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THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFF SHERRILL, on behalf of himself and a
class of those similarly situated,

Plaintiff,

v.

PREMERA BLUE CROSS; LIFEWISE
HEALTH PLAN OF OREGON; and LIFEWISE
ASSURANCE CO.,

Defendants.

NO. 2:10-cv-00590-TSZ

**PLAINTIFF’S NOTICE OF
MOTION AND MOTION FOR
FINAL APPROVAL OF
SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: June 30, 2011
Time: 10:00 a.m.
Courtroom: 15206
Judge: Thomas S. Zilly

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, pursuant to this Court’s Preliminary Approval Order, Docket No. 40, on June 30, 2011 at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 15206 of this Court, located at 700 Stewart Street, Seattle, Washington, Plaintiff Jeff Sherrill (“Plaintiff”) will, and hereby does, move this Court to grant, pursuant to Federal Rule of Civil Procedure 23(e), final approval of the Joint Stipulation of Class Settlement and Settlement Agreement and Release (the “Settlement”) (Docket No. 35, Exhibit 1), and entry of judgment in accordance with the Settlement; and (2) to grant, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), and section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), final class certification and collective action designation of the settlement Class

1 conditionally certified in the Preliminary Approval Order.

2 Plaintiff makes this motion on the ground that the Settlement was reached after arms-
3 length negotiations by counsel for Plaintiff and the Class and counsel for Defendants (“the
4 Parties”), is fair and reasonable, has drawn a very favorable response from the Class, and should
5 be given final approval by the Court for all the reasons set forth in the following memorandum in
6 support of the motion.

7 This motion is supported by this notice; the following memorandum in support of the
8 motion; the accompanying Declaration of Jahan C. Sagafi in Support of Plaintiff’s Motion for
9 Final Approval of Class Settlement; the Declaration of Settlement Services, Inc. Describing
10 Settlement Administration; the Notice of Motion and Unopposed Motion for Order
11 (1) Conditionally Certifying Settlement Class and Collective Action, (2) Granting Preliminary
12 Approval to Proposed Class Action and Plan of Allocation, and (3) Directing Dissemination of
13 Class Notice to Class, and (4) Setting Final Approval Hearing Date and Related Dates;
14 Memorandum in Support filed with the Court February 3, 2011 (Docket No. 34) and supporting
15 papers (Docket Nos. 35-38); Plaintiff’s Motion for Award of Attorneys’ Fees, Reimbursement of
16 Costs and Expenses, and award of Class Representative Service Payment (Docket No. 41) and
17 supporting papers (Docket Nos. 42-43); the Preliminary Approval Order (Docket No. 40); the
18 Court’s record in this action; all matters of which the Court may take notice; and such other
19 documentary and oral evidence or argument as may be presented to the court at the hearing on
20 this motion.

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Dated: May 27, 2011

Respectfully submitted,

Kelly M. Dermody (*admitted pro hac vice*)
Jahan C. Sagafi (*admitted pro hac vice*)
Anne B. Shaver (*admitted pro hac vice*)
LIEFF CABRASER HEIMANN & BERNSTEIN LLP

Michael C. Subit (Wash. Bar No. 29189)
FRANK FREED SUBIT & THOMAS LLP

By: /s/ Jahan C. Sagafi
 Jahan C. Sagafi

Attorneys for Plaintiff and the Class Members

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MEMORANDUM IN SUPPORT OF MOTION**I. INTRODUCTION**

Plaintiff requests that this Court grant final approval of the Settlement.¹ This Settlement resolves litigation over Plaintiff's and Class Members' claims that Premera misclassified the Class Members as exempt from federal and state overtime laws, and due to the misclassification, failed to pay overtime, provide proper meal and rest periods, or pay certain benefits (as a result of failing to credit the Class for their claimed unpaid wages). The Settlement is the product of arms-length negotiations by experienced counsel, after significant investigation, and recognition of the strengths and weaknesses of each side's positions.

