and fees for administering the claims process will be submitted separately to
26 the Court for approval, as described in the proposed settlement agreement. See Dkt. No. 25-2, Settlement
Agreement ¶ 6.

1 recovery for each claimant); and (e) discuss the factors that the Court may choose to
2 consider tending to show that the fee percentage we seek is fair and reasonable. We
3 will also address our request for reimbursement of costs and out-of-pocket expenses
4 and the request for incentive awards.

5 II. STATEMENT OF FACTS

6 Plaintiffs commenced this lawsuit on April 15, 2009, on behalf of
7 themselves and all similarly situated individuals, alleging that defendant Nationwide
8 Life Insurance Company (“Nationwide”) sold them an unauthorized fixed-indemnity
9 medical policy or policies and violated the Washington Consumer Protection Act,
10 RCW 19.84 *et seq.* See Complaint, Dkt. No. 1.

11 From approximately January 2005 to November 23, 2009, about 1,037
12 Washington residents were enrolled in Nationwide’s “fixed-indemnity” policies.
13 Dkt. No. 27, Hamburger Decl., ¶ 4. As the Court has already determined:

14 Nationwide failed to file the medical plan with the Office of
15 the Insurance Commissioner (“OIC”), violating WASH. REV.
16 CODE 48.18.100. Additionally, until July 22, 2007, fixed-
17 indemnity policies were illegal when sold as stand-alone
18 policies in this state, and are still subject to strict regulation
19 by the OIC. See former WASH. REV. CODE 48.43.005(19)(i)
20 (2006); WASH. REV. CODE 48.43.005(19)(d), (i); 48.21.370;
21 WASH. ADMIN. CODE 284-50-440, 284-96-550. Finally, the
22 medical plan that Nationwide sold conflicted with
23 Washington law: among other violations, it did not provide
24 certain benefits mandated for such plans in this state,
25 expressed limitations that are not lawful here, and failed to
26 include appropriate disclaimers.

Dkt. No. 29, Order dated May 17, 2010, p. 2.

24 The parties in this case reached a proposed settlement, which was fully
25 executed on April 23, 2010. See Proposed Settlement Agreement, Dkt. No. 25-2. On
26 May 17, 2010, the Court certified a settlement class defined as:

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

5 Dkt. No. 29, p. 12.

6 The proposed settlement agreement addresses the payment of attorneys'
7 fees and incentive awards:

8 Class counsel shall apply for attorneys' fees pursuant to the
9 common fund doctrine as a percentage of, and to be paid
10 from, the Settlement Fund. They shall also apply for
11 cost/expense reimbursement and for incentive awards for
the Plaintiffs, all from the Settlement Fund. The sole source of
recovery of any attorneys' fees, costs, or incentive awards
shall be from the Settlement Fund.

12 Settlement Agreement ¶ 2, Dkt. No. 25-2. The cost of administering the claims process
13 must also be paid out of the Settlement Fund. *Id.*, ¶ 6. Any residual funds will *not* be
14 returned to Nationwide. Instead, any surplus funds will be distributed to *Class*
15 *members*:

16 If any surplus funds exist after the payment of attorneys'
17 fees, costs, incentive payments, costs of administration, and
18 claims at 100 percent, the surplus funds shall be distributed
on a *per capita* basis to Class Members.

19 Dkt. No. 25-2, ¶ 11, p. 12.

20 The total amount of premiums paid by Class members during the Class
21 period is approximately \$462,000. *See* Dkt. No. 27, Hamburger Decl. ¶ 6, p. 2. Under
22 the proposed Settlement Agreement, if every Class member were to choose "premium
23 refund" as the basis for his or her claim, every Class member would receive 100%
24 reimbursement, with more than enough funds to pay for the proposed attorneys' fees
25 and costs, the incentive awards and the anticipated costs of claims administration.
26

1 Hamburger Decl., ¶ 4. The residual funds would then be distributed to each Class
2 member.

3 However, not every Class member will request “premium refund.” A
4 small but significant portion of Class members had uncovered medical expenses.
5 Some, like plaintiff Bjorklund, had very significant medical expenses that were not
6 covered by Nationwide or any other coverage. *Id.*, ¶ 5.

