HON. RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

K.M., by and through his parents and guardians, L.M. and E.M., individually, on behalf of GARRIGAN LYMAN GROUP HEALTH BENEFIT PLAN, and B.S., by and through his parents and guardians, E.S. and R.S., individually, on behalf of THE WESTERN CLEARING CORPORATION HEALTH BENEFIT PLAN, on behalf of similarly situated individuals and plans, and DISABILITY RIGHTS WASHINGTON, Plaintiffs, v. REGENCE BLUESHIELD; and CAMBIA HEALTH SOLUTIONS, INC., f/k/a THE REGENCE GROUP, Defendants.	NO. 2:13-cv-01214-RAJ CLASS COUNSEL'S **REPLY** IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS AND INCENTIVE AWARDS **NOTED FOR CONSIDERATION: September 11, 2015 at 9:00 a.m.**

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I. INTRODUCTION

729,533 households received notice of class counsel's request for attorneys' fees, costs and incentive awards for the class representatives. Dkt. No. 89, ¶2, *Exh. A*. They were informed, in multiple places on both the mailed notice and in the web-based notice, that they had the right to object. Dkt. No. 80, pp. 7-8, 14; *See* www.sylaw.com/RegenceSettlement.

No class member objected to these requests. Dkt. No. 89, ¶4, *Exhs. D* and *E*. This is "significant evidence that the proposed fee request is fair." *In re Ravisent Tech., Inc. Sec. Litig.*, 2005 WL 906361, *11 (E.D. Pa., April 18, 2005) (collecting cases).

> We find that the total absence of objections to the requested fees weighs in favor of finding that the percentage of the settlement fund requested [35%] is appropriate. *See in re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004) ("The absence of objections supports approval of the Fee Petition."); *In re Rent-Way Sec. Litig.*, 305 F.Supp.2d 491, 515 (W.D. Pa. 2003) ("[T]he absence of substantial objections by other class members to the fee application supports the reasonableness of Lead Counsels' request."); *In re Aetna*, 2001 WL 20928, at *15 ("[T]he Class members' view of the attorneys' performance, inferred from the lack of objections to the fee petition, supports the fee award.").

Bradburn Parent Teacher Store, Inc. v. 3M, 513 F.Supp.2d 322, 338 (E.D. Pa. 2007) (awarding class counsel 35%). Here, of course, the result is so good that all approved claims will be paid at 100% (with over $1,000,000 in *cy pres* funds) if the attorneys' fees, costs and incentive awards are approved. Approval of the requested fees, costs and incentive awards will have no impact on any class member's recovery.

Class counsel's request should be approved. For its efforts in this case, class counsel now seeks, from this Court, a fee award of $1,400,000, or 35% of the $4,000,000

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allocated to this case.[1] The request for 35% of just the cash fund represents less than 14% of the ***total benefit*** to class members, which includes not only the back benefits but also the value of prospective relief securing coverage of medically necessary NDT and ABA services. *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); Dkt. No. 75, ¶7 (showing calculation).

The costs associated with this case and *J.T./S.A.*, $31,109.32, are modest for this type of litigation. Dkt. No. 73, pp. 19-21, 28-30 (cost ledgers); Spoonemore Decl. Re: Reply on Fees and Costs, ¶2 ($479.40 in additional litigation expense incurred since October 10, 2014 ledgers). They should be approved as well. Finally, incentive awards of $25,000 for each named plaintiff to account for their time, effort and risk in prosecuting this case should be approved. Again, no class member is prejudiced by any of these awards: all approved claims will be paid at 100% with over $1,000,000 in surplus funds to grant to organizations.

II. LAW AND ARGUMENT

A. The Extraordinary Results in this Case Merit An Award of the Requested Attorneys' Fees.

As described in the opening brief, the Ninth Circuit's percentage method of awarding attorneys' fees is "results-oriented." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Attorneys who achieve remarkable results in extraordinary

[1] Class counsel is seeking separate awards from both this Court and the State Court in *O.S.T.* based on a two-thirds to one-third allocation between the two courts. Dkt. No. 78, pp. 7-8 (Court requesting class counsel to "preliminarily advise the court what percentage of the common fund will be sought based on work performed in connection with the cases before this court."); Dkt. No. 79, pp. 4-5 (Class counsel's response to the Court, separating the relief sought from this court from the relief sought in the state court by allocating $4,000,000 of the fund to this Court, and $2,000,000 to the *O.S.T.* case based on the number of ERISA and non-ERISA insureds covered by the fund.) This allocation will allow each court, without interfering with the other court, to make a fee award based just on the action before it.

