

HON. RICHARD A. JONES

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7
8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 R.H., by and through his parents and
11 guardians, P.H. and N.B.-H., individually, on
12 behalf of WASHINGTON ALLIANCE FOR
13 HEALTHCARE INSURANCE TRUST
14 HEALTH BENEFIT PLAN, and on behalf of
similarly situated individuals and plans,

15 Plaintiff,

16 v.

17 PREMERA BLUE CROSS, LIFEWISE
18 HEALTH PLAN OF WASHINGTON

19 Defendants.

NO. 2:13-cv-00097-RAJ

MOTION FOR ATTORNEYS FEES,
EXPENSES AND INCENTIVE
AWARDS

**Noted for Hearing:
January 9, 2015**

20 **I. INTRODUCTION**

21 In a landmark settlement, class counsel obtained broad prospective relief for
22 thousands of Premera insureds - valued at no less than \$3 million in covered claims
23 per year - in addition to a cash fund for back neurodevelopmental therapy benefit
24 claims totaling \$3.5 million. As a result of class counsels' years of effort, children with
25 developmental disabilities who have Premera coverage will be able to access medically
26 necessary Neurodevelopmental Therapy (NDT) and Applied Behavior Analysis (ABA)

1 therapies to treat their conditions. For many children, access to these therapies is life-
2 changing - even to the point of preventing lifelong disability. *The Seattle Times*
3 recognized this, and went out of its way to applaud the efforts of class counsel as the
4 only meaningful enforcement of Washington's Mental Health Parity Act:

5 ...Washington remains in a minority of states without an
6 insurance mandate to cover these therapies. The Legislature
7 has failed to act, and so has the state insurance commissioner.

8 But a series of lawsuits since 2010 has begun to change all
9 that. One insurer after another - including Group Health,
10 Medicaid, the state employees' plan and, just this week,
11 Premera - have settled suits and begun coverage.

12 ...

13 [Insurance Commissioner Mike] Kreidler and the Legislature
14 left enforcement to class-action lawyers, in particular
15 attorneys Rick Spoonemore and Ele Hamburger.

16 These attorneys' settlement with Premera this week is a
17 significant victory for families raising children with autism.
18 True mental health parity has a long way to go but it is now a
19 journey a little less far.

20 Hamburger Decl., *Exh. A*, "State Needs Mandate to Cover Autism Therapy," *The Seattle*
21 *Times*, May 21, 2014.

22 Class counsel now seeks a fee award of \$1,225,000, or 35% of just the cash fund.
23 This amount represents less than 18% of the *total* benefit to class members, which
24 includes not only the back benefits cash but also the value of prospective relief securing
25 coverage of medically necessary NDT and ABA services for all Premera insureds. *See*
26 *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1305 (W.D. Wash. 2001) ("[T]he
'benchmark' percentage of recovery fee is 25% of the recovery obtained, *including*
future benefits.") (emphasis added).

1 Class counsel also seek reimbursement of \$66,681.72 in costs incurred to date in
2 all three cases¹ and incentive awards of \$25,000 for each named plaintiff family in each
3 case (totaling \$100,000) to account for their time, effort and risk in prosecuting these
4 cases.

5 II. BACKGROUND

6 For years Premera ignored the requirements of Washington's Mental Parity Act,
7 RCW 48.43.341, ("Parity Act") when it came to covering services for insureds with
8 developmental disabilities. Although the Parity Act required coverage of all medically
9 necessary services to treat conditions listed in the Diagnostic and Statistical Manual
10 (DSM), Premera applied the Parity Act only to psychiatric conditions. Developmental
11 DSM conditions such as autism, expressive language disorder and mental retardation
12 continued to be excluded from full coverage. For example, Premera completely
13 excluded coverage of NDT (speech, occupational and physical therapies to treat
14 developmental conditions) from its individual plans, and excluded all such coverage
15 for insureds over the age of six from its group plans. Moreover, Premera continued to
16 apply a "developmental disabilities" exclusion, allowing the insurer to eliminate all
17 coverage for any condition considered "developmental" in nature, such as autism or
18 any service deemed to treat only developmental disabilities. Premera routinely
19 informed its insureds who asked that ABA therapy to treat autism was not covered.
20 Hamburger Decl. ¶2.

21 On April 17, 2012, King County Superior Court Judge Michael J. Trickey ruled
22 that Premera's "developmental disability" exclusion violated both the Parity Act and
23 Washington public policy:

24
25 ¹ Class counsel will submit a supplemental brief prior to the Final Approval Hearing on January 9,
26 2014, identifying any additional litigation expenses to be included in this amount.