7 The total amount of the “medical expense reimbursement” claims that
8 Class members may submit is difficult to predict. The total of health care claims
9 submitted to Nationwide on behalf of Class members during the Class period was
10 approximately \$1.5 million. Dkt. 27, Hamburger Decl., ¶ 9, p.3. That figure does not
11 represent the ultimate amount each Class member could properly claim, which is likely
12 significantly lower. *Id.* ¶ 10-11. However, the parties are unable to predict the amount
13 of medical expenses that Class members never submitted to Nationwide. *Id.*, ¶¶ 12-14;
14 pp. 3-4.

15 Class counsel has manually reviewed the claims that have been received
16 thus far. The review revealed the following:

- 17 • Only one (1) Class member opted out.
- 18 • A total of 10 claim forms have been returned.
- 19 • 87 Class members requested premium reimbursement.
- 20 • 22 Class members asked that their uncovered medical
21 bills form the basis of their claims.
- 22 • 58 Class members (37 primary insured and 21
23 spouses/dependents) could not be located.

24 Hamburger Decl., ¶ 8. Additional information about the claims received is not yet
25 available. Class counsel will submit a more detailed analysis of the submitted claims
26 with its reply briefing.

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III. ISSUES PRESENTED

1. Should the Court award attorneys' fees of 25% of the net proceeds of the settlement?

2. Should the Court order that Class counsel's out-of-pocket expenses and costs be reimbursed from the Settlement Fund?

3. Should plaintiffs John Gabriel, Ruth Bjorklund and Lauren Gustafson-Omer be provided with incentive awards of \$15,000 each from the common fund?

IV. ARGUMENT

A. The "Percentage Of Recovery" Approach Applies In This Common Fund Settlement.

Fees in this case should be determined by a percentage of the net recovery. This matter was before the Court on diversity jurisdiction. Washington state substantive law applies, including Washington law on attorneys' fees. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1325 (W.D. Wash. 2009).

Washington law recognizes the "percentage of recovery" approach. *Bowles v. Washington Dept. of Ret. Sys.*, 121 Wn. 2d 52, 72, 847 P.2d 440 (1993). This approach is appropriate when the settlement of a case results in the creation of a "common fund" from which attorneys' fees are taken. *Id.* Under the percentage method, the Court "sets attorney fees by calculating the total recovery secured by the attorneys and awarding them a reasonable percentage of that recovery, often in the range of 20 to 30 percent." *Id.* Because this case involves the creation of a "common fund," the percentage of recovery approach, rather than the lodestar method, is appropriate. *See id.* at 71.

1 The proposed Settlement Agreement anticipates that the “percentage”
2 method will be used to calculate attorneys’ fees:

3 Class counsel shall apply for attorneys’ fees pursuant to the
4 common fund doctrine as a percentage of, and to be paid
5 from, the Settlement Fund.

6 Settlement Agreement, ¶ 2, Dkt. No. 25-2. The parties to a class action may properly
7 negotiate the payment of attorneys’ fees, including whether fees would be sought as a
8 percentage of an established common fund. *See Williams v. MGM-Pathe Communications*
9 *Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997), *citing to Evans v. Jeff D.*, 475 U.S. 717, 734-35, 738
10 n. 30, 106 S. Ct. 1531 (1986).

11 **B. The “Benchmark” For A Common Fund Award Is 25% Of The Net
12 Recovery For The Plaintiff Class.**

13 “In common fund cases, the ‘benchmark’ award is 25% of the recovery
14 obtained.” *Bowles*, 121 Wn. 2d at 72. Under Washington state and Ninth Circuit
15 caselaw, only “special circumstances” can justify the adjustment upward or
16 downward, or replace the percentage approach with the lodestar calculation. *Id.* at 73,
17 *citing to Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.
18 1990). Such circumstances include a determination that the percentage of recovery
19 would be either too small or too large given the hours devoted to the case or other
20 relevant factors based upon the case’s individual circumstances. *Arizona Citrus*
Growers, 904 F.2d at 1311.