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circumstances should receive compensation that reflects the risks undertaken and the results achieved. *Morris v. Lifescan, Inc.*, 54 Fed. Appx. 663, 664 (9th Cir. 2003); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989) ("That percentage amount can then be adjusted upward or downward to account for any unusual circumstances involved in th[e] case.").

Here, class counsel achieved a resolution that (1) guaranteed coverage of neurodevelopmental and Applied Behavior Analysis (ABA) therapies without age or treatment limitations; (2) established clinical coverage criteria for ABA therapy so that Regence insureds can easily determine how to obtain ABA therapy; (3) obtained a judicial determination that all blanket exclusions of medically necessary mental health services violate the Washington Mental Health Parity Act, reaching far beyond the specific exclusions at issue in this case; (4) established a settlement fund of $6 million for payment of back benefits for neurodevelopmental therapies; (5) achieved ***payment of all claims from the Settlement Fund at 100%;*** and (6) ensured that there will be substantial residual funds from which a *cy pres* award will be made to an organization or organizations that assist individuals with developmental conditions and their families access health care and health coverage. As Dr. Stephen T. Glass, widely recognized as the leading pediatric neurologist in Washington State, declared, the "lives of many thousands of children have been and will be improved as a result of this litigation." Dkt. No. 83, ¶12.

Class counsel and plaintiffs took on the battle against the largest carrier in the State alone. As *The Seattle Times* concluded in May 2014, class counsel became *de facto* regulators when it came to enforcement of the Washington Mental Health Parity Act:

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

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Dkt. No. 75-1, p. 37 (*Exh. B* to Spoonemore Decl.), "State Needs Mandate to Cover Autism Therapy," *The Seattle Times*, May 21, 2014. Where, as here, attorneys undertake risky litigation in cases of first-impression and pursue the cases vigorously, successfully, and with results that benefit not only class members but also the general public, the attorneys' fee award should reflect those results.

Class counsel's lodestar fees in the cases before this Court total $495,167. Dkt. No. 75-2, pp. 2-23 ($216,971.50); Dkt. No. 75-3, pp. 2-17 ($157,222); Spoonemore Decl. Re: Reply on Fees and Costs, ¶3, *Exh. A* ($120,973.50 in fees since August 15, 2014 not reflected in prior timesheets filed with the court). The multiplier cross-check is therefore less than 3, easily passing muster under the Ninth Circuit common fund fee jurisprudence. *Vizcaino*, 290 F.3d at 1051 (multiplier of 3.65 "was with the range of multipliers applied in common fund cases").

B. Class Counsel's Out-Of-Pocket Costs and Expenses Should Be Reimbursed.

No class member objects to payment of class counsel's litigation costs which, given the scope of the litigation, are quite modest. As of July 31, 2015, class counsel had incurred $31,109.32 in litigation costs in the cases before this court. Dkt. No. 73, pp. 19-21, 28-30 (cost ledgers); Spoonemore Decl. Re: Reply on Fees and Costs, ¶2 ($479.40 in additional litigation expense incurred since October 10, 2014 ledgers). All of those costs were necessary to achieve the settlement of this matter and are reasonable.

C. Incentive Awards of $25,000 per Plaintiff Are Appropriate.

The proposed incentive awards are reasonable. Not a single person objected to compensating the named plaintiffs for the time, expense, and risk associated with being named plaintiffs in this lawsuit. Spoonemore Decl. Re: Reply on Fees and Costs, ¶4. The parents spent countless hours advancing the cause of the class while simultaneously caring for children with intense medical needs. Dkt. No. 86, ¶¶6-8; Dkt. No. 85, ¶¶6-9. They risked alienating their employers and providers. *See e.g.* Dkt. No. 85, ¶6-9.

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DRW was required to spend 288.1 hours responding to Regence's voluminous discovery requests. Dkt. No. 84, *Exh. A*. The time value of its attorneys for these tasks is $60,269.50. *Id*. Its request for $25,000 is less than half of its documented costs.

Incentive awards will encourage parents to stand up for other families who might not be able to withstand the pressures (both financial and emotional) of litigation. The parents of the named plaintiffs did the right thing not only for their children, but for all Washington children. In light of the extraordinary benefits of this litigation, their efforts should be recognized and fairly compensated. "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 v. Niedert,* 142 F.3d 1004, 1016 (7th Cir. 1998) (approving a $25,000 incentive award).

III. CONCLUSION

For the foregoing reasons, the class counsel respectfully requests that this Court award: (1) attorneys' fees of $1,400,00; (2) incentive awards of $25,000 to DRW and the parents of K.M. and B.S.; and (3) reimbursement of all costs and out-of-pocket expenses in the cases before this Court, totaling $31,109.32.

DATED: September 3, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2015, 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:

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DATED: September 3, 2015, at Seattle, Washington.

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