

THE HONORABLE 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.

Case No. C09-0508-JCC

ORDER

This matter comes before the Court on the parties' Joint Motion for Final Approval of Settlement Agreement (Dkt. No. 34) and Plaintiff's Motion for Attorneys' Fees, Costs and Incentive Awards (Dkt. No. 31) and Reply (Dkt. No. 36), to which there has been no objection by Defendant. The Court held a hearing to test the fairness, reasonableness, and adequacy of the settlement agreement on August 5, 2010. Having thoroughly considered the parties' briefing, the relevant record, and the proceedings at the fairness hearing, the Court hereby APPROVES the Settlement Agreement and GRANTS Plaintiffs' motion for attorneys' fees, costs, and incentive awards, for the reasons explained herein.

ORDER
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1 I. BACKGROUND

2 This class action concerns Nationwide Life Insurance Company's uncontested failure to
3 follow Washington insurance law when it unwittingly sold a medical insurance plan to
4 approximately 1,037 residents of this state.

5 The facts are not materially in dispute. Nationwide offered a fixed-indemnity insurance
6 plan to employers in various states, including twenty-two employers outside the state of
7 Washington that, unknown to Nationwide, employed Washington residents. Nationwide failed
8 to file the medical plan with the Office of the Insurance Commissioner ("OIC"), violating
9 WASH. REV. CODE 48.18.100. Additionally, until July 22, 2007, fixed-indemnity policies were
10 illegal when sold as stand-alone policies in this state; they are still subject to strict regulation
11 by the OIC. *See former* WASH. REV. CODE 48.43.005(19)(i) (2006); 48.43.005(19)(d), (i)
12 (2009). Finally, the medical plan that Nationwide sold conflicted with Washington law: for
13 example, it did not provide certain benefits mandated for such plans in this state, expressed
14 limitations that are not lawful here, and failed to include appropriate disclaimers. (*See* OIC
15 Order (Dkt. No. 27-2 at 4–6) (listing these and other substantive violations of Washington
16 law).) Nationwide acknowledges its "technical" statutory violations. (Dkt. No. 25 at 6.)

17 The OIC, at Plaintiffs' urging, conducted a review and determined that Nationwide had
18 violated Washington law. (OIC Order (Dkt. No. 27-2 at 4–6).) Pursuant to the ensuing consent
19 decree, Nationwide promised, *inter alia*, to bring the medical plan into compliance and to pay a
20 penalty of \$20,000. (*Id.* at 6.) Importantly, the OIC also determined that no claims submitted
21 by a covered employee had been improperly denied, either under the plan as written or as
22 otherwise required by Washington law. (*Id.* at 4.) Nationwide maintains that the class has
23 suffered no harm, but chose to settle its claims relatively early in the litigation.

24 The Settlement Agreement requires Nationwide to contribute \$1 million to a common
25 fund, to be disbursed to class members according to two different compensation options. Class
26 members may choose either rescission or reformation of their insurance contract. (Settlement

1 Agreement ¶ 1 (Dkt. No. 25-2 at 4.) If the class member elects rescission, she will be refunded
2 the premiums paid. If she chooses reformation, she must make a claim for medical expenses;
3 Nationwide will then pay her unreimbursed expenses that would have been covered by a lawful
4 health plan, less a \$1,500 deductible, after review by class counsel. (Settlement Agreement ¶
5 12(d), (e) (Dkt. No. 25-2 at 14).)

6 On May 17, 2010, the Court certified the class and preliminarily approved the proposed
7 settlement. (Dkt. No. 29.) The Court then directed notice to the class members. (*Id.* at 13.)
8 Class members who wished to opt out of the class were required to do so by July 2, 2010. Any
9 class members who wished to appear, comment, or object at the hearing to inform the court
10 and class counsel of his or her intent to do so by July 30, 2010. (*Id.* at 13–14.)

11 Out of those notices, the parties were unable to locate 43 primary insureds and 25
12 family members—just 6.5% of the class. (Joint Motion 4 (Dkt. No. 34).) Only one class
13 member opted out. (*Id.* at 2.) Neither counsel nor the Court received any written comments,
14 objections, or notices of appearance prior to the fairness hearing. (*Id.* at 4.)