21 “Selection of the benchmark or any other rate must be supported by
22 findings that take into account all of the circumstances of the case.” *Vizcaino*, 290 F.3d
23 at 1048; *see also Williams*, 129 F.3d at 1027. In *Vizcaino*, the Ninth Circuit identified a
24 number of considerations in awarding attorneys’ fees under the common fund
25 doctrine, including the results achieved, risks taken, duration of the case and the
26 degree to which the attorney had to forego other work. *Id.*, 290 F.3d at 1048-50. The

1 results in this case support the award of attorneys' fees based upon the benchmark of
2 25% of the net recovery to the Class.

3 **C. Class Counsel Achieved Exceptional Results.**

4 **1. Class members are expected to receive 100% or nearly**
5 **100% of their claims in a very short period of time.**

6 Class counsel expect to obtain 100% recovery or near 100% recovery for
7 all Class members after only a year of litigation. Many Class members are low-wage
8 hourly workers at businesses such as Dollar Tree, Dollar Tire and Rescare, a home
9 health care agency. Hamburger Decl., ¶ 8. While the claims paid to these working
10 individuals and families may look small when compared to damages sought in typical
11 class actions, these funds will make a significant difference to many Class members'
12 budgets. Class members have remarked that they will use the payments to stave off
13 medical debt collections, and pay down other debts. *Id.*, ¶ 7. Calls from Class
14 members in response to the Class Notice have been overwhelmingly positive. *Id.*

15 **2. Class members will receive the benefits of this litigation,**
16 **even if they do nothing.**

17 Class members' recovery does not depend upon their submission of claim
18 forms. Under the terms of the proposed Settlement Agreement, if Class members do
19 nothing at all, their claims will be based upon the premiums that were paid to
20 Nationwide on their behalf. Dkt. No. 25-2, ¶ 12(g), p. 16. Class members who fail to
21 submit a claim form will still be sent a disbursement from the Settlement fund. Any
22 disbursements that are unclaimed in three years will be considered "unclaimed
23 property" and sent to the State of Washington to distribute according to statutory
24 requirements under the Uniform Unclaimed Property Act, Chapter 63.29 RCW. *Id.*,
25 ¶ 12(h), p. 16. Thus, Class members will have many years to claim their settlement
26 funds.

1 **3. Any residual funds will be distributed to Class members,**
2 **not Nationwide.**

3 Class members further benefit because any funds remaining after paying
4 claims, fees and costs will be distributed to Class members on a *per capita* basis. Dkt.
5 No. 25-2, Proposed Settlement Agreement, ¶ 11, p. 12. This, too, is unusual. In many
6 class action settlements (and judgments), excess funds revert back to the defendant
7 after the claims process. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 477, 100 S. Ct.
8 745 (1980).

9 **4. Class members will get help with their unpaid medical**
10 **bills, despite the finding by the Washington Office of the**
11 **Insurance Commissioner that Nationwide processed all**
12 **claims correctly.**

13 The settlement results are extraordinary in light of the actions by the OIC
14 on the eve of mediation. The business day before the parties mediated, OIC resolved
15 its investigation of Nationwide (which only occurred because Mrs. Bjorklund, with
16 help from Class Counsel, filed a complaint). Hamburger Decl., ¶ 9. The OIC fined
17 Nationwide a mere \$20,000 as punishment for selling illegal policies to Washington
18 residents. Moreover, the OIC issued factual findings that no benefits were improperly
19 denied by Nationwide, not even those sought by Mrs. Bjorklund. Dkt. No. 27-2,
20 Consent Order, Findings of Fact ¶ 6, p. 5 (“The OIC determined that *no claims*
21 submitted by a covered employee *had been improperly denied*, both as the Plan was
22 written and as otherwise required under Washington law”) (emphasis added). Had
23 the litigation proceeded, the OIC’s factual findings would have been used by
24 Nationwide to undercut the Class claims for reimbursement of medical expenses,
25 which represented the bulk of Class members’ alleged damages. The Settlement
26 Agreement, however, preserved the ability of all Class members to submit claims
 based upon their uncovered medical bills.