1 Given the broad mandate regarding mental health services in
2 the Mental Health Parity Act, RCW 48.44.341, and pursuant
3 to Washington’s Declaratory Judgment Act, RCW 7.24, *et seq.*,
4 Plaintiff A.G. is entitled to a declaration that the exclusion in
5 Defendants’ policies for “[s]ervices, therapy and supplies
6 related to the treatment of ... developmental delay or
7 neurodevelopmental disabilities” violates Washington public
8 policy and the Mental Health Parity Act. The Court declares
9 the exclusion void and unenforceable in this case.

7 Under the Mental Health Parity Act, Defendants must
8 provide coverage for all medically necessary “mental health
9 services” to the same extent as they provide coverage for
10 other medical and surgical services. Neurodevelopmental
11 therapies are “mental health services” designed to treat
12 autism, a mental disorder listed in the DSM-IV. Since
neurodevelopmental therapies may be medically necessary to
treat autism, Defendants cannot use a blanket exclusion to
deny coverage for those therapies.

13 Dkt. No. 9, *Exh. B*, p. 3. Despite Judge Trickey’s injunctive and declaratory Order,
14 *Premera continued to apply the exclusion to all other Washington insureds except for*
15 *A.G.* It took more than a year of fighting Premera’s procedural maneuvers up to the
16 Washington Court of Appeals, back down to the trial court and then up to the
17 Washington Supreme Court before plaintiffs obtained court-ordered classwide
18 injunctive relief for Premera’s non-ERISA insureds. *See* Hamburger Decl., ¶¶3-6, Dkt.
19 No. 41, *Exh. A*, and Dkt. No. 52. Only after Premera lost its battle to avoid classwide
20 injunctive relief in state court did it finally agree to negotiate a settlement involving all
21 three cases, including this ERISA case. *See* Dkt. No. 53.

22 Premera fought hard to avoid prospective relief because that relief represents
23 the most significant cost to the insurer (and the greatest benefit to Premera insureds).
24 The reason is clear: many people simply cannot afford medical services. However,
25 when insureds know they have coverage, they are able to access medically necessary
26 services. This is known as the “insurance effect.” *See* Fox Decl., ¶¶8-9; Dkt. No. 69,

1 *Exh. A*, pp. 9, 19-23 (describing the “insurance effect” and the research documenting it).
2 Dr. Fox concludes that the value of just one year of injunctive relief for NDT services
3 alone is, conservatively, \$3,055,794. Fox Decl., ¶9. Under the settlement, there is no
4 limit on the duration of the prospective relief. Yet, considering the prospective relief
5 obtained for *just one year* and *only for NDT* (even though prospective relief was also
6 obtained for ABA services), the value to the Class when, combined with the cash
7 settlement fund, is more than \$6.5 million. *Id.*, ¶¶9-11.

8 Providing prospective relief for thousands of developmentally disabled Premera
9 insureds has an additional, dramatic impact on the lives of class members that cannot
10 be easily quantified. As Stephen Glass, M.D., plaintiffs’ expert neuropsychologist
11 opined, the relief obtained can be *life-altering*:

12 NDT services are the only specialized health interventions
13 provided to treat the needs of young developmentally
14 disabled children. *These interventions, if provided on a*
15 *timely and sufficiently intensive basis, often have the*
16 *capacity to enhance the developmental skill attainment of*
17 *such children with special needs, restore a child’s*
18 *development to more normal functioning or as near normal*
19 *as possible, build adaptive and compensatory skills that*
20 *serve to advantage, especially during early developmental*
21 *years, and provide an individualized program of treatment,*
22 *support and stimulation that will ultimately be reflected in a*
23 *child’s later cognitive ability.*

24 Children who need these therapies, but do not receive them
25 (or do not receive them in a timely manner and at the
26 required intensity), are likely to lose the developmental
“window of opportunity” to have the impact of their
developmental deficits reduced to the maximum degree, or
to enjoy the prospects of their development being restored to
normal functioning, or, at the very least, as near to normal
functioning as possible. The harm attendant in any delay in
providing NDT services is real and substantial. Especially for
the very young child, losing access to needed therapies in a

1 timely manner can make reversible or treatable
2 developmental conditions more severe, of greater long-term
3 functional impact and, at times, devastating and unneeded
 consequences may be seen.

4 Glass Decl., ¶¶6-7 (emphasis added). As a result of the named plaintiffs' efforts and
5 that of their counsel, hundreds of thousands of Washington insureds now have access
6 to coverage for medically necessary NDT and ABA services. When these therapies are
7 timely and appropriately provided within the "developmental window of
8 opportunity," children's conditions can be dramatically improved.² *Id.*

9 The \$3,500,000 common fund for payment of back benefits is significant as well.
10 Class counsel anticipates that the settlement amount will be sufficient to pay all claims
11 at 100% even after the payment of attorney fees, costs, incentive awards and costs of
12 administration. Dkt. No. 63, Spoonemore Decl., ¶2. If insufficient funds remain to pay
13 all claimants at 100%, then all class members will receive a *pro rata* distribution of their
14 approved claim amount. Dkt. No. 62-1, *App. 1*, ¶ 8.4.7. This distribution is in addition
15 to the far-reaching prospective relief obtained.