The Settlement, in the amount of \$1,450,000, is "fair, reasonable, and adequate" within the meaning of Federal Rule of Civil Procedure 23(e). The Class has responded favorably to the Settlement. Of the 133 Class Members who were sent notices, only one has objected and two have opted out. Declaration of Mark Patton Describing Settlement Administration ("Patton Decl."), ¶ 10. Furthermore, Class Counsel have conducted sufficient discovery to enable them (who are among the most highly experienced attorneys in the country handling large overtime class actions, particularly those on behalf of information technology support workers) to evaluate the claims and defenses in the action. Lastly, the Settlement is in line with the strength and recoverability of Plaintiff's claims given the risk, expense, complexity, and likely duration of further litigation. *See Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

In connection with requesting final settlement approval, Plaintiff also requests that the Court confirm as final (1) the certification of the Class conditionally certified in its Preliminary Approval Order; (2) the designation of the case as a collective action under the FLSA as preliminarily designated in that Order; and (3) the appointment of Plaintiff as the Class Representative and of Plaintiff's counsel as Class counsel as initially provided in that Order

¹ Premera does not oppose this motion.

1 (“Class Counsel”).²

2 **II. FACTUAL BACKGROUND**

3 **A. The Action**

4 On April 7, 2010, Plaintiff commenced this class action against Premera. Plaintiff
5 contends that Premera misclassified the Class as exempt from the overtime requirements of the
6 FLSA and the wage-and-hour laws of the State of Washington. Complaint, ¶¶ 11-12, Docket
7 No. 1. Plaintiff further asserts that, due to this alleged misclassification, Premera violated the
8 Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 *et seq.* *Id.*, ¶¶ 21-22.
9 Specifically, Plaintiff contends that certain ERISA-covered benefit plans in which he participated
10 required Premera to provide employees with benefit credits based upon their compensation
11 earned. *Id.* Plaintiff asserted that these employees should have been classified as nonexempt,
12 paid overtime, provided meal and rest breaks, and given additional benefits payments.

13 At all points during this litigation, including in connection with the Settlement, Premera
14 disputed, and it continues to dispute, Plaintiff’s allegations, expressly denying any liability for
15 any of the claims that Plaintiff or the Class has raised or could have raised. *See, e.g.*, Answer to
16 Complaint, Docket No. 23.

17 **B. Preliminary Approval of the Settlement**

18 On February 28, 2011, this Court granted preliminary approval of the Settlement,
19 conditionally certified the Class, ordered that the Class be sent notice of the Settlement, and set a
20 schedule for final approval. Docket No. 40. The Court determined that the Settlement “falls
21 within the range of possible approval as fair, adequate, and reasonable,” is “the result of arms-
22 length negotiations between the Parties,” “is non-collusive,” and was reached only “after Class
23 Counsel had investigated Plaintiff’s claims and become familiar with their strengths and
24 weaknesses.” *Id.*, § V.

25 ² Pursuant to the Settlement Agreement and the Court’s Preliminary Approval Order, Plaintiff’s
26 counsel has moved separately for a Class Representative Service Payment and for Class
Counsel’s Attorneys’ Fees and Costs. Docket Nos. 41-43. Premera does not oppose that motion.

1 **C. The Settlement Class**

2 As part of the Settlement, Premera agreed to certification of the following Class:

3 All persons who work or worked for Premera in a Covered Position
4 during a Covered Period. The term “Covered Position” means one
5 or more of the following titles held by an individual working for
6 Premera in the United States: Application Support Engineer I & II;
7 Database Administrator I; Information Security Administrator III;
8 IT Analyst I & II; Network Administrator III; PeopleSoft Systems
9 Administrator; Production Control Analyst III; Senior Middleware
10 Administrator; Senior Network Administrator; Senior Systems
11 Administrator; Software QA Analyst; Software Test Engineer I;
12 System Administrator – HCS; Systems Administrator I, II, & III;
13 Systems Engineer I; Telecommunications Administrator I, II, & III;
14 and Telecommunications Engineer I.

15 Settlement, § I.J. The “Covered Period” is the period from April 7, 2006 to February 28, 2011,
16 which is the date the Preliminary Approval Order was entered by the Court. Settlement, § I.I.
17 There are 133 Class Members, two of whom have opted out. Patton Decl., ¶ 10.