1 **5. The percentage of fees sought is lower than if each**
 2 **Class member had pursued an individual claim against**
 3 **Nationwide.**

4 Class counsel seeks the benchmark 25% of the net recovery. This is
 5 generally less than what an attorney would charge to an individual contingent fee
 6 client in the private market. *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 568 (7th Cir.
 7 1992) (“court should determine what the lawyer would have received if he [or she]
 8 were selling his [or her] services in the market rather than being paid by court order”);
 9 *Vizcaino*, 290 F.3d at 1049 (pre-certification retainer agreements between counsel and
 10 named plaintiffs setting a 30% contingency rate was some evidence of the standard
 11 contingency fee for similar cases); *Linney v. Cellular Alaska P’ship*, 1997 WL 450064 (N.D.
 12 Cal. July 18, 1997), *aff’d* 151 F.3d 1234 (9th Cir. 1998) (“Courts in this district have
 13 consistently approved attorneys’ fees which amount to approximately one-third of the
 14 relief procured for the class”).

15 It is unlikely that most Class members would have been able to retain any
 16 counsel to assist them with this case, given the small amounts of damages at stake.
 17 Only a handful of Class members, like plaintiff Bjorklund, had sufficient damages to
 18 make individual litigation financially feasible. But even Mrs. Bjorklund and others in
 19 her situation would likely only find counsel willing to take on the case for a contingent
 20 fee of 30% or more. *Hamburger Decl.*, ¶ 10.

21 **6. The litigation and the investigation spurred by plaintiff**
 22 **Bjorklund and Class counsel benefitted all Washington**
 23 **citizens.**

24 In many private class actions, class counsel will “piggyback” a case on the
 25 enforcement efforts of the government or on some other action. *See, e.g., Swedish Hosp.*
 26 *Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993). This case was just the opposite.
 Class counsel, together with plaintiff Bjorklund, started the OIC’s enforcement

1 activities by filing a complaint. Hamburger Decl., ¶ 9. The OIC investigated, but its
2 enforcement action was mixed. The OIC did obtain prospective relief by requiring
3 Nationwide to submit to the proper regulation by the OIC. Now, any Washington
4 resident sold a Nationwide policy will be provided with the mandatory disclosure that
5 the policy is not “comprehensive health coverage” and will not cover most hospital
6 and medical bills.

7 While the OIC concluded that Nationwide’s sale of an unauthorized
8 policy violated Washington law, the OIC failed to take any action to redress the past
9 harm to Mrs. Bjorklund and to the plaintiff Class. Thus, this case was the primary
10 enforcement mechanism in the State of Washington for those harmed by Nationwide’s
11 actions.

12 **D. The Risk Involved In The Litigation.**

13 Class counsel undertook significant risk by pursuing this litigation. To
14 the best of Class counsel’s knowledge, no similar case had been filed in Washington
15 state. Indeed, it was an open question whether Washington law applied to the
16 Nationwide policies. Even if Washington law did apply, it was uncertain whether the
17 claims asserted were suitable to resolution via a class action and whether the remedies
18 sought – reformation and rescission – were applicable.

19 Moreover, long before the lawsuit was filed, Class counsel knew that
20 Class members’ damages might be quite low, and that, even if the law firm were
21 successful in establishing a common fund, the contingent fees obtained might be less
22 than what the firm would have earned on an hourly basis. Mr. Gabriel and Ms. Omer
23 reported only paying about \$45 per month for the Nationwide policy (inexplicably,
24 Mrs. Bjorklund paid significantly more – about \$500 a month for the same policy for
25 her four-person family). Despite the uncertainty that any significant damages could be
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1 obtained for Washington residents who purchased the Nationwide policy, or that their
2 legal fees would be covered in whole or in part, Class counsel undertook the case.