16 Few class action cases have such dramatic effect on the lives of class members.
17 When they do, courts appropriately order attorneys fees awards that reflect the
18 extraordinary results. For example, in *D.F. v. Wash. Health Care Auth.*, King County
19 Superior Court, No. 10-2-29400-7, a similar common fund settlement was reached for
20 \$3.5 million. Dkt. No. 69, *Exh. K*, p. 6. The settlement included both prospective
21 coverage of ABA therapy to treat ASD, and a common fund out of which payment of
22 unpaid ABA claims would be made. All *D.F.* claims were paid at 100% with residual

24 ² Some children may ultimately "recover" from their developmental condition with timely, intensive
25 interventions. See http://www.nytimes.com/2013/01/17/health/some-with-autism-diagnosis-can-recover-study-finds.html?_r=0 (In one study, children who lost the ASD diagnosis were twice as likely to
26 have received behavioral therapy such as ABA as those who continued to have the diagnosis).

1 funds awarded by the D.F. Court under the *cy pres* doctrine. *Id.*, ¶6. Judge Susan
2 Craighead granted class counsel request for attorneys' fees of 33% of the common fund,
3 or \$1,155,000.00. Dkt. No. 69, *Exh. K*, p. 6. The D.F. court also ordered \$25,000 to each
4 named plaintiff family as an incentive award. *Id.*

5 Class counsel now seeks an award of fees based upon the common fund analysis
6 of \$1,225,000, representing 35% of the cash fund, but less than 18% of the total benefit
7 resulting from the litigation, as well as litigation costs and incentive awards of \$25,000
8 for each plaintiff family.

9 III. ANALYSIS

10 A. Legal Standard

11 The percentage-of-recovery approach is used in calculating fees in common
12 fund cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). When state
13 substantive law applies, the attorneys fees are to be awarded in accordance with state
14 law. *Id.* The only significant difference between state and federal law on calculating
15 attorneys fees is that Washington law applies the percentage method without the use of
16 any "lodestar cross-check." *Vizcaino*, 142 F. Supp. 2d at 1302 ("Under Washington law,
17 the percentage method, without a lodestar cross-check, should be used in common
18 fund cases.").

19 The primary consideration in the fee determination is the magnitude of the
20 benefit conferred on class members. "In a common fund case, the size of the recovery
21 constitutes a suitable measure of the attorneys' performance." *Bowles v. Washington*
22 *Dept. of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993); *see also Vizcaino*, 142 F. Supp. 2d
23 at 1302. *Accord*, MANUAL FOR COMPLEX LITIGATION (4TH), § 14.121 ("[T]he factor given
24 the greatest emphasis is the size of the fund created, because 'a common fund is itself
25 the measure of success ... [and] represents the benchmark from which a reasonable fee
26 will be awarded.'" (hereinafter "MANUAL"). Once the size of the total benefit to the

1 class is determined, the Court may award a percentage of the benefit as attorneys' fees.
2 In Washington state, as well as the Ninth Circuit, the benchmark percentage is 25% of
3 the total benefit. *Bowles*, 121 Wn.2d at 72; *Vizcaino*, 290 F.3d at 1047.

4 The benchmark is not a cap or ceiling on fees. "That percentage amount can
5 then be adjusted upward or downward to account for any unusual circumstances
6 involved in th[e] case." *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th
7 Cir., 1989); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1310 (9th
8 Cir. 1990) ("The benchmark percentage should be adjusted ... when special
9 circumstances indicate that the percentage recovery would be either too small or too
10 large...."). Where exceptional circumstances exist, such as class action cases which are
11 "risky and complicated," subjected to "vigorous opposition throughout the litigation,"
12 and where settlement is the result of class counsel's work, a higher percentage is
13 appropriate. *Morris v. Lifescan, Inc.*, 54 Fed. Appx. 663, 664 (9th Cir., 2003). When
14 supported by the complexity of the issues and the risks involved in the litigation, a
15 court can – and should – depart from the benchmark.

16 The Ninth Circuit has upheld awards well above the 25% benchmark as
17 reasonable when the district court has articulated the special circumstances justifying
18 the percentage, including that the settlement resulted in substantial non-monetary
19 relief. *See Morris*, 54 Fed. Appx. at 664 (33%); *Principe v. Ukropina (In re Pacific Enters.*
20 *Sec. Litig.)*, 47 F.3d 373, 379 (9th Cir., 1995) (33%); *see also In re Ampicillin Antitrust*
21 *Litigation*, 526 F. Supp. 494, 503 (D.D.C. 1981) (40.4%); *Van Gemert v. Boeing Co.*, 516 F.
22 Supp. 412, 420 (S.D.N.Y. 1981) (36%). In a study of attorney's fee awards in 2006-2007,
23 nearly two-thirds of all awards were between 25-35%, with the most common fee
24 awards in the Ninth Circuit being 25%, 30% and 33%. *In re Toyota Motor Corp.*, 2013
25 U.S. Dist. LEXIS 94485, *219 (C.D. Cal., June 17, 2013).

1 Factors that may justify departure from the benchmark include: (1) the result
2 obtained; (2) counsel's efforts, experience, and skill; (3) the complexity of the issues; (4)
3 the risks of non-payment assumed by counsel; (5) the reaction of the class; (6) non-
4 monetary benefits, such as clarification of certain points of law; and, when Washington
5 substantive law does not apply, (6) comparison with the lodestar. *Vizcaino*, 290 F.3d
6 1048-50. Even though the fees sought here are below the benchmark when taking into
7 account the value of future benefits, this case meets every factor articulated in *Vizcaino*
8 for an increase above the benchmark.

9 **B. Class Counsel Achieved Extraordinary Results**

10 **1. The Prospective Relief Obtained is Worth More than \$3 Million**
11 **per Year.**

12 The total size of the benefit is critical in common fund fee analysis. As Dr. Fox
13 explained, the majority of the value in the Settlement Agreement is in the prospective
14 relief. *See* Fox Decl., ¶9. Premera fought bitterly to avoid classwide injunctive relief,
15 and once it lost that battle in state court, it finally agreed to resolve this litigation. It is
16 also why prospective relief was, and remains, critical for class members.

17 Premera vigorously opposed prospective relief because that coverage is
18 expensive - more expensive than paying for past out-of-pocket damages. This
19 distinction is due to the "insurance effect." As Dr. Fox explains, if insureds do not have
20 coverage for a certain medically necessary treatment, the lack of coverage essentially
21 raises the price of the service for insureds. For many insureds, the loss of coverage
22 means that they will go without the service or they will use less of the service, even
23 though the service is medically necessary. Conversely, when coverage is put in place,
24 many more insureds will seek the services they need because the price of the service
25 has been effectively lowered. *See* Dkt. No. 70, *Exh. A*, pp. 19-23; Fox Decl., ¶¶8-9.

1 Based upon the insurance effect, Dr. Fox calculated that the value of coverage
2 for just medically necessary NDT services to Premera insureds to be at least
3 \$3,055,794.00 for just one year's worth of claims. *Id.*, ¶9. Thus, the total benefit for
4 Premera insureds is far more than the \$3,500,000 fund for back damages. It includes at
5 least an additional \$3 million for a single year's worth of prospective NDT claims – and
6 much, much more as the prospective relief extends indefinitely. *Id.*, ¶¶9-10.

7 **2. Prospective Relief Also Provides Substantial Non-Monetary**
8 **Benefit to Class Members.**

9 Dr. Glass describes the life-changing effect of prospective coverage of NDT
10 services. *See generally* Glass Decl. He notes that access to NDT services at the right
11 time in a child's life can mean the difference between little or no disability and lifelong
12 impairment. *See* Glass Decl., ¶¶6-8. For many class members, this benefit is far more
13 significant than the savings that prospective relief represents. Where, as here, class
14 counsel's advocacy resulted in meaningful benefits in addition to the cash settlement
15 fund, an award above the benchmark is warranted. *Vizcaino*, 290 F.3d at 1049.

16 **3. The Actual Common Fund Is Likely To Pay Claims At or Near**
17 **100%.**

18 Even considering the size of the actual common fund alone, the settlement is an
19 extraordinary result. The benchmark award of 25% contemplates compromise
20 settlements which often result in claims awards for small fractions of a class member's
21 actual loss. When class counsel is able to recover more than a small fraction of loss for
22 individual class members, courts find that the recovery is "unusual" such that an
23 award beyond 30% is warranted. *See In Re: Heritage Bond Lit.*, 2005 U.S. Dist. LEXIS
24 13555, *60 (C.D. Cal., June 10, 2005) (awarding 33 $\frac{1}{3}$ % because of "exceptional result" in
25 obtaining settlement for just 23% of class members' losses, and citing cases awarding
26 33 $\frac{1}{3}$ % or more for recoveries ranging from 10% to 17% of class members' losses). Here,

1 class counsel anticipates that a full or near full recovery can be obtained for
2 participating class members.

3 **4. Residual Funds Will Be Distributed to Organizations To Assist**
4 **Persons with Developmental Disabilities, Not Premera.**

5 Class members further benefit because any funds remaining after paying
6 claims, fees and costs will be distributed to the Legal Foundation of Washington
7 (pursuant to Washington Civil Rule 23 (f)(2)) and organizations dedicated to assisting
8 families with a family member with developmental conditions to access health care
9 and health coverage. Dkt. No. 62, *App. 1*, ¶ 8.4.6. This, too, is unusual. In many class
10 action settlements (and judgments), excess funds revert back to the defendant after the
11 claims process. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 477, 100 S. Ct. 745
12 (1980).

13 **5. The Litigation Spearheaded by Named Plaintiffs and their**
14 **Parents Benefited All Washington Insureds.**

15 In many private class actions, class counsel will “piggyback” a case on the
16 enforcement efforts of the government or on some other action. *See e.g., Swedish Hosp.*
17 *Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993). This case was just the opposite.

18 When *A.G. v. Premera* was first filed, the Office of the Insurance Commissioner
19 (OIC) routinely allowed health carriers to include exclusions like Premera’s
20 “developmental disability” exclusion. *Hamburger Decl.*, ¶7. The OIC failed to issue
21 any regulations regarding the implementation of the Parity Act, even though it had
22 been enacted years earlier. *Id.* Only after Judge Trickey confirmed that blanket
23 exclusions of services to treat developmental disabilities violated the Parity Act and
24 Washington public policy did the OIC announce that it would work on rulemaking. *Id.*
25 And, although that announcement was made in November 2012, the OIC waited until
26 after this settlement was reached with Premera in May 2014 before finally distributing

1 a "discussion draft" for rulemaking. *Id.* In sum, the efforts of named plaintiffs and
2 class counsel are and have been the primary enforcement mechanism in the State of
3 Washington for violations of the state Mental Health Parity Act. *See* Hamburger Decl.,
4 *Exh. A* ("Kreidler and the Legislature left enforcement to class-action lawyers, in
5 particular attorneys Rick Spoonemore and Ele Hamburger.").

6 **C. Effort, Experience and Skill of Class Counsel.**

7 Premera litigated these three cases to the hilt. Shortly after the *A.G. v. Premera*
8 case was filed, Premera moved to dismiss. Plaintiff did not wait for discovery. In
9 response, Plaintiff moved for injunctive relief. Hamburger Decl., ¶3. After Judge
10 Trickey issued an injunction (applicable only to A.G.) and denied Premera's motion,
11 Premera moved for discretionary review, which was accepted by the Court of Appeals.
12 *Id.* ¶ 4. Not content to sit on their hands for the year (or more) that discretionary
13 review might take, class counsel moved before the Court of Appeals and then Judge
14 Trickey to be able to have the injunction extended to all Premera non-ERISA insureds.
15 *Id.*, ¶¶ 4-6. Judge Trickey agreed that classwide injunctive relief was appropriate and
16 ultimately, in September 2013, the Washington Supreme Court permitted the injunctive
17 order issued by Judge Trickey to be entered. *Id.*; *see* Dkt. No. 52. As noted above, it
18 was the entry of that Order that brought Premera to the table to mediate all three cases.
19 *See* Dkt. No. 53. These cases involved significant, aggressive and time consuming effort
20 from class counsel.

21 This is a relevant consideration in setting the appropriate fee percentage:

22 Any appraisal of the risks inherent in instituting suit on a
23 contingent basis also requires some evaluation of the
24 character of the defense. This should focus on two aspects.
25 First, there is the degree to which protraction in the case is
26 attributable to the tactical maneuvers of the defendants.
Second, and not entirely separable from the first, the court
should evaluate the professional quality of the defense.

1 Thus, some courts have indicated that the quality of
2 opposing counsel bears on the risk factor.

3 7B FED. PRAC. & PROC. CIV., *Attorney Fees – Standards for Assessing* §1803.1 (3d ed.).
4 Premera’s aggressive procedural maneuvers to avoid classwide injunctive relief, and
5 Class counsel’s determined (and successful) efforts to undo them merit an above-the-
6 benchmark award.

7 Class counsel had the right combination of class action and substantive
8 ERISA/insurance law experience. They also retained top Washington experts in
9 autism and neurodevelopmental conditions, including Stephen T. Glass, M.D., one of
10 the region’s leading pediatric neurologists; Charles Cowan, M.D., the medical director
11 of Seattle Children’s Autism Center; and Ilene Schwartz, Ph.D., the Director of the
12 University of Washington’s Haring Center for Applied Research and Training in
13 Education, and a local expert on the provision of ABA therapy. Hamburger Decl., ¶9.
14 Class counsel’s ability to navigate the complex legal, regulatory and substantive mental
15 health framework for all three cases was critical to their success.

16 **D. Extraordinary Risk Assumed by Class Counsel.**

17 These three cases, all of first impression, were fraught with risk from the
18 beginning. As noted above, the OIC had been asleep at the regulatory wheel, allowing
19 insurers to include within their health plans all sorts of blanket exclusions which
20 eliminated coverage of medically necessary mental health services. Hamburger Decl.,
21 ¶8. Premera raised the OIC’s inaction as justification for its exclusionary practices at
22 every turn. *See e.g.*, Dkt. No. 8, pp. 11-12; Dkt. No. 37, p.17; Dkt. No. 45, p. 4; Dkt. No.
23 49, pp. 3-4. A loss at any point would have killed all three lawsuits. This fact also
24 justifies an upward adjustment from the usual range:

25 [T]he Court recognizes that the case was extremely risky for
26 class counsel to pursue because of negative facts, no
controlling law and the vigorous defense of the case. Courts

1 have recognized that a high risk factor is one reason for
2 increasing class counsel’s attorney fee award above the
3 “benchmark” 25% fee.

4 *Vizcaino*, 142 F. Supp. 2d at 1303.

5 In addition to being risky from a legal and factual perspective, this case posed
6 financial risks to class counsel. Not only were class counsel’s fees contingent upon
7 success, but costs were as well. See RPC 1.8(e)(2) (“[I]n matters maintained as class
8 actions only, repayment of expenses of litigation may be contingent on the outcome of
9 the matter.”). A loss would have cost class counsel over 1,000 hours in lost income-
10 generating time (representing more than \$600,000 in time value) and approximately
11 \$66,681.72 in earned firm income that was expended on costs. Hamburger Decl.,
12 *Exhs. B-D*. This is an extraordinary commitment for a small law firm. See A. Conte,
13 ATTORNEY FEE AWARDS, §2.22 (3d ed. 2012) (“special factors” include “burdens caused
14 by the expenditure of time and money by a small firm”); *Municipal Authority of Town of*
15 *Bloomsburg v. Com. of Pa.*, 527 F. Supp. 982, 994 (M.D. Penn. 1981) (“expending 795.3
16 hours ... without any guarantee of remuneration over a period of almost two years” is
17 “a substantial financial risk to a small firm”).

18 Class counsel also had to turn away hourly work and other attractive contingent
19 fee matters because of the time and financial commitment demanded by this litigation.
20 Hamburger Decl., ¶10. These risks, on a novel legal claim, were far from typical even
21 for a contingent fee case. Where, as here, the litigation has resulted in broad public
22 policy change benefitting thousands of Washington residents, the risks involved
23 should be incentivized. *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330,
24 1364 (S.D. Fla. 2011) (“[G]iven the positive societal benefits to be gained from lawyers’
25 willingness to undertake difficult and risky, yet important, work like this, such
26 decisions must be properly incentivized.”).

1 **E. Reaction of the Class**

2 It is too early in the claims process for the Court or Class counsel to evaluate the
3 reaction of the Class. To date, however, class counsel has only received a single opt-
4 out, and class members with NDT claims who have called report to Class counsel that
5 they are pleased with the results. Hamburger Decl., ¶11. If class members' approved
6 claims are paid in full, then a fee award of 35% will not prejudice any class member.

7 **F. Complexity and Novelty of the Issue**

8 "Courts have recognized that the novelty, difficulty and complexity of the issues
9 involved are significant factors in determining a fee award." *In Re: Heritage Bond Lit.*,
10 2005 WL 1594403, *20.

11 Cases of first impression generally require more time and
12 effort on the attorney's part ... [counsel] should not be
13 penalized for undertaking a case which may 'make new law,'
[but] appropriately compensated for accepting the
14 challenge."

15 *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974). This was not a
16 cookie-cutter securities or stock-drop case. Class counsel brought the first cases
17 interpreting and enforcing the state Mental Health Parity Act in our state and among
18 the very first in the country. Based upon the path blazed by the Premera litigation,
19 attorneys representing children with ASD in other states are achieving the same or
20 similar outcomes. See *A.F. v. Providence Health Plan*, 2014 U.S. Dist. LEXIS 109507 *45
21 (D. Ore., Aug. 8, 2014) (following Judge Trickey's decision in *A.G. v. Premera* by
22 holding that Providence Health Plan's "developmental disabilities" exclusion violates
23 both the Oregon and Federal Mental Health Parity Acts).

1 **G. Lodestar Cross Check**

2 As noted above, the lodestar cross-check does not apply under Washington
3 substantive law. *Vizcaino*, 142 F. Supp. 2d at 1302. Nonetheless, even if the cross-check
4 is applied, the requested \$1,225,000 represents a multiplier of only 2.0.

5 When comparing to the lodestar, multipliers range from 0.6 to 19.6, with most in
6 the 1.0 to 4.0 range. *Vizcaino*, 290 F.3d at 1051, n. 6. Multipliers of 4 or higher are often
7 approved. *Vizcaino*, 142 F. Supp. 2d at 1305 (multiplier of 3-4 is “wholly justified” by
8 duration of case and combative nature of defendant). *See also* NEWBERG ON CLASS
9 ACTIONS, § 14.6 (multipliers of five or more justified in significant recoveries, collecting
10 cases); *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1122 (C.D. Cal. 2008)
11 (approving 5.2 multiplier, “there is ample authority for such awards resulting in
12 multiplier in this range or higher” and noting that a court should not punish efficient
13 counsel: “[o]ther counsel ... would likely have had to expend considerably more time
14 to accomplish the same result.”) (collecting cases). Class counsel’s request for
15 \$1,225,000 is well within the appropriate range for reasonable multipliers, especially
16 given the risks and benefits involved in the cases.

17 **H. Class Counsel’s Out-Of-Pocket Costs and Expenses Should Be Reimbursed.**

18 Litigation costs are recoverable in a class action settlement. *Staton v. Boeing Co.*,
19 327 F.3d 938, 975 (9th Cir. 2003); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362,
20 1366 (N.D. Cal. 1996) (“Reasonable costs and expenses incurred by an attorney who
21 creates or preserves a common fund are reimbursed proportionately by those class
22 members who benefit by the settlement”). The expenses are awarded “in addition to
23 the fee percentage.” Conte, ATTORNEY FEE AWARDS §§2.08, 2:19 (3d ed.); *In re*
24 *Businessland Sec. Lit.*, 1991 U.S. Dist. LEXIS 8962, *6 (June 18, 1991) (same; collecting
25 cases). Reimbursement of the costs is subject to the court’s determination of relevance
26 and reasonableness. *Id.*

1 As of September 12, 2014, Class counsel had incurred \$66,681.72 in costs and
2 out-of-pocket expenses for all three cases. *Hamburger Decl., Exhs. B-D*. The bulk of the
3 expenses relates to payments to the experts hired by the plaintiff Class, the costs of
4 mediation, and discovery-related expenses. *Id.* Class counsel has been paying for all
5 costs out-of-pocket with no guarantee of ever being repaid if the action was lost. Class
6 counsel had every incentive to be cautious in incurring costs. All of those costs were
7 necessary to achieve the settlement of this matter, and were reasonable.

8 **I. Incentive Awards of \$25,000 per plaintiff family are appropriate.**

9 The Court has the discretion to order incentive awards, and courts routinely do
10 so for class representatives who act as a private attorney general and undertake
11 financial and reputational risks for the class. *Rodriguez v. West Publ'g Corp.*, 563 F.3d
12 948, 958 (9th Cir. 2009); *see, e.g., In re GNC Shareholder Litig.*, 668 F. Supp. 450, 451 (W.D.
13 Pa. 1987); *Linney*, 1997 WL 450064 at *7; *see generally* Newberg, § 11.38. A study by the
14 Federal Judicial Center of four federal district courts found that a substantial number of
15 class action settlements included designated awards to class representatives.
16 T. Willging, L. Hooper, and R. Niemic, *Empirical Study of Class Actions in Four Federal*
17 *District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial
18 Center 1996). In 1994, the median incentive awards to class representatives in northern
19 California was \$17,000 and ranged up to \$28,600 in cases with an average monetary
20 settlement of \$10 million. *Id.*, p. 26. A more recent study revealed that in insurance
21 class action litigation, the average incentive award was \$28,708.90. *See* Theodore
22 Eisenberg & Geoffrey P. Miller, *Symposium: Emerging Issues in Class Action Law:*
23 *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 *UCLA L. Rev.* 1303,
24 1308, 1333 (Aug. 2006) (Across all categories of cases, the average award was \$15,992
25 per class representative). The proposed \$25,000 award for each plaintiff family is well
26 within the range of incentive awards granted in similar class action litigation.

1 Courts have used the following criteria when determining the amount of an
2 incentive award:

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

10 *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329 (W.D. Wash. 2009). The
11 declarations of the named plaintiffs' parents demonstrate that each have undertaken
12 significant risk, effort, and time away from work and their families to act as a private
13 attorney general in this litigation.

14 Each parent spent many hours attempting to obtain coverage for their child, pre-
15 litigation. *See e.g.*, P.H. Decl., ¶4. P.N. and M.M. undertook hours of effort to appeal
16 Premera's denials administratively. M.M. Decl., ¶4; P.N. Decl., ¶¶5-8. P.N. even filed
17 a complaint with the Office of the Insurance Commissioner on behalf of her two
18 daughters. *Id.* The parents completed these appeals and complaints on their own
19 without legal representation. *Id.*, ¶8; M.M. Decl., ¶4.

20 Premera deposed at least one parent of every named plaintiff, and sometimes
21 both parents in depositions that lasted many hours. *See* J.G. Decl., ¶7; P.N. Decl., ¶9;
22 M.M. Decl. ¶6; P.H., ¶5. These depositions were extremely difficult and stressful for
23 the plaintiff parents as they were forced to recount their children's diagnostic odyssey
24 in a hostile environment. *See id.*; *see also* Dkt. No. 69, ¶4(c). While Premera's counsel
25 was professional while fulfilling their obligations as defense counsel, the plaintiff
26 parents experienced the depositions as if Premera blamed them for not having their
children diagnosed earlier, or for being unable to afford the treatment that their child
needed after Premera's denials. *Id.* As M.M. describes the experience, "I was asked

1 painful questions about J.'s medical and developmental history and even my divorce. I
2 felt that making me relive all of these painful experiences just to get Premera to cover
3 the services that they should have always covered was wrong. Nonetheless, I
4 answered Premera's questions and would do so again in order to get J. and other
5 insureds the services they need." M.M. Decl. ¶6.

6 Premera served extensive discovery on each family, sometimes asking for
7 medical, educational and psychological/behavioral records going back more than ten
8 years. P.H. Decl., ¶6; M.M. Decl., ¶5; P.N. Decl., ¶10; J.G. Decl., ¶6. For one plaintiff,
9 Premera sought 23 years of records. M.M. Decl., ¶5. One set of parents tracked their
10 exact hours, recording more than 18 hours to gather and organize the extensive
11 documents requested by Premera in discovery. *See e.g.*, J.G. Decl., ¶6; *see also* P.H.
12 Decl., ¶10. The plaintiff families also had to respond to and reassure their children's
13 medical, mental health and educational providers who received subpoenas for their
14 records. P.H. Decl., ¶6; M.M. Decl., ¶7; P.N. Decl., ¶10; J.G. Decl., ¶8.

15 Named plaintiffs had at least one and sometimes both parents participate in the
16 multiple mediation sessions. P.H. Decl., ¶7; M.M. Decl., ¶8; P.N. Decl., ¶11; J.G. Decl.,
17 ¶9; *see* Dkt. No. 63, ¶2 (a total of five mediation sessions were held with three different
18 mediators). The parents had to make extensive arrangements for time off from work,
19 specialized child care for their children with ASD, and most traveled long distances to
20 attend. *Id.* Many lost work income for the time taken to participate in mediation. *Id.*
21 For one mediation session, Plaintiff J.P.'s mother had to shovel her way out of several
22 feet of snow at her mountain home outside of Bellingham and drive two hours to
23 attend the mediation, and when it was over, drove home again in a snow storm. M.M.
24 Decl., ¶8.

25 In sum, each of the parents took their role as private attorney general and
26 fiduciary for thousands of developmentally disabled Premera insureds very seriously.

1 They committed much of their limited free time and lost work hours in order to see this
2 case to its very successful completion. They had many uncompensated expenses
3 arising from this case, including the cost of specialized child care, transportation, and
4 lost pay. But each of them would do it all again. As P.N. said about her two daughters
5 with ASD, "I worried about how they would learn the basis for their lives - things that
6 other people take for granted, things that are necessary for them to have a life worth
7 living. I knew we could not wait to get them help. They need help now and so did
8 many other children. That is why we became a part of this lawsuit, despite the stress,
9 difficulty and expense associated with it." P.N. Decl., ¶17. In light of the plaintiff
10 parents' unfailing commitment to ensuring that other children who have
11 developmental disabilities obtain access to NDT and ABA therapies that they need,
12 incentive awards of \$25,000 per plaintiff family should be authorized.

13 Only plaintiff R.H. is before the Court in this case. Class counsel requests that
14 this Court award R.H., by and through his parents P.H. and N.B.-H., an incentive
15 award of \$25,000.

16 IV. CONCLUSION

17 For the foregoing reasons, the Class respectfully requests that this Court grant
18 its Motion and award attorneys fees of \$1,225,000, and an incentive award of \$25,000 to
19 R.H., by and through his parents P.H. and N.B.-H., and reimbursement of all costs and
20 out-of-pocket expenses, totaling at present \$66,681.72.

21 DATED: September 11, 2014.

22 SIRIANNI YOUTZ
23 SPOONEMORE HAMBURGER

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