18 **D. The Settlement**

19 The Settlement creates a common fund of \$1,450,000. Settlement § I.S. After deducting
20 the claims administrator’s costs, the Class Representative Payment, and Class Counsel Attorneys’
21 Fees and Costs, the remainder of the Settlement fund will be distributed to Class Members³
22 according to the number of weeks each Class Member worked in a Covered Position during the
23 covered time period. *Id.*, § XII.A.2. There will be no reversion of funds to Premera; the entire
24 \$1,450,000 will be paid out. *Id.*, § XII.B. All Class Members who did not opt out will
25 automatically receive their settlement shares. *Id.*, § VII.D.3.

26 In exchange, all Class Members who did not opt out of the Settlement (“Participating
27 Class Members”) will release Premera from claims brought in this litigation. These Participating
28 Class Members will release all claims arising from the allegations in the complaint, “including

29 ³ For tax purposes, half of each Settlement Share will constitute a settlement of claims for wages
30 and half will be deemed a settlement of claims for interest and penalties. The Settlement
31 Administrator will issue to each claimant an IRS Form W-2 for the wage portion and a Form
32 1099 for the interest and penalties portion of the Settlement Share. Settlement, § XII.A.3. The
33 employer’s share of taxes on the wage payments will be paid by Premera separately. *Id.* at § I.S.

1 claims arising under the FLSA, the Washington Minimum Wage Act, the Washington Consumer
2 Protection Act, ERISA, and other applicable law based on the allegation that Plaintiff was
3 misclassified as exempt and denied overtime pay and other benefits as a result.” *Id.* at § X.V.B.
4 The scope of these releases was fully described in the Court-approved Notice. Docket No. 35,
5 Exhibit A to Exhibit 1.

6 **E. Notice Process**

7 **1. The Settlement’s Class Notice Requirements Were Satisfied.**

8 The procedures for giving notice to the Class Members, as set forth in the Settlement and
9 ordered in the Preliminary Approval Order, have been fully and properly followed. *See*
10 Preliminary Approval Order, Docket No. 40; Settlement, § VII. The Court directed that the
11 proposed Notice of Proposed Class Settlement and Final Settlement Approval Hearing (“Class
12 Notice”) be sent to Class Members, in the manner specified by the Settlement. Preliminary
13 Approval Order, § VI.C.; Settlement, § VII.

14 The Parties implemented the instructions of the Preliminary Approval Order in this regard.
15 On or about March 10, 2011, Premera provided the settlement administrator, Settlement Services,
16 Inc. (“SSI”), with the list of the names, addresses and compensable work weeks of the Class
17 Members. Patton Decl., ¶ 4. On March 14, 2011, SSI sent the individualized notices to each of
18 the 133 Class Members. *Id.* at ¶ 6. The individualized notices listed (a) each Covered Position
19 held by the Class Member during the Covered Period; (b) the beginning and ending date the Class
20 Member held that position; (c) the number of Compensable Work Weeks the Class Member held
21 that position; and (d) the Class Member’s predicted recovery amount in dollars. *Id.* This detailed
22 information – particularly the inclusion of the predicted recovery – put Class Members in the best
23 possible position to evaluate their options as to whether to participate, opt out, and/or object. The
24 Notice informed Class Members of their right to contest this information, with disputes resolved
25 by the Claims Administrator based on evidence provided by the Class Members and Premera.
26 The Notice also explained the process for objecting to the settlement and excluding oneself from

1 the settlement, along with contact information for Class Counsel and the Settlement
2 Administrator. *Id.*

3 The Parties also employed the following notice procedures to maximize the efficacy of the
4 Notice. First, SSI used address tracing to verify the accuracy of all addresses prior to sending the
5 Notices. Patton Decl., ¶ 4. Second, SSI ran traces on the addresses of any returned Notices to
6 again search for an updated address. Only seven were returned as undeliverable, and SSI resent
7 the Notices to those seven Class Members promptly after determining their updated addresses.
8 *Id.* at ¶ 7. Just one of those seven was returned as undeliverable. *Id.*