3 **E. The Duration Of The Case.**

4 Class counsel efficiently litigated this proceeding, bringing it to a final
5 resolution just a year after the case was filed. Extensive investigation, informal
6 discovery, legal analysis and research was conducted up-front, before the lawsuit was
7 filed. After the lawsuit was filed, Class counsel conducted further formal and informal
8 discovery into the alleged damages. Data regarding every claim submitted by
9 Nationwide's Washington insureds was compiled into a complex database and
10 analyzed by an expert consultant to determine Class members' potential damages. See
11 Dkt. No. 27, ¶¶ 5-15. The case was quickly resolved so that Class members could
12 receive the benefit of the litigation as soon as possible.

13 Such efficiency should be rewarded. See *Shaw v. Toshiba Am. Info. Sys.,*
14 *Inc.*, 91 F. Supp. 2d 942, 964 (E.D. Tex. 2000) (preferring the percentage method because
15 "[t]he lodestar method rewards plodding mediocrity and penalizes expedient
16 success").

17 **F. The Extent That Class Counsel Had To Forgo Other Work.**

18 As of April 23, 2010, the date that the proposed Settlement Agreement
19 was fully executed, Class counsel had spent a total of 383.9 hours on this litigation. At
20 Class counsel's present hourly rates of \$350 per hour for Ms. Hamburger, \$395 per
21 hour for Mr. Spoonemore (both partners in the law firm), and \$225 per hour for
22 Mr. Charles Sirianni (an associate at the law firm). Class counsel would have earned
23 approximately \$133,196.00 in fees if the time had been spent on regular hourly work.
24 See Hamburger Decl., ¶¶ 24, 27, 29.

25 Class counsel's fees are reasonable. Their rates are at or below the hourly
26 rate for local litigators. For example, *in 2001*, this Court determined that it was

1 reasonable for the *Vizcaino* class counsel to bill at \$350 per hour for partners and
2 \$250-300 per hour for non-partners. *Vizcaino v. Microsoft*, 142 F. Supp.2d 1299, 1305
3 (W.D. Wash. 2001). Decisions from other districts within the Ninth Circuit confirm that
4 Class counsel's hourly rates are at or significantly below what would be considered
5 reasonable rates in today's legal market. See e.g. *Aguilar v. Melkonian Enters., Inc.*, CIV.
6 No. 05-0032 slip op. at 8 (E.D. Cal. Jan. 24, 2007) (\$495 for partner, \$295 for associate is
7 reasonable rate); *Gullidge v. Harford Life & Acc. Ins. Co.*, 501 F. Supp.2d 1280, 1282-83
8 (C.D. Cal. 2007) (\$450 is reasonable hourly rate); *Farhat v. Hartford Life & Acc. Co.*, 2006
9 WL 2521571, *7 (N.D. Cal. 2006) (approving hourly rates of \$435 for partner, \$295 for
10 third-year associate and \$260 for first-year associate for insurance litigation).

11 While it is not necessary, federal courts employing a common
12 fund/common benefit analysis may cross-check the requested common fund fee with a
13 lodestar/multiplier approach. *Vizcaino*, 290 F.3d at 1050 ("Calculation of the lodestar,
14 which measures the lawyers' investment of time in the litigation, provides a check on
15 the reasonableness of the percentage award"); but see *Bowles*, 121 Wn.2d at 73 (the
16 percentage of recovery approach should be applied regardless of the lodestar amount
17 or any multiplier); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995)
18 (approving 33% award with no lodestar cross-check); *Linney*, 1997 WL 450064 at *6
19 (same).