15 141 class members submitted claim forms before the deadline. According to counsel,
16 most of the submitted claims were small. Class counsel is currently investigating claims for
17 medical expenses and reducing them as necessary after assisting class members with applying
18 for free or reduced care under Washington’s hospital debt-relief statutes. (*Id.* at 4–5.) At a
19 fairness hearing held on August 5, 2010, class counsel informed the court that reformation
20 claims would total, at most, around \$550,000, and that the rescission claims would total
21 approximately \$450,000.

22 The Court held a hearing on August 5, 2010, to test the fairness, reasonableness, and
23 adequacy of the settlement, as required by Federal Rule of Civil Procedure 23(e)(2). No absent
24 class member appeared and no objections were lodged. Class counsel has also submitted a
25 motion for attorneys’ fees, costs, and class representative incentive awards. (Attorneys’ Fees
26 Mot. (Dkt. No. 31).)

1 II. DISCUSSION

2 **A. Class Action Settlement**

3 The amended version of Rule 23(e) provides for searching judicial inquiry into the
4 fairness of a class action settlement. It requires the court to determine ““whether a proposed
5 settlement is fundamentally fair, adequate, and reasonable.”” *Staton v. Boeing Co.*, 327 F.3d
6 938, 959 (9th Cir. 2003) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
7 1998)). To make this determination, the Court must consider a number of factors, including (1)
8 the strength of plaintiff's case; (2) the risk, expense, complexity, and likely duration of further
9 litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount
10 offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings;
11 (6) the experience and views of counsel; (7) the presence of a governmental participant; and
12 (8) the reaction of the class members to the proposed settlement. *See id.* (citations and
13 quotation marks omitted). In addition, the settlement may not be the product of collusion
14 among the negotiating parties. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir.
15 2000) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1992)). Finally,
16 the district court is “not free to redraft the agreement, or strike out certain parts” that it finds to
17 be problematic: the agreement must stand or fall as a whole. *Hanlon*, 150 F.3d at 1026, 1028.

18 The Court previously preliminarily approved the settlement agreement, and tentatively
19 found that

20 the proposed settlement appears fair, reasonable, and adequate. There is no
21 evidence of fraud, collusion or overreaching by the parties, and it does not appear
22 from the face of the agreement that the rights of absent class members were
23 disregarded; there is no preferential treatment in the Agreement. The parties plainly
24 arrived at the Settlement Agreement after serious, informed, adversarial
25 proceedings, including mediation. The settlement agreement has no obvious
26 deficiencies and falls within the range of possible approval.

Nothing on the record has called those preliminary findings into question.

More importantly, many of the factors enumerated in *Mego* support approval of the
class settlement here. *Mego*, 213 F.3d at 458.

1 ***The strength of plaintiff's case.*** The Settlement Agreement provides for monetary
2 compensation to class members, including reimbursement for unpaid medical expenses, even
3 though the OIC determined that Nationwide did not improperly deny any claim under
4 Washington law. Although the OIC's conclusion was not necessarily binding on this Court, it
5 provided compelling evidence for the defense that the class suffered no monetary harm from its
6 technical violations of Washington statutes. Had litigation proceeded, Plaintiff's case on
7 damages could have been undermined. (*See* Attorneys' Fees Mot. 9 (Dkt. No. 31).)

8 ***The risk, expense, complexity, and likely duration of further litigation.*** If Nationwide
9 had chosen to contest damages in this case, the extensive motion practice and possible trial
10 would increase the risk, expense, and likely duration of further litigation. Settlement conserves
11 judicial and legal resources.

12 ***The extent of discovery completed, and the stage of the proceedings.*** "In the context of
13 class action settlements, formal discovery is not a necessary ticket to the bargaining table[,]
14 where the parties have sufficient information to make an informed decision about settlement."
15 *Mego*, 213 F.3d at 459 (citations and internal quotation marks omitted). The parties here have
16 conducted significant discovery and research, and, most notably, submitted the matter to the
17 OIC for investigation, which resulted in public disclosure of relevant information. (*See* Joint
18 Motion 8 (Dkt. No. 34).) Moreover, the parties have participated in mediation, further
19 subjecting the claims to adversarial testing. (*Id.* at 9.) The parties have demonstrated that they
20 are at a stage in litigation where they can make an informed decision about settlement. *Mego*,
21 213 F.3d at 459.