9 **2. CAFA's Notice Requirements Are Being Satisfied**

10 On or about May 25, 2011, Premera served upon the Attorney General of the United
11 States and the appropriate officials of Washington, Oregon, Idaho, and California a notice of the
12 Settlement consisting of: a copy of the complaint in this action; a notice of the scheduled judicial
13 hearings in this class action; copies of the Settlement; the proposed Notice; and the names of
14 Class Members and their estimated proportionate share of the entire Settlement. Declaration of
15 Jahan C. Sagafi In Support of Final Approval ("Sagafi Final Approval Decl."), ¶ 4. The Notice of
16 Settlement also invited comment on the Settlement. As the parties discussed in yesterday's
17 telephonic conference, because CAFA allows the attorneys general 90 days during which to
18 comment on any Rule 23 settlement, 28 U.S.C. § 1715(d), Premera is requesting the attorneys
19 general to provide their comments on an expedited basis, preferably before the June 10 final
20 approval hearing (or, if that is not possible, as soon thereafter as is feasible). Class Counsel will
21 assist Premera in these efforts. As discussed in yesterday's telephonic conference, Premera will
22 separately submit briefing before the final approval hearing proposing how CAFA can be
23 satisfied without delaying payment to the Class Members.

1 **III. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**
2 **AND ENTER JUDGMENT IN ACCORDANCE WITH THE SETTLEMENT**

3 **A. The Best Practicable Notice of Settlement Has Been Provided to the Class.**

4 The mailing of the individualized notices to Class Members, and the general
5 administration of the notice process as described above, meet the requirements for the “best
6 practicable” notice in this case as necessary to protect the due process rights of Class Members.
7 *See* Preliminary Approval Order, §VI.C. (“[T]he Class Notice will provide the best notice
8 practicable, satisfies the notice requirements of Rule 23(e), and satisfies all other legal and due
9 process requirements.”); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)
10 (provision of “best practicable” notice with description of the litigation and explanation of opt-out
11 rights satisfies due process); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974)
12 (individual notice must be sent to class members who can be identified through reasonable
13 means); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (best
14 practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise
15 interested Parties of the pendency of the action and afford them an opportunity to present their
16 objections”).

17 Therefore, the Court may proceed to determine the fairness and adequacy of the
18 Settlement, and order its approval, secure in the knowledge that all absent Class Members have
19 been given the opportunity to participate fully in the opt-out, comment, and approval process.

20 **B. The Standard For Final Approval**

21 “[V]oluntary conciliation and settlement are the preferred means of dispute resolution,”
22 especially in complex class actions. *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615,
23 625 (9th Cir. 1982). Class action lawsuits readily lend themselves to compromise because of the
24 difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. *City*
25 *of Seattle*, 955 F.2d at 1276 (noting that “strong judicial policy . . . favors settlements, particularly
26 where complex class action litigation is concerned”).

1 On a motion for final approval of a class action settlement under Federal Rule of Civil
2 Procedure 23(e), a court's inquiry is whether the settlement "fair, adequate and reasonable,"
3 recognizing that "it is the settlement taken as a whole, rather than the individual component
4 parts, that must be examined for overall fairness." *Staton*, 327 F.3d at 952 (quoting *Hanlon v.*
5 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). Similarly, under the FLSA, a settlement
6 that results in waiver of FLSA claims should be approved where it is "entered as part of a
7 stipulated judgment approved by the court after scrutinizing the settlement for fairness." *Lynn's*
8 *Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1352-53 (11th Cir. 1982). A settlement is fair, adequate
9 and reasonable, and therefore merits final approval, when "the interests of the class are better
10 served by the settlement than by further litigation." *Manual for Complex Litigation Fourth* (Fed.
11 Judicial Center 2004) ("*Manual*"), § 21.6 at 309.

12 When determining whether to grant final approval, "the court's intrusion upon what is
13 otherwise a private consensual agreement negotiated between the Parties to a lawsuit must be
14 limited to the extent necessary to reach a reasoned judgment that the agreement is not the product
15 of fraud or overreaching by, or collusion between, the negotiating Parties, and that the settlement,
16 taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d
17 at 625. The court should balance "the strength of plaintiffs' case; the risk, expense, complexity,
18 and likely duration of further litigation; the risk of maintaining class action status throughout the
19 trial; the amount offered in settlement; the extent of discovery completed, and the state of the
20 proceedings; the experience and views of counsel . . . and the reaction of the class to the proposed
21 settlement." *Class Plaintiffs*, 955 F.2d at 1291; *Boyle v. Arnold-Williams*, No. C01-5687 JKA,
22 2006 U.S. Dist. LEXIS 91920, *13-14 (W.D. Wash. Dec. 20, 2006). "The recommendations of
23 plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485
24 F. Supp. 610, 622 (N.D. Cal. 1979); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D.
25 Cal. 1980) ("[T]he fact that experienced counsel involved in the case approved the settlement
26 after hard-fought negotiations is entitled to considerable weight.").

1 C. **The Settlement Is Presumptively Fair Because It Was Negotiated At Arms’**
 2 **Length.**

3 The Court should begin its analysis with a presumption that the Settlement is fair and
 4 should be approved. Arms’ length negotiations conducted by competent counsel after appropriate
 5 discovery are *prima-facie* evidence of a settlement that is fair and reasonable. *See Ortiz v.*
 6 *Fibreboard Corp.*, 527 U.S. 815, 852 (1999); *In re Phenylpropanolamine (PPA) Prods. Liab.*
 7 *Litig.*, 227 F.R.D. 553, 567 (W.D. Wash. 2004); *Boyle*, 2006 U.S. Dist. LEXIS 91920 at *13-14.
 8 These factors are well satisfied here.

9 First, the Settlement was reached only after arms-length and good-faith negotiations. As
 10 such, there is an absence of any indicia of collusion. Second, as discussed in more detail below,
 11 the Parties engaged in a significant exchange of relevant information and data in advance of the
 12 mediation. *See* Preliminary Approval Motion, § II(D); Declaration of Jahan Sagafi In Support of
 13 Preliminary Approval (“Sagafi Preliminary Approval Decl.”), Docket No. 35, ¶¶ 9-14. As a
 14 result of these efforts, Class Counsel had sufficient information to evaluate the strengths and
 15 weaknesses of the Class claims and defenses, whether to pursue litigation or settle, and the
 16 appropriate settlement value for the claims at issue. Third, Class Counsel are experienced in
 17 wage-and-hour class-action litigation, acted in good faith, and have represented the Class
 18 Members’ best interests in reaching the Settlement. Sagafi Preliminary Approval Decl., ¶¶ 5-
 19 8,19. Finally, there has been just one objection to the Settlement by a Class Member. Patton
 20 Decl., ¶ 10, Exhibit B. Thus, a presumption is appropriate that the class relief in the Settlement is
 21 fair.

22 1. **The Overwhelmingly Positive Reaction Of The Class Supports**
 23 **Approval Of The Settlement.**

24 To date, SSI and Class Counsel have received one objection from Class Members.⁴

25 _____

26 ⁴ The deadline for Class Members to opt out of or object to the settlement was April 28, 2011.

1 Patton Decl., ¶ 10; Sagafi Fee Decl., ¶¶ 13-14. Two Class Members have opted out of the
2 Settlement. Patton Decl., ¶ 10, Exhibit A. These facts indicate that the Class Members
3 overwhelmingly support the Settlement and strongly favor its approval. *See Boyle*, 2006 U.S.
4 Dist. LEXIS at *10-11 (“the fact that there is opposition does not necessitate disapproval of the
5 settlement. Instead, the court must independently evaluate whether the objections being raised
6 suggest serious reasons why the proposal might be unfair.”). Here, the sole objection argues that
7 Premera’s decision to classify the Class Members as exempt was and is appropriate, concluding
8 that the lawsuit is meritless. Sagafi Fee Decl., ¶ 14 & Ex. B. It also questions Plaintiff’s motives
9 in bringing the action. *Id.* The objection underscores the difficulties Plaintiff would have faced
10 in proving his claims on behalf of himself and the class. *Id.* It therefore supports the
11 reasonableness of the Settlement, which provides real benefits to the Class Members in light of
12 the difficulty of substantial recovery in litigation. The objection does not argue that the
13 Settlement is unfair to the Class Members, that the Notice is inadequate, or that the attorneys’
14 fees or class representative service award is unreasonable. *Id.*

15 **2. The Settlement Was Reached Through Arms-Length Negotiations**
16 **After The Parties Conducted An Extensive Investigation And Analysis.**

17 **a. The Parties Engaged in Substantial Investigation and Analysis**
18 **of the Legal Issues.**

19 The Parties engaged in extensive fact-gathering, informal and formal discovery, and
20 extensive discussions of the substantive legal issues before finalizing the Settlement. Sagafi
21 Preliminary Approval Decl., ¶¶ 12-14. Class Counsel filed the complaint in this action after
22 months of investigation and research by Class Counsel. *Id.*, ¶¶ 10-11. From the filing of the
23 Complaint to mediation, potential Class Members contacted Class Counsel, expressing their
24 interest in participating in the action. Sagafi Final Approval Decl., ¶ 5. Class Counsel assisted
25 these individuals in filing consent to join forms to formally assert their FLSA claims. *Id.* In
26 addition, Class Counsel interviewed at least a dozen witnesses and collected sworn witness
statements from eight of them supporting Plaintiff’s position. *Id.*, ¶ 5. Plaintiff submitted those

1 statements to the mediator and made them available to Premera in connection with the mediation
2 efforts. *Id.*

3 During the litigation, the Parties conducted substantial formal and informal discovery.
4 Plaintiff advised Premera of the documents and witnesses sought through a First Set of Document
5 Requests and a Federal Rule of Civil Procedure 30(b)(6) deposition notice on June 29, 2010. The
6 parties also agreed to an informal document exchange. Sagafi Preliminary Approval Decl., ¶ 12.
7 During the course of discovery, Premera produced thousands of pages of documents, including
8 handbooks, manuals, policies, job descriptions, and personnel information. *Id.*, ¶ 12-13. Premera
9 also produced voluminous electronic payroll data in several iterations, requiring extensive and
10 time-consuming analysis. Sagafi Fee Decl., ¶ 20.

11 Premera likewise conducted written and testimonial discovery regarding, among other
12 things, Plaintiff's individual and class liability and damages claims and Plaintiff's contentions
13 regarding class and collective action certification. Sagafi Preliminary Approval Decl., ¶ 14.
14 Plaintiff provided written responses to requests for production of documents, and produced close
15 to a hundred pages of documents. *Id.*

16 **b. The Parties Participated In Arms-Length Negotiations Before**
17 **An Experienced Neutral Mediator.**

18 As set forth above, a settlement is presumed fair if it was negotiated at arm's length by
19 experienced, competent counsel equipped with enough information to act intelligently. *See*
20 *Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 U.S. Dist. LEXIS 5976, at *20 (W.D. Wash.
21 Mar. 26, 2001) ("A presumption of correctness is said to attach to a class settlement reached in
22 arms-length negotiations between experienced capable counsel after meaningful discovery.")
23 (citing *Manual for Complex Litigation (Third)* § 30.42 (1995)). On November 17, 2010, the
24 Parties attended a private mediation with Teresa Wakeen of the Seattle firm Wakeen &
25 Associates. Sagafi Preliminary Approval Decl., ¶ 17. Beforehand, each party submitted a
26 mediation brief to the mediator and to the other side, summarizing the legal arguments and

1 evidence gathered to date. *Id.* Late that evening, the Parties reached an agreement, memorialized
2 in a Memorandum of Agreement. *Id.*, ¶ 18. In the weeks following the mediation, the Parties
3 drafted, negotiated, and finalized a settlement agreement, which was submitted to the Court on
4 February 4, 2011. Docket No. 35, Exhibit 1.

5 **c. The Value Of The Settlement Favors Final Approval.**

6 As set forth above, the value of the Settlement—\$1,450,000—is substantial, and the
7 Settlement is in line with other similar class-action settlements recently approved. *See* Plaintiff’s
8 Motion for Attorneys’ Fees and Costs, Docket No. 41, p. 12 (citing cases). This is especially true
9 in light of the strong defenses Premera had regarding the propriety of class certification and on
10 the merits of Plaintiff’s claims. Sagafi Fee Decl., ¶¶ 18-19. Plaintiff faced the very real
11 possibility that if he proceeded to trial, he might obtain little if *any* recovery for the Class. *Id.*

12 This recovery is substantial, especially as its adequacy must be judged as “a yielding of
13 absolutes and an abandoning of highest hopes Naturally, the agreement reached normally
14 embodies a compromise; in exchange for the saving of cost and elimination of risk, the Parties
15 each give up something they might have won had they proceeded with litigation. . . .” *Officers*
16 *for Justice*, 688 F.2d at 624 (citation omitted). Accordingly, the Settlement is not to be judged
17 against a speculative measure of what might have been achieved. *Linney v. Cellular Alaska*
18 *P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). In the end, “[s]ettlement is the offspring of
19 compromise; the question we address is not whether the final product could be prettier, smarter or
20 snazzier, but whether it is fair, adequate and free from collusion.” *Hanlon*, 150 F.3d at 1027;
21 *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 544 (W.D. Wash. 2009) (same). In addition, the
22 Court should consider that the Settlement provides for payment to the Class now, rather than a
23 speculative payment many years down the road. *See City of Detroit v. Grinnell Corp.*, 495 F.2d
24 448, 463 (2d Cir. 1974). Therefore, the \$1,450,000 settlement amount is well within the range of
25 reasonableness.

1 3. **Litigating This Action Would Be Complex, Expensive, Time**
2 **Consuming, And Would Delay And Endanger Recovery.**

3 As is evident from the procedural background outlined above and in the detailed
4 Settlement, this nationwide class and collective action involves intricate legal and factual
5 questions under federal and state law. *See* Sagafi Fee Decl., ¶¶ 18-19. Litigating these complex
6 claims, which arose over a period of three years, would require substantial and expensive
7 discovery and pre-trial motions, as well as the consideration, preparation, and presentation of
8 voluminous documentary and testimonial evidence and the preparation and analysis of expert
9 reports. Trial itself would require the use of expert witnesses at the damages phase, and would
10 involve numerous complex legal and factual issues. As is typical with any case, but especially so
11 with class actions, appeals would probably follow, with the result that payments to Class
12 Members, if any, would likely occur only after several years of delay.

13 In contrast, the Settlement will yield a prompt, certain, and substantial recovery for the
14 Class Members. Such a result benefits the Parties and the court system.

15 4. **The Recommendations Of Experienced Counsel Favor Approval Of**
16 **The Settlement.**

17 The judgment of experienced counsel regarding the settlement is entitled to great weight.
18 *Boyle*, 2006 U.S. Dist. LEXIS 91920 at *13-14; *Hanlon*, 150 F.3d at 1026; *Ellis*, 87 F.R.D. at 18.
19 Here, Class Counsel endorse the Settlement as fair, adequate, and reasonable.

20 Class Counsel have extensive experience in prosecuting and litigating class action wage
21 and hour suits like this one. Sagafi Fee Decl., ¶¶ 4-12, Ex. A (attaching the firm resume for Lieff,
22 Cabraser, Heimann & Bernstein LLP); Declaration of Michael C. Subit in Support of Attorneys
23 Fees and Costs, Docket No. 43, ¶¶ 7-12. Class Counsel have conducted extensive investigation
24 of this case, including reviewing thousands of pages of documents produced by Premera,
25 reviewing Class Member data, and interviewing many Class Members. Sagafi Fee Decl., ¶ 22.
26 The fact that qualified and well-informed counsel endorse the Settlement as being fair,

1 reasonable, and adequate heavily favors this Court's approval of the Settlement.

2 **IV. THE COURT SHOULD GRANT FINAL CLASS CERTIFICATION AND**
3 **COLLECTIVE ACTION DESIGNATION.**

4 The Court's Preliminary Approval Order provisionally certified the Settlement Class
5 pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure and provisionally
6 designated the case as an FLSA collective action. Preliminary Approval Order, §§ II.B-III. The
7 Court ruled that, for purposes of settlement, the Class meets the Rule 23 requirements as well as
8 the FLSA collective action requirements. *Id.* The Court also appointed the named Plaintiff as
9 Class representative and Plaintiff's counsel as Class Counsel. *Id.*, § IV. No Class Member has
10 objected to these aspects of the Settlement. Sagafi Fee Decl., ¶ 14. For these reasons, and the
11 reasons set forth in Plaintiff's motion for preliminary settlement approval, Class Counsel
12 respectfully submit that the Court should grant final certification and collective action designation
13 for purposes of settlement of this matter and should confirm the appointment of the class
14 representatives and class counsel.

15 **V. CONCLUSION**

16 For the reasons set forth above, Class Counsel respectfully requests that the Court
17 (1) grant final approval of the Settlement and (2) grant final class certification and collective
18 action designation of the Settlement.

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Dated: May 27, 2011

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN

By: /s/ Jahan C. Sagafi
Jahan C. Sagafi

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Attorneys for Plaintiff and the Class Members

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THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFF SHERRILL, on behalf of himself and
a class of those similarly situated,

Plaintiff,

v.

PREMERA BLUE CROSS; LIFEWISE
HEALTH PLAN OF OREGON; and
LIFEWISE ASSURANCE CO.,

Defendants.

NO. 2:10-cv-00590-TSZ

**[PROPOSED] ORDER (1) CONFIRMING
CERTIFICATION OF CLASS AND
COLLECTIVE ACTION, (2) GRANTING
FINAL APPROVAL TO CLASS ACTION
SETTLEMENT, AND (3) ENTERING
FINAL JUDGMENT**

On June 10, 2011, a hearing was held on the unopposed motion of Plaintiff Jeff Sherrill for final approval of the class settlement; and on the separate motion of Plaintiff and his counsel for awards of the Class Representative Service Payment and the Class Counsel Attorneys' Fees and Costs Payment. Jahan C. Sagafi, Anne B. Shaver, and Michael C. Subit appeared for Plaintiff; and _____, appeared for Premera.

The Parties have submitted their Joint Stipulation of Class Settlement and Class Settlement Agreement (the "Settlement"), which this Court preliminarily approved in its February 28, 2011, order (the "Preliminary Approval Order"). In accordance with the Preliminary Approval Order, Class Members have been given notice of the terms of the Settlement and the opportunity to comment on it or to opt out of its provisions. In addition, pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA"), Premera gave the Attorney General of

1 the United States and the appropriate state officials of Washington, Oregon, Idaho, and California
2 notice of the Settlement on May 25, 2011.

3 Having received and considered the Settlement, the supporting papers filed by the Parties,
4 and the evidence and argument received by the Court at the final approval hearing on June 10,
5 2011, by means of this order (the “Final Approval Order”) the Court grants final approval to the
6 Settlement, and HEREBY ORDERS and MAKES DETERMINATIONS as follows:

7 1. Except as otherwise specified herein, the Court for purposes of this Final
8 Approval Order adopts all defined terms set forth in the Settlement.

9 2. This Court has jurisdiction over the subject matter of this litigation and all
10 related matters and all state and federal claims raised in this action and released in the Settlement,
11 and personal jurisdiction over Premera and all Class Members (except for those who timely filed
12 opt out requests). Specifically, this Court has federal question jurisdiction over this action
13 pursuant to 28 U.S.C. section 1331; section 16(b) of the Fair Labor Standards Act (“FLSA”), 29
14 U.S.C. § 216(b); and the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §
15 1132(e)(1).

16 3. This Court also has supplemental jurisdiction over all state-law claims
17 asserted by Plaintiff because the state-law claims derive from a common nucleus of operative fact
18 and form part of the same case or controversy as those claims over which the Court has primary
19 jurisdiction. *See* 28 U.S.C. § 1367 (providing for supplemental jurisdiction over related state-law
20 claims that “form part of the same case or controversy”); *United Mine Workers v. Gibbs*, 383 U.S.
21 715, 726 (1996) (federal courts have supplemental jurisdiction over state law claims that arise
22 from the same “common nucleus of operative fact” such that the parties “would ordinarily be
23 expected to try them all in one judicial proceeding”).