20 Even the lodestar cross-check supports awarding at least the benchmark
21 of 25%. Assuming a fee award of \$250,000 (the actual award will be lower since this
22 figure is based upon 25% of the *gross* recovery of \$1 million, not the *net* recovery), the
23 lodestar cross-check multiplier would be less than 1.9. A multiplier of 1.9 is within—
24 but at the very low end of—the range that courts deem reasonable. See generally
25 Newberg, Herbert, NEWBERG ON CLASS ACTIONS, § 14.7 (courts typically approve
26 percentage awards based on lodestar cross-checks of 1.9 to 5.1 or even higher);

1 *Thompson v. Midwest Foundation Independent Physicians Assoc.*, 124 F.R.D. 154, 162-63
 2 (S.D. Ohio 1988) (multipliers of 4 to 5 “well within the multipliers awarded counsel in
 3 analogous cases”); *Roberts v. Texaco Inc.*, 979 F. Supp. 185, 197-98 (S.D. N.Y. 1997) (5.5
 4 multiplier reasonable, citing authorities for multipliers of 4.4, 5 and 6); *Rabin v. Concord*
 5 *Assets Group, Inc.*, 1991 WL 275757 (S.D. N.Y. 1991) (4.4 within range of common
 6 multipliers); *In re Fernald Litigation*, 1998 WL 267038 (S.D. Ohio 1989) (multiplier of 5).

7 **G. Class Counsel’s Out-Of-Pocket Costs and Expenses Should Be**
 8 **Reimbursed.**

9 Pre-settlement litigation costs are recoverable in a class action settlement.
 10 *Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003); *In re Media Vision Tech. Sec. Litig.*,
 11 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) (“Reasonable costs and expenses incurred by
 12 an attorney who creates or preserves a common fund are reimbursed proportionately
 13 by those class members who benefit by the settlement”). Reimbursement of the costs is
 14 subject to the court’s determination of relevance and reasonableness. *Id.* As of
 15 April 23, 2010, Class counsel had incurred \$24,278.55 in costs and out-of-pocket
 16 expenses. Hamburger Decl., *Exh. 2*. The bulk of the costs relate to payments to the
 17 expert hired to evaluate the damages incurred by the plaintiff Class, costs related to
 18 mediation, and data-entry expenses for developing the damages database used in
 19 mediation. *Id.* All of those costs were necessary to achieve the settlement of this
 20 matter, and were reasonable. Indeed, costs in the case were kept quite low because the
 21 case settled relatively early.

22 **H. Plaintiffs Ruth Bjorklund, John Gabriel and Lauren Gustafson-**
 23 **Omer Should Receive Incentive Awards of \$15,000 Each.**

24 The Court has the discretion to order incentive awards, and courts
 25 routinely do so for class representatives who perform services, and undertake risks, for
 26 the class. *Pelletz*, 592 F. Supp. 2d at 1329; *see, e.g., In re GNC Shareholder Litig.*, 668
 F. Supp. 450, 451 (W.D. Pa. 1987); *Linney*, 1997 WL 450064 at *7; *see generally* Newberg,

1 § 11.38. A study by the Federal Judicial Center of four federal district courts found that
2 a substantial number of class action settlements included designated awards to class
3 representatives. T. Willging, L. Hooper, and R. Niemic, *Empirical Study of Class Actions*
4 *in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*
5 (Federal Judicial Center 1996). In 1994, the median incentive awards to class
6 representatives in northern California was \$17,000 and ranged up to \$28,600 in cases
7 with an average monetary settlement of \$10 million. *Id.*, p. 26.

8 Courts have used the following criteria when determining the amount of
9 an incentive award:

- 10 (1) the risk to the class representative in commencing a class
11 action, both financial and otherwise; (2) the notoriety and
12 personal difficulties encountered by the class representative;
13 (3) the amount of time and effort spent by the class
14 representative; (4) the duration of the litigation; and (5) the
personal benefit, or lack thereof, enjoyed by the class
representative as a result of the litigation.

15 *Pelletz*, 592 F. Supp.2d at 1329.

16 The award sought by the Class here appropriately recognizes the
17 contributions of Mrs. Bjorklund, Mr. Gabriel and Ms. Gustafson-Omer to the success of
18 this action.