22 ***The experience and views of counsel.*** The law firm representing the class has
23 significant experience in class-action lawsuits in the health-insurance field. (*See* Hamburger
24 Decl. 3–7 (Dkt. No. 24) (listing Eleanor Hamburger and Richard Spoonemore's extensive
25 experience and record).) Defense counsel is likewise experienced. (*See* Turetsky Decl. 2 (Dkt.
26 No. 35).) This factor weighs in favor of allowing settlement.

1 ***The reaction of the class members to the proposed settlement.*** In *Mego*, 213 F.3d at
2 459, the Ninth Circuit found that class members’ reaction supported settlement when “[o]nly
3 one of the 5,400 potential class members . . . chose to opt-out of the class and [there were] only
4 a handful of objectors at the fairness hearing.” Of course, there were fewer negative reactions
5 here: only one class member has opted out and *no* class member has objected. (Joint Mot. 2, 4
6 (Dkt. No. 34).) Class counsel has stated that class members who have contacted them have
7 been “overwhelmingly pleased” with the proposed settlement. (Joint Motion 2 (Dkt. No. 34).)
8 The reactions of the class have been positive; this weighs heavily in favor of approving the
9 Settlement Agreement.

10 ***The settlement fund amount.*** Although it deserves some increased attention, the
11 settlement fund amount appears reasonable, fair, and adequate under the circumstances.

12 The Agreement establishes a Settlement Fund of \$1 million, which represents
13 Nationwide’s total liability and the sole source of all recovery. (Settlement Agreement Item 1
14 (Dkt. No. 25-2 at 4).) However, Nationwide will not get any of that \$1 million back—after full
15 disbursement, any surplus will be distributed on a per capita basis to the class. (*Id.*) The most
16 current numbers indicate that the claims of the class members fall below that threshold,
17 according to class counsel’s estimations at the fairness hearing.

18 This figure does not, however, include attorneys’ fees, which must also be drawn from
19 the Settlement Fund, and which are estimated to be somewhere between \$133,000 and
20 \$250,000. (*See id.*); *see also infra* (discussing attorneys’ fees). Moreover, if the settlement fund
21 is inadequate to cover both attorneys’ fees and the submitted claims, the attorneys get paid
22 before the class: “[i]n the event that insufficient funds exist to pay attorneys’ fees, costs, costs
23 of administration, incentive awards, and submitted claims at 100 percent, then Class Members
24 shall be paid on a *pro rata* basis after the payment of attorneys’ fees, costs, incentive awards,
25 and costs of administration, including the dispute resolution process . . .” (Settlement
26 Agreement Item 10 (Dkt. No. 25-2 at 12).)

1 Judicial review in these situations must be rigorous. When attorneys' fees are to be paid
2 from a common settlement fund, "the relationship between plaintiffs and their attorneys turns
3 adversarial" and "the district court must assume the role of fiduciary for the class plaintiffs." *In*
4 *re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994) Nonetheless,
5 other courts have ratified settlement agreements with similar provisions. *See Staton*, 327 F.3d
6 at 969–70 (discussing cases where attorneys' fees were paid out of a common fund, reducing
7 the pro-rata payment to the class); *Munoz v. UPS Ground Freight, Inc.*, No. C 07-00970 MHP,
8 2009 WL 1626376, at *1 (N.D. Cal. June 9, 2009) ("After attorneys' fees and the other
9 associated costs, the common fund would be distributed pro rata to the class . . ."). Moreover,
10 the Court is not free to reform the Agreement in any way. *Hanlon*, 150 F.3d at 1026, 1028.

11 In the context of this case, the settlement amount seems reasonable, even considering
12 that class recovery may be reduced after attorneys' fees are taken out of the Settlement Fund.
13 First, and most importantly, the class will probably still receive near 100% recovery. Class
14 counsel averred at the fairness hearing that it is still investigating the larger claims for medical
15 expense reimbursement, and based on its experience with one large claim, may reduce those
16 claims significantly by assisting class members with seeking reimbursement through
17 Washington statutory channels. (*See* Joint Motion 4–5 (Dkt. No. 34); *see also* Attorneys' Fees
18 Mot. 8 (Dkt. No. 31), Reply 2 (Dkt. No. 36) (indicating that class counsel expect total or near-
19 total recovery for all class members).) Thus, the claims estimate is a generous one; the actual
20 dollar amount of claims will probably be much lower. Second, Plaintiffs' counsel has reserved
21 the right to cancel it if Nationwide's estimations of the claims and premiums turns out to be
22 more than \$140,000 under the actual amount of damages. (Settlement Agreement ¶ 17 (Dkt.
23 No. 25-2).) And finally, the Court cannot ignore the fact that the OIC determined that no class
24 member had been improperly denied his or her claim for medical expenses. (OIC Order (Dkt.
25 No. 27-2 at 4).) The settlement amount of \$1 million, taking into consideration the facts of this
26 case, is reasonable, fair, and adequate. FED. R. CIV. P. 23(e)(2).

B. Attorneys' Fees

Class counsel is seeking a fee award of 25 percent of the net benefit to class members, the exact dollar amount to be determined when all class members' claims are finalized. (Attorneys' Fees Mot. 1 (Dkt. No. 31).) As described briefly above, attorneys' fees and costs will be paid out of the common fund, and will be disbursed at a higher priority than payments to the class. (Settlement Agreement Item 10 (Dkt. No. 25-2 at 12).) Class counsel also seeks reimbursement of the out-of-pocket costs incurred prior to settlement; this includes the cost of mediation and the cost of retaining an expert to assess the amount of damages. (Hamburger Decl. 2 (Dkt. No. 32-2).) Finally, each of the three named class representatives is seeking an incentive award of \$15,000. (*See* Reply 3 (Dkt. No. 36).)

In this diversity matter, Washington substantive law on attorneys' fees applies. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Under Washington law, it is appropriate for attorneys to take a percentage of the common fund that is created at the settlement of the case. *Bowles v. Washington Dep. of Ret. Sys.*, 847 P.2d 440, 449–50 (Wash. 1993); *see also Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 276–77 (1975) (discussing the “common-fund doctrine”).

Assuming that the “net benefit” to the class will be calculated at \$1 million—which it will not, because that represents the *gross* benefit to the class, when the actual *net* benefit will be lower—counsel would receive \$250,000 in fees. (*See* Attorneys' Fees Mot. 13 (Dkt. No. 31).) Class counsel estimated at the fairness hearing that they would be receiving around \$170,000 in fees, although the final number has yet to be calculated.

This amount is reasonable. Under both Washington and Ninth Circuit law, 25 percent of the common fund recovery is a “benchmark” that should be adjusted, or replaced by a lodestar calculation, only when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors. *Bowles*, 847 P.2d at 450–51 (a reasonable percentage of recovery is “often in the range

1 of 20 to 30 percent,” and in common fund cases “the benchmark award is 25 percent of the
2 recovery obtained”); *see also Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301,
3 1311 (9th Cir. 1990) (25 percent is a benchmark); *see also* 3 NEWBERG ON CLASS ACTIONS §
4 14.03 (20–30 percent is usual common fund award). There are no circumstances here that
5 would warrant departing from the benchmark 25 percent recovery. *Arizona Citrus Growers*,
6 904 F.2d at 1311; *see also Vizcaino*, 290 F.3d at 1047–50 (discussing circumstances that
7 warranted an upward adjustment).

8 Importantly, the lodestar cross-check analysis lends support for this figure. Calculation
9 of the lodestar, which measures the lawyers’ investment of time in the litigation, provides a
10 check on the reasonableness of the percentage award. *Id.* at 1050. If the attorneys assigned to
11 this case had been working at an hourly basis, based on their ordinary billable rate, they would
12 have made \$133,196.00. (Motion for Attorneys’ Fees 12 (Dkt. No. 31).) If the Court were to
13 apply a “lodestar” calculation, instead of a percentage-of-recovery approach, the requested
14 amount of \$250,000—again, a figure that is significantly higher than counsel expects—is only
15 1.9 times the lodestar amount. (*Id.*) This is typical of what courts ordinarily approve. *See* 4
16 NEWBERG ON CLASS ACTIONS § 14.7 (courts typically approve percentage awards based on
17 lodestar cross-checks of 1.9 to 5.1 or even higher, and “the multiplier of 1.9 is comparable to
18 multipliers used by the courts”); *see also In re Prudential Ins. Co. America Sales Practice*
19 *Litigation Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) (“[M]ultiples ranging from one to
20 four are frequently awarded in common fund cases when the lodestar method is applied.”)
21 (quoting Newberg). The Court thus finds that the attorneys’ fees requested in this case are
22 reasonable.

23 Class counsel has requested reimbursement of costs in the amount of \$24,278.55.
24 (Hamburger Decl. (Dkt. No. 32-2 at 2).) Based on a review of the figures provided by counsel,
25 these costs are reasonable and are approved.

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1 Finally, class counsel has requested approval of an incentive award to Ruth Bjorklund,
2 John Gabriel and Lauren Gustafson-Omer, the Class representatives, in the sum of \$15,000
3 each. This incentive award is reasonable, considering (1) the risk to the class representatives in
4 commencing a class action, both financial and otherwise; (2) the notoriety and personal
5 difficulties encountered by the class representatives; (3) the amount of time and effort spent by
6 the class representatives; (4) the duration of the litigation; and (5) the personal benefit, or lack
7 thereof, enjoyed by the class representative as a result of the litigation. *See Pelletz v.*
8 *Weyerhaeuser Co.*, 592 F.Supp.2d 1322, 1329 (W.D.Wash. 2009). Based on the statements of
9 counsel and the circumstances of this case, the requested incentive awards are reasonable and
10 are approved.

11 III. CONCLUSION

12 For the foregoing reasons, the parties' Joint Motion for Final Approval of Settlement
13 Agreement (Dkt. No. 34) and Plaintiff's Motion for Attorneys' Fees, Costs and Incentive
14 Awards (Dkt. No. 31) are both GRANTED. Therefore, it is hereby ORDERED that:

- 15 1. The proposed Settlement Agreement is approved as fair, reasonable and adequate under
16 Federal Rule of Civil Procedure 23.
- 17 2. Plaintiffs' Motion for attorneys' fees in this action at the benchmark of 25 percent of
18 the net recovery to Class members, the exact amount to be determined at the conclusion
19 of the claims process, and costs in the sum of \$24,278.55 is GRANTED.
- 20 3. Class representatives Ruth Bjorklund, John Gabriel and Lauren Gustafson-Omer are
21 awarded \$15,000 each as incentive awards.
- 22 4. Pursuant to ¶15 of the Settlement Agreement, all complaints and claims asserted in this
23 action are DISMISSED with prejudice and without costs.
- 24 5. Each Class member who has not timely opted out of the Class shall be barred from
25 initiating, asserting or prosecuting any claim released under ¶15 of the Agreement to
26 Settle Claims.

1 6. THIS IS THE FINAL DETERMINATION OF THE RIGHTS OF THE PARTIES IN
2 THE ACTION AND OF ALL CLASS MEMBERS WHO HAVE NOT TIMELY
3 OPTED OUT OF THE CLASS. THIS IS A FINAL AND APPEALABLE ORDER
4 AND JUDGMENT.

5 7. Notwithstanding the preceding paragraph of this Order and Final Judgment, the Court
6 shall retain exclusive and continuing jurisdiction to interpret and enforce the terms,
7 conditions and obligations of the Agreement to Settle Claims in accordance with its
8 terms for the mutual benefit of the parties and Class members, until all transactions
9 detailed in the Settlement Agreement are completed.

10 DATED this 9th day of August, 2010.

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14 John C. Coughenour
15 UNITED STATES DISTRICT JUDGE
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