HON. RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| R.H., by and through his parents and guardians, P.H. and N.B.-H., individually, on behalf of WASHINGTON ALLIANCE FOR HEALTHCARE INSURANCE TRUST HEALTH BENEFIT PLAN, and on behalf of similarly situated individuals and plans,<br><br>Plaintiff,<br><br>v.<br><br>PREMERA BLUE CROSS, LIFEWISE HEALTH PLAN OF WASHINGTON<br><br>Defendants. | NO. 2:13-cv-00097-RAJ<br><br>PLAINTIFF'S UNOPPOSED **RENEWED** MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT<br><br>**NOTED FOR CONSIDERATION: July 30, 2014** |

## I. INTRODUCTION

On July 7, 2014, the Court denied Plaintiff's Unopposed Motion for Preliminary Approval of Settlement Agreement, and later on July 22, 2014, denied Plaintiff's Motion for Reconsideration. The Court, however, permitted plaintiff to renew his Motion for Preliminary Approval by July 30, 2014 to address the Court's questions and concerns regarding the Settlement Agreement. This motion (1) provides an overview of the history of the litigation, (2) provides a summary of the proposed Settlement Agreement, and (3) responds to the issues raised by the Court in its prior orders.



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The Settlement Agreement provides a far-reaching global agreement that fundamentally changes the insurance landscape for all Washington insureds of Premera Blue Cross and LifeWise Health Plan of Washington (hereinafter "Premera") with developmental disabilities and autism. *See* Dkt. No. 62-1, *Appendix 1,* "Agreement to Settle Claims," attached hereto ("Settlement Agreement").[1] The Settlement Agreement provides coverage for medically necessary speech, occupational and physical therapies (NDT) and Applied Behavior Analysis therapy (ABA), when medically necessary to treat mental health conditions. Dkt. No. 62-1, *App. 1,* ¶ 6.1.1 ("Coverage of NDT for Individuals with Mental Health Conditions"), ¶ 6.2.1 ("Coverage of ABA Therapy"). The Agreement prohibits the application of exclusions and age limits on the coverage. *Id.*, ¶¶ 6.1.2, 6.2.2. The Agreement further prohibits the imposition of monetary caps or visit limits on these therapies. *Id.,* ¶ 6.1.4; ¶ 6.2.2.2. The Agreement also codifies ABA coverage under agreed criteria, so that there is a clear "path to coverage" for Premera insureds who need ABA therapy. Dkt. No. 62-1, *App. 1,* ¶ 6.2.1 and *App. A.* The prospective relief alone benefits thousands of Washington Premera insureds both now and well into the future. In addition to the broad prospective relief, the Settlement Agreement provides for a $3,500,000 settlement fund to pay for past claims related to neurodevelopmental therapy, attorney fees, costs, incentive awards and costs of administration.

The Court expressed concern that the original Motion for Preliminary Approval did not include sufficient information to demonstrate that the disposition of the Settlement Fund as contemplated by the Settlement Agreement is "fair, adequate and

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[1] The proposed Settlement Agreement would resolve not only this case, but two others as well: *A.G. v. Premera Blue Cross*, No. 11-2-30233-4 SEA, King Cty. Sup. Ct., J. Trickey; and *J.P. v. Premera Blue Cross,* No. 12-2-33676-8 SEA, King Cty. Sup. Ct., J. Spector. The broad prospective relief is applied across the board to all of Premera's insured polices, ERISA and non-ERISA.



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reasonable" to merit preliminary approval. *See* Dkt. No. 65, p. 8. Specifically, the Court requested additional information related to (1) whether the $3.5 million settlement fund is adequate and sufficient to pay the claims of R.H. and A.G. class members; (2) whether the Settlement Agreement attorney fees provision permitting class counsel to submit a request of up to 35% of the Settlement Fund to the Court for approval is justified; (3) whether the proposed incentive awards, anticipated litigation costs and costs of claims administration are fair and reasonable; and (4) the identity of the possible *cy pres* recipients or legal authority as to why *cy pres* recipients have not yet been identified. *See* Dkt. No. 65, pp. 8-11.

Plaintiff R.H. addresses all of the Court's concerns below. Accordingly, plaintiff R.H. renews his Motion for an Order preliminarily approving the global Settlement Agreement. Specifically, pursuant to FRCP 23(e), R.H. hereby moves the Court to:

(a) preliminarily approve the Settlement Agreement;

(b) authorize the mailing of notice to *R.H.* NDT class members and *R.H.* ABA class members; and

(c) establish a final settlement approval hearing and process.

## II. FACTS

This case was filed on January 16, 2013, on behalf of R.H., a child with autism spectrum disorder (ASD), and on behalf of similarly situated individuals. R.H. alleged that Premera's exclusion and limitation of coverage of neurodevelopmental and ABA therapies to treat DSM conditions violated the Washington State Mental Health Parity Act ("Parity Act").



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Shortly thereafter, Premera moved to stay this case pending the outcome of Premera's interlocutory appeal in *A.G. v. Premera*. *See* Dkt. No. 8.[2]

On February 21, 2013, R.H. moved for class certification and partial summary judgment and permanent injunction to require Premera to cover neurodevelopmental therapies to treat DSM conditions under its mental health services benefit. Premera moved to strike these motions. *See* Dkt. No. 23.

On March 8, 2013, the Court denied Premera's motion to strike but terminated R.H.'s class certification and summary judgment motions. *See* Dkt. No. 28. The Court directed R.H. to refile his summary judgment motion as a motion for preliminary injunction and indicated that the class certification motion would be re-noted at that time. *Id.* Shortly thereafter, Premera withdrew its motion to stay. *See* Dkt. No. 29.

On April 29, 2013, R.H. filed a motion for preliminary injunction. On May 16, 2013, Premera filed a motion to dismiss. After the motions (including R.H.'s motion for class certification) were fully briefed, the Court requested supplemental briefing on the effect of the final rules from the Washington State Office of the Insurance Commissioner on essential health benefits. *See* Dkt. No. 48.

While these motions were pending, the parties concluded that a global settlement of all three cases was possible. R.H.'s counsel and Premera had met in the summer and fall of 2012, with Judge Finkle's assistance, in an attempt to settle the *A.G. v. Premera* case, but no agreement could be reached. The parties' counsel continued to discuss a possible resolution in the fall of 2013. The parties jointly requested that the case be stayed pending settlement discussions. *See* Dkt. No. 53. They also moved to stay the *J.P. v. Premera* case.

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[2] In *A.G.*, the trial court certified a class of Premera's non-ERISA insureds and enjoined Premera from denying coverage. Dkt. No. 63, Spoonemore Decl., *Exh. B*. The Washington State Supreme Court specifically approved entry of the certification and injunction orders. *Id.*, *Exh. C*.



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The parties engaged in mediation with Stew Cogan on February 24, 2014, but a Settlement Agreement remained elusive. The parties then engaged Thomas V. Harris to mediate in sessions held on March 14 and May 1, 2014. Late in the evening on May 1, 2014, the parties in each of the three cases reached a global Settlement Agreement, contingent upon final approval by all three Courts. The Settlement Agreement was filed as *Appendix 1* to plaintiffs' initial Motion for Preliminary Approval of Settlement Agreement. *See* Dkt. No. 62-1, *App. 1.*

## III. EVIDENCE RELIED UPON

R.H. relies upon the Declaration of Richard E. Spoonemore in Support of Renewed Motion for Preliminary Approval of Settlement Agreement as well as the records and pleadings in this case. While Premera does not oppose this motion, it does not agree with the facts or legal conclusions alleged herein.

## IV. OVERVIEW OF THE SETTLEMENT AGREEMENT

This "overview" section provides a summary of the key terms of the proposed Settlement Agreement. The "Law and Argument" section of this brief then addresses why the Court should preliminarily approve the agreement and authorize notices to be sent.

### A. Defendants Will Provide Coverage of Neurodevelopmental Therapies to Treat Mental Health Conditions Without Age Exclusions, Treatment Limits or Caps.

Under the terms of the Settlement Agreement, Premera will affirmatively and immediately provide coverage of neurodevelopmental therapies to treat individuals with a DSM mental health condition without age or treatment limits. Dkt. No. 62-1, *App. 1,* ¶ 6.1. Premera agrees that it will not apply its exclusion for "services, therapy and supplies related to the treatment of … developmental delay or neurodevelop-mental disabilities." *Id.,* ¶ 6.1.2. It will not deny coverage solely due to a class member's age. *Id.*, ¶ 6.1.3. Significantly, it will not apply treatment limits or caps to



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neurodevelopmental therapies to treat individuals with a DSM mental health condition. *Id.,* ¶ 6.1.4. It will change its policies to reflect these new coverage obligations. *Id.*, ¶¶ 6.1.2, 6.1.3, 6.1.4.

**B. Premera Will Provide Coverage for ABA Under Agreed Clinical Criteria.**

Premera also agrees to provide ABA coverage without age or treatment limitations, or any other exclusion that categorically denies ABA coverage. The Settlement Agreement specifically prevents Premera from denying coverage for any of the reasons historically raised by other insurers. *See* Dkt. No. 62-1, *App. 1,* ¶ 6.2.2. Premera must provide coverage for ABA under the agreed ABA Coverage Criteria, creating a clear "path to coverage" for Premera insureds. *Id.,* ¶ 6.2.1 and *App. A.* As described in Plaintiff's original Motion for Preliminary Approval, the ABA coverage criteria follow a "best practices" model for the delivery of ABA informed by experts from the University of Washington's Autism Clinic and the Seattle Children's Autism Center. *See* Dkt. No. 63, Spoonemore Decl., ¶ 4.

**C. Agreement Provides for Retrospective Relief on Neurodevelopmental Therapy Claims.**

The Settlement Agreement provides for a $3,500,000 fund from which payments will be made for attorney fees, costs, claims administration costs, payments to R.H. and J.P. for retrospective ABA coverage, incentive awards, and class members' claims for uncovered neurodevelopmental therapy services. Dkt. No. 62-1, *App. 1,* ¶ 8.2.[3]

[3] With respect to ABA, the Settlement Agreement follows the Group Health settlement in that it resolves the parties' dispute over prospective relief by seeking certification of a settlement class under FRCR 23(b)(2). Dkt. No. 62-1, *App. 1,* ¶ 1.18. With the exception of the named plaintiff's claim for past unpaid ABA, the Settlement Agreement does not address, nor does it release, any retrospective damage claims. Premera, unlike other insurers, elected to not dispute the medical necessity of ABA. Instead, it maintained that it did provide some coverage for ABA under certain circumstances. This spotty and *ad hoc* coverage made class-wide retrospective relief problematic and nearly impossible to value. The resolution was to settle on an agreed protocol going forward, but to retain the rights of any class member to seek damages for past unpaid claims in a separate action.



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*R.H.* NDT class members will be eligible for payment from the settlement fund upon submission of a claim form that verifies: (1) the class member's DSM diagnosis and date of diagnosis; (2) the date(s) of neurodevelopmental treatment for that diagnosis (month/year); (3) the provider(s) of the treatment; and (4) the unreimbursed charges or debt incurred with that treatment. Dkt. No. 62-1, *App. 1,* ¶ 8.4. *See also* Dkt. No. 66-1, *Exh. A* (revised proposed Class Notice); Dkt. No. 66-2, *Exh. B* (redline showing changes from original Notice, as requested by the Court); *Dkt. No. 66-3*, *Exh. C* (revised proposed Claims Form, Claim Form Matrix, Claim Form Instructions, and Opt-Out Form); Dkt. No. 66-4, *Exh. D* (redline showing changes from original Claims Form, Claim Form Matrix, Claim Form Instructions and Opt-Out Form).

A Claims Processor – Seattle-based Nickerson & Associates – will review the claims to confirm that the four requisite items are on the claim form. Dkt. No. 62-1, *App. 1,* ¶ 8.4.3. It will also confirm with Premera that the class member was insured by Premera at the time the services were received and that the claimed sums are not duplicative of claims previously paid by Premera. *Id.* The Claims Processor must provide a class member who has a deficient claim form an opportunity to cure any problems, and class counsel is empowered to assist the class member in making any claim. Dkt. No. 62-1, *App. 1,* ¶¶ 8.4.3.1, 8.4.3.2. Any dispute concerning whether a claim should be granted or denied is subject to binding arbitration before (ret.) Judge George Finkle. *Id.*, ¶ 8.4.5.

**D. *Pro Rata* Reduction in the Event of Insufficient Funds**

Class counsel anticipates that the settlement amount will be sufficient to pay all claims at 100%, even after payment of attorney fees, costs, incentive awards and costs of administration. Dkt. No. 63; Spoonemore Decl., ¶ 2. However, if insufficient funds remain to pay all claimants at 100% after fees, costs, incentive awards and expenses,



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then all class members will receive a *pro rata* distribution of their approved claimed amount. Dkt. No. 62-1, *App. 1,* ¶ 8.4.7.

**E. *Cy Pres* Award**

If funds remain after the payment of claims, attorney fees, costs, incentive awards and costs of administration, then those funds shall be attributed 50% to the *A.G.* litigation and 50% to this case. With respect to the funds allocated to this case, any residual funds shall be distributed to organizations to assist families with a family member with developmental conditions to access health care and health coverage. Dkt. No. 62-1, *App. 1,* ¶ 8.4.6.2. The parties will attempt to reach agreement on *cy pres* recipient(s) to present to the Court. *Id*. If no agreement can be reached, then class counsel will submit a proposal to the Court for distribution of the *cy pres* funds. *Id*. Premera may object and/or provide an alternative proposal to the Court. *Id*. The Court will have the final authority to distribute the *cy pres* funds. *Id*.

**F. ABA Retrospective Claims Are Not Released Except for Named Plaintiffs.**

Claims for damages by the *R.H.* and *J.P.* ABA class members are not released and are expressly reserved. *Id.*, ¶¶ 9.3, 9.4. Named plaintiffs R.H. and J.P. shall have their out-of-pocket expenses for ABA therapy, up to the date of execution of the Settlement Agreement, paid out of the settlement fund in exchange for dismissal with prejudice of their individual retrospective claims for damages. *Id.,* ¶¶ 9.1, 9.2. Those amounts will total no more than $175,000.00. Spoonemore Decl., ¶ 2.f.

**G. Attorney Fees, Costs and Incentive Awards**

Class counsel is permitted to apply for attorney fees under the common fund doctrine/common benefit doctrine in an amount up to but not exceeding 35% of the settlement amount, or $1,225,000. Dkt. No. 62-1, *App. 1,* ¶ 13.1. Litigation costs and claims processing costs will also be paid from the settlement amount. *Id.*, ¶¶ 13.2, 13.4. Finally, up to, but not exceeding, $25,000 in incentive awards to each class



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representative family ($25,000 to the parents of R.H.; $100,000 total to all class representative families in all three cases) may be requested from the settlement amount. *Id.*, ¶ 13.3. All of these disbursements are subject to Court review and approval. *Id.*, ¶¶ 6.4, 6.5, 6.6.

## V. LAW AND ARGUMENT[4]

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

Compromise of complex litigation is encouraged and favored by public policy. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Federal Rule of Civil Procedure 23 governs the settlement of certified class actions and provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." FRCP 23(e). The Court must consider the settlement as a whole, "rather than the individual component parts," to determine whether it is fair and reasonable. *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003); *see Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("The settlement must stand or fall in its entirety"). Where, as here, the settlement agreement includes broad prospective relief, the Court must include consideration of that relief in its decision. *See, e.g., Laguna v. Coverall N. Am., Inc.*, 2014 U.S. App. LEXIS 10259, 12 (9th Cir., June 3, 2014); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (in both cases, the Ninth Circuit affirmed approval of a settlement which provided broad prospective relief in addition to a cash settlement fund).

As part of the Court's consideration, it should consider factors including:

> [T]he strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class

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[4] Plaintiff adopts by reference the argument and authorities presented to the Court in his original Motion for Preliminary Approval, Dkt. No. 60, and his Motion for Reconsideration, Dkt. No. 66.



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> action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

*Staton,* 327 F.3d at 959. *See* Dkt. No. 62, pp. 12-15 (addressing factors). Some of these factors, such as the reaction of class members, can only be gauged after preliminary approval and notice is provided to class members. Especially at this preliminary phase, the question is not "whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon,* 150 F.3d at 1027.

In this case, the parties negotiated at arm's length through five different mediation sessions, using three respected and independent mediators, over the course of several years. Taking the settlement as a whole, it is fair, adequate and there is no collusion between the parties.

**B. The Amount Offered in Settlement of the NDT Claims in *R.H.* and *A.G.* Cases Is Fair, Adequate and Reasonable.**

The Court requested that the parties provide it with information that would allow it to conclude that $3.5 million is "adequate and sufficient to pay the thousands of NDT class members."

Based upon confidential enrollment data provided by Premera, class counsel's expert health economist, Frank G. Fox, Ph.D., developed a utilization model. *See* Spoonemore Decl., *Exhs. A, B.* There was little dispute between the parties as to the pricing of the therapies, nor the size of the population that was likely to have conditions that Premera would consider to be "neurodevelopmental." *Id.,* ¶ 2.a.i. Moreover, the parties agreed on the specific CPT and diagnostic codes that would be considered NDT in Premera's system. *Id.*



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The parties differed on the estimated past utilization of NDT by class members: both the actual utilization where the claims were not submitted to Premera, and the utilization that would have occurred had Premera been properly covering NDT during the class period. Class counsel relied upon data based upon the Medical Expenditure Panel Survey (MEPS) to determine the likely utilization of NDT by class members in the past, and the amount that Premera would have spent but for its NDT exclusion. *Id., Exh. A,* p. 5. Premera, on the other hand, used data sources from states that Premera claimed had NDT mandates in effect. *Id.*, ¶ 2.a.ii. Both sides assumed that some care would be suppressed due to the lack of insurance coverage (the "insurance effect"), and the amount of those assumptions further impacted the total anticipated amount of utilization.[5]

Although Dr. Fox's model predicts costs that are greater than the final Settlement Fund, class counsel anticipates that the claims can be paid 100%. Dr. Fox's analysis modeled the entire universe of unpaid claims, not the class members who would make a claim. *See Chesbro v. Best Buy Stores, L.P.,* 2014 U.S. Dist. LEXIS 25404 (W.D. Wash. 2014) (participation of only 8.5% of class members is "within the normal range for participants in class actions."). Dr. Fox's analysis does not exclude claims that were paid by secondary insurance, Medicaid or other third-party payors such as the state's birth-to-three program. He did not include cost-sharing deductions. The detailed basis for class counsel's opinion that the settlement fund will likely result in full payment to claimants is contained in the Spoonemore Declaration, ¶ 2. Given ongoing settlement discussions in other cases, that Declaration has been filed under seal as permitted by Dkt. No. 67, p. 2. A redacted version has been publicly filed.

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[5] Dr. Fox's report provides an analysis of the potential number of claimants, as requested by the Court. Dkt. No. 65, n. 3; *see* Spoonemore Decl., *Exh. A,* p. 6 and *Exh. B,* p. 6.



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Finally, even if the Settlement Agreement results in only partial compensation to class members, it should still be approved because of the broad injunctive relief provided to class members. *See, e.g., Laguna,* 2014 U.S. App. LEXIS 10259, at 12; *Linney*, 151 F.3d at 1242 (trial court approval of settlement agreements with broad injunctive relief affirmed by the Ninth Circuit). As noted above and in Dkt. No. 62, pp. 2-3, 13-14, this settlement – if approved – will fundamentally alter access to insurance coverage (and hence, access to medically necessary health care) for all of Premera's insureds with developmental disabilities.

Finally, the Court will have the opportunity to reject the Settlement Agreement if it determines, after the claims process, that the amount of compensation to be provided to class members, in addition to broad injunctive relief, is too little. By the time final approval is considered, the Court will have the actual claims data to review. At that time, the Court may make a final conclusion regarding whether the settlement fund is "fair, adequate and reasonable" to address the claims brought by the plaintiff class. At this preliminary stage, the information contained in the Spoonemore Declaration and supporting exhibits (including Dr. Fox's detailed model) should be sufficient to allow class notice of the Settlement Agreement to go forward.

**C. The Settlement Agreement Provision Governing Attorney Fees and Costs Is Reasonable.**

The Court requested additional evidence to support the Settlement Agreement provision that permits class counsel seek fees of up to 35% of the Settlement Fund. As the Court correctly notes, the benchmark percentage in the Ninth Circuit is 25% of the common fund, with the opportunity to adjust the percentage upwards or downwards depending upon special circumstances (including exceptional results, the level of risk involved in the litigation, any additional common benefits obtained in the Settlement



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Agreement beyond the cash fund, and a showing that the fee award is similar to standard fees in other similar litigation). *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002); *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.'"); NEWBERG ON CLASS ACTIONS, § 14.6 (same).

Courts typically award fees in the range of 20% to 50% of the common benefit created by counsel's efforts. NEWBERG ON CLASS ACTIONS, § 14.6. *See also* MANUAL FOR COMPLEX LITIGATION, § 24.121 ("Attorney fees awarded under the percentage method are often between 25% and 30% of the fund."). Indeed, 20%-30 % is the "usual" range under Ninth Circuit authority. *Vizcaino,* 290 F.3d at 1047-48. But the "usual" range is not a cap or ceiling on fees. *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1310 (9th Cir. 1990) ("The benchmark percentage should be adjusted … when special circumstances indicate that the percentage recovery would be either too small or too large …"). When supported by "the complexity of the issues and the risks," as well as exceptional results, a court can – and should – depart from that range. *See, e.g., In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (approving 33⅓% award); *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 460 (9th Cir. 2000) (affirming 33⅓% award).

The first step in computing a fee under the common fund doctrine is to calculate the total value of the benefit conferred upon the class. *Vizcaino,* 142 F. Supp. 2d 1299, 1302 ("under federal case law, the 'benchmark' percentage of recovery fee is 25% of the recovery obtained, ***including future benefits***, with 20 to 30% as the usual range of common fund fees."); *Vizcaino*, 290 F.3d at 1049 ("[N]onmonetary benefits conferred by the litigation are a relevant circumstance" to consider when evaluating the total benefit of the litigation). This value includes the amount a defendant was forced to pay into a



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fund, as well as sums paid (or to be paid) directly by a defendant to class members due to a forced change in policy:

> Though in many common fund cases the size of the recovery is easily determined, if prospective or other nonmonetary relief is granted, the recovery may be difficult to evaluate. Nevertheless, the fee should be based on a percentage of the value of ***all*** the relief obtained for the class of beneficiaries through counsel's effort, whether monetary or nonmonetary.

M.F. Derfner and A. Wolf, COURT AWARDED ATTORNEY FEES, ¶ 2.06, pp. 2-86-87 (2000) (emphasis in original). *See also* A. Conte, ATTORNEY FEE AWARDS, § 2.05, p. 37 (1993) ("numerous courts have concluded that the ***amount of the benefit conferred*** logically is the appropriate benchmark against which a reasonable common fund fee charge should be assessed") (emphasis added); *id*., § 2.22 (all benefits should be presented to court in common fund fee application).

In this case, class counsel not only secured a cash fund, but also obtained a massive and unprecedented expansion of coverage for NDT and ABA services for class members. In fact, the majority of value in this settlement is not the cash, but the promise of coverage into the future without visit limits or other caps. Even if the prospective relief of NDT and ABA coverage for all eligible Premera insureds were valued at just $1.5 million,[6] then 35% of the cash settlement amount would be less than 25% of the common benefit to the class.

The Court may "cross-check" the percentage approach by considering the potential loadstar fee award. *Vizcaino,* 290 F.3d at 1050. Performing the "cross-check" reveals that the fee request is justified. Through June 30, 2014, class counsel have dedicated over 1100 hours to litigating all three Premera cases. Spoonemore Decl.,

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[6] Dr. Fox's model shows that the actual prospective value for a ***single year*** of ***just NDT*** coverage is over $2.5 million. Spoonemore Decl., ¶ 3, *Exh. A*, p. 8; *Exh. B*, p. 8.



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*Exhs. E-G* (attorney fees schedules in all three cases through June 30, 2014). At class counsel's normal hourly rates (from $295 to $595), the time value of this effort exceeds $600,000.[7] Should class counsel decide to seek a 35% fee award (which they have not yet determined), the amount sought would represent a multiplier of only 2, far less than multipliers awarded in other similar cases. *Vizcaino*, 290 F.3d at 1051 (approving a percentage-of-the-settlement award where the loadstar cross-check multiplier was 3.65, and noting that most lode-star cross-check multipliers are often in the 1-4 range). A multiplier of 2 (or even more) is reasonable considering the *Kerr* factors, including the risks involved in the litigation, the length of the litigation, the novelty of the issues involved, the contingent nature of the cases, and awards in similar cases. *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). Here, class counsel obtained systemic, far-reaching change for all Premera insureds on an issue of first impression. The risk involved in the litigation was high, which has been reflected in awards in similar cases. *See, e.g.*, Spoonemore Decl., *Exh. K,* p. 5 (in *D.F. v. WHCA,* the trial court approved a settlement award of 33% of the cash fund).

In any event, the Court need not approve class counsel's attorney fees at this stage. The relevant provision in the Settlement Agreement only secures the defendants agreement not to oppose a later motion for attorney fees up to 35%. The Settlement Agreement does not prohibit any lower fee request and preliminary approval of the Settlement Agreement does not bind the Court to any provision of attorney fees. *See, e.g., Jones v. GN Netcom, Inc.*, 654 F.3d 935, 945 (9th Cir. 2011) (the Ninth Circuit's rejection of a fee award does not necessitate invalidation of the trial court's approval of a settlement agreement).

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[7] Class counsel has incurred approximately $70,000 in costs to date, as reflected in the schedule of the litigation costs, by case, attached to the declaration of Richard E. Spoonemore. *See* Spoonemore Decl., *Exhs. H-J.*



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**D. The Proposed Incentive Award Provision Is "Fair, Adequate and Reasonable."**

The Ninth Circuit has established the factors to consider when reviewing incentive awards for named plaintiffs. The Court must consider whether "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation and reasonable fears of workplace retaliation." *Staton,* 327 F.3d at 977, *citing to Cook v. Niedert,* 142 F.3d 1004, 1016 (7th Cir. 1998). "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook*, 142 F.3d at 1016 (approving a $25,000 incentive award); *see, e.g., Louie v. Kaiser Found. Health Plan, Inc.,* 2008 U.S. Dist. LEXIS 78314, 18 (S.D. Cal. Oct. 6, 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 maintaining three separate lawsuits, conducting extensive informal discovery, hiring experts to analyze discovered data and engaging in day-long settlement negotiations with a respected mediator").

Here, plaintiffs, through their parents, have all dedicated substantial time, effort, and undertaken risk to protect the interests of the plaintiffs. All parents were willing to open themselves and their families up to extensive personal scrutiny in order to win systemic change for all Premera insureds. Spoonemore Decl., ¶ 4. Many filed individual appeals prior to litigation, on their own (without representation by a lawyer). *Id.* Once litigation commenced, Premera sought extensive written discovery from each named plaintiff and his/her parents, delving into years of medical history for each, thousands of emails, and years of school records. *Id.* The named plaintiffs' parents all spent hours gathering documents responsive to Premera's exhaustive discovery requests. *Id.* Premera also deposed nearly all of the named plaintiffs'



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parents, questioning them at length regarding their children's diagnostic journeys, which for most parents was a stressful and emotionally difficult history to recount. *Id.*

Most of the named plaintiffs' parents work full-time and had to take unpaid leave from their work to participate in deposition preparation, depositions, and multiple mediation sessions. *Id.* Because they all have children with special needs, when they were required to be present for the litigation, they had to arrange for skilled providers or relatives to watch their children. *Id.* Additionally, all of the parents invested hours to review the detailed medical and educational records of their children and to prepare for deposition. *Id.* The class has benefitted tremendously from the willingness of the named plaintiffs to step forward. Without their willingness to stand in the place of thousands of other Premera insureds, the broad systemic relief included in this settlement may never have happened. *Id.*

Finally, the proposed incentive awards are consistent with those approved by courts in other similar litigation. In *D.F. v. Washington Health Care Authority,* the first mental health parity act case brought in Washington State, the named plaintiffs were awarded incentive awards of $25,000 per plaintiff family, after similar extensive discovery, years of litigation, and multiple mediation sessions. Spoonemore Decl., *Exh. K,* p. 5. The plaintiffs here, like the *D.F.* plaintiffs, have invested many hours in the litigation, participated in multiple mediation sessions and opened themselves up to extensive scrutiny by defense counsel. For this reason, plaintiffs seek an incentive award for each named plaintiff family of up to $25,000.

Nevertheless, the Court need not decide at this time whether such an incentive award should be ordered. The Court should conclude that the provision in the Settlement Agreement permitting class counsel to seek an incentive award for each plaintiff family of up to $25,000 does not render the proposed Settlement Agreement unfair or a product of collusion.



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**E. *Cy Pres* Award Provision in the Settlement Agreement Is Reasonable.**

The Court requested plaintiffs' legal authority to support the Settlement Agreement's *cy pres* award provision, in which the type of *cy pres* recipient is expressly described in the Settlement Agreement, but the actual organization is not yet identified. Dkt. No. 65, p. 10. Specifically, the Settlement Agreement provides that, if there are remaining funds after payment of class members' claims at 100%, attorney fees and costs, and incentive awards, those funds shall be divided between the *A.G. v. Premera* case and the *R.H. v. Premera* case.[8] In the *R.H. v. Premera* case, the *cy pres* funds must be distributed to "organizations to assist families with a family member with developmental conditions to access health care and health coverage." *See* Dkt. No. 62-1, *App. 1,* ¶ 8.4.6.3.

The *cy pres* provision in the Settlement Agreement expressly follows the "next best distribution" mandate required in the Ninth Circuit. *Lane v. Facebook, Inc.*, 696 F.3d 811, 820 (9th Cir. 2012). As the Ninth Circuit concluded:

> We do not require as part of that doctrine that settling parties select a *cy pres* recipient that the court or class members would find ideal. On the contrary, such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process. *See Hanlon*, 150 F.3d at 1027. The statement in *Six Mexican Workers* and elsewhere in our case law that a *cy pres* remedy must be the "next best distribution" of settlement funds means only that a district court should not approve a *cy pres* distribution unless it bears a substantial nexus to the interests of the class members—that, as we stated in *Nachshin*, the *cy pres* remedy "must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members. . . ."

*Id.* at 820-821. Here, the proposed *cy pres* distribution, subject to the Court's approval, necessarily has a direct and substantial nexus with the litigation itself. The *cy pres*

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[8] Washington State Civil Rules necessitate the *cy pres* distribution split. Under CR 23(f)(2), 25% of all *cy pres* funds attributed to *A.G. v. Premera* must be distributed to the Legal Foundation of Washington.



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funds, if any, must be dedicated to assisting to access the NDT, ABA and other essential health care services and coverage for their developmentally disabled insureds. As in *Lane*, this type of "mission statement" codifies a nexus between the lawsuit and the objectives of any recipient. *Id.* at 822. It tells the Court and absent class members exactly how the excess funds will be used. *Id.*

The *cy pres* doctrine does not require the parties to select a specific organization to provide the *cy pres* assistance in the Settlement Agreement. Importantly, here, a *cy pres* distribution could only occur ***after*** all class members' claims have been compensated at 100%, and is not a substitute for direct compensation of class members. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 176 (3d Cir. 2013). Because any *cy pres* award must go to organizations to assist families with a developmentally disabled family member to access health care and health coverage, the distribution will, with reasonable certainty, benefit absent class members who fail to submit claims. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011).

The question of the specific organization(s) to receive funds is better considered after the class claims process. At that time, the Court will know the full amount available for *cy pres* distribution. The parties will meet and confer to identify a specific organization or organizations which will receive the funds pursuant to a Court order to ensure that the funds are dedicated to assisting families with a family member with a developmental condition to access health care and health coverage. The size of the potential distribution matters a lot and will determine which Washington state nonprofits are willing to submit proposals to provide the assistance described in the *cy pres* provision. Under the Settlement Agreement, the Court, rather than the parties or a third-party entity (as in *Lane*), will make the final decision as to the proper distribution



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of the *cy pres* funds. This process will be more open, public and transparent than the Ninth Circuit-approved *cy pres* distribution in *Lane*. [9]

Where, as here, the amount of *cy pres* funds to be distributed after a claims process is unknown, courts and settlement parties typically postpone identifying a particular *cy pres* recipient. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (Ninth Circuit declines to consider the propriety of the Settlement Agreement's *cy pres* distribution provision before it was known whether any excess funds remained after the claims process which would "trigger" the *cy pres* distribution); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1309 (9th Cir. 1990) ("After the claims period has expired and the amount of the unclaimed funds is known, the district court will be in a better position to determine [the appropriate *cy pres* distribution]."); *see, e.g., Bellows v. NCO Fin. Sys.*, 2008 U.S. Dist. LEXIS 114451, *10 (S.D. Cal. 2008) (settlement agreement approved by the court provides that *cy pres* award will be made to a "mutually agreed-upon organization" meeting certain requirements, once the amount of *cy pres* funds to be distributed was known). The Court should postpone any consideration of the specific *cy pres* provision in the Settlement Agreement until the claims process concludes and there are excess funds for distribution.

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[9] The Court indicates that it is concerned that absent class members have notice of the identity of the ultimate *cy pres* recipients. Dkt. No. 65, p. 10. Absent class members in *Lane*, however, had no notice of the ultimate *cy pres* recipients. The selected *cy pres* recipient Digital Trust Foundation (DTF) was a charitable organization with a three-member Board of Trustees set up by the litigating parties to do nothing more than receive the $9.5 million in *cy pres* funds and pass them through to unidentified grantees. *Lane,* 696 F.3d at 817. Here, given the unknown amount of available *cy pres* funds (and the chance that the *cy pres* funds, if any, might be modest), it makes little sense for the Settlement Fund to create a similar pass-through nonprofit. The parties have determined that the better, more financially efficient and transparent approach is to have the *cy pres* distribution occur publicly through judicial approval. *See Lane,* 696 F.3d at 822.



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**F. The Proposed Notice, Opt-Out and Claim Forms Should Be Approved.**

Class counsel has revised the proposed Class Notice, Opt-Out Form and Claim Form to address the Court's concerns, providing both final and redlined versions. *See* Dkt. Nos. 66-1 to 66-4. Class counsel has also drafted a notice plan to detail the web-based notice protocols, as described by the Court. Dkt. No. 66-5.

**G. Proposed Scheduling Order**

Class counsel has conferred with Premera's counsel and identified a proposed revised schedule, submitted to the Court in Dkt. No. 66-6.

**H. A Final Approval Hearing Should Be Set.**

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

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



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## VI. CONCLUSION

R.H. respectfully requests that the Court:

(a) preliminarily approve the Settlement Agreement;

(b) authorize the mailing of notice to *R.H.* NDT class and *R.H.* ABA class members;

(c) approve the notice plan; and

(d) establish a final settlement approval hearing and process.

DATED: July 30, 2014.

SIRIANNI YOUTZ
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## CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- **Barbara J Duffy**
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and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

- (No manual recipients)

DATED: July 30, 2014, at Seattle, Washington.

*/s/ Richard E. Spoonemore*
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