19 Each named plaintiffs was essential to pursuing this litigation.
20 Mrs. Bjorklund first raised this issue with Class counsel. She was willing to file a
21 complaint with the OIC, and she participated in outreach efforts to locate other Class
22 members, speaking with community groups, reporters, and governmental
23 representatives. With her assistance, Class counsel conducted extensive, pre-litigation
24 discovery, including obtaining the OIC's investigative file of her complaint. She
25 worked closely with Class counsel to develop the litigation strategy well in advance of
26 the filing of this lawsuit, devoting many hours of her own time to the pursuit of this

1 case. Indeed, Mrs. Bjorklund dedicated significant effort to this litigation, despite
2 recovering from the emergency brain surgery (the event that led to Mrs. Bjorklund's
3 discovery that the Nationwide policy had never been approved for sale in Washington
4 State), and despite the demands of caring for her adult developmentally disabled
5 daughter and teenage son. Hamburger Decl., ¶ 13.

6 Mrs. Bjorklund's claims were sufficient to be pursued on her own behalf.
7 *Id.*, ¶ 14. However, she agreed to pursue a class action strategy because, at all times,
8 she was most concerned that no one else go through the trauma that she experienced.
9 *Id.* During the case, Mrs. Bjorklund continued to monitor Class counsel's efforts and
10 the progress of the litigation. She was subjected to extensive written discovery by
11 Nationwide, which consumed many hours of response time. She participated in a full-
12 day mediation in November and carefully reviewed each proposed change to the
13 settlement agreement. *Id.*, ¶ 15. Without Mrs. Bjorklund, neither this litigation nor the
14 OIC's enforcement action would have been pursued. *Id.*

15 John Gabriel and Lauren Gustafson-Omer were also deeply involved in
16 the litigation. Mr. Gabriel and Ms. Omer learned of Mrs. Bjorklund and her effort to
17 change Nationwide's practices from Washington Community Action Network, as part
18 of its organizing efforts to support national health care reform. *Id.*, ¶ 16. Although
19 Mr. Gabriel and Ms. Omer did not experience the same kind of severe financial and
20 physical devastation that Mrs. Bjorklund did, they decided to become involved in the
21 lawsuit in order to help their co-workers (who had the same Nationwide policy) and
22 others. In fact, there was little financial benefit for each of them to pursue the lawsuit.
23 Mr. Gabriel paid only \$773.67 in premium payments, while Ms. Omer had paid
24 \$1,092.24. Neither had any unpaid medical expenses. (Ms. Omer's medical expenses
25 were eventually covered by another source.)

1 Both Mr. Gabriel and Ms. Omer were essential to the litigation. They
2 were needed in the event subclasses were required. Mr. Gabriel could represent the
3 interests of Class members who did not have medical expenses and who would likely
4 only seek premium reimbursement. Ms. Omer represented those individuals who had
5 medical expenses but were discouraged from submitting claims when they were told
6 that Nationwide would not cover the expenses. *Id.*, ¶ 17.

7 Like Mrs. Bjorklund, Mr. Gabriel and Ms. Omer were subjected to
8 extensive written discovery from Nationwide. Both were very involved in the
9 settlement negotiations, taking time off from work to travel to Seattle to participate in
10 the full day mediation. Each reviewed the various settlement proposals exchanged
11 repeatedly after mediation until a final Agreement was reached in April 2010. *Id.*, ¶ 15.

12 In sum, all the named plaintiffs meet the criteria for awarding incentive
13 awards. They dedicated significant time and effort to the litigation, far in excess of the
14 benefits they received. They lost time at work to support this effort, and did so without
15 complaint or any expectation of reimbursement. Their efforts ensured that more than
16 one thousand other Washington residents, many of whom are low-wage workers like
17 the named plaintiffs, will receive valuable compensation. Their selfless support of this
18 litigation should be rewarded.

V. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court grant their Motion for Attorneys' Fees of 25% of the net recovery by the Class, reimbursement of all costs and out-of-pocket expenses, and \$15,000 as an incentive award to each named plaintiff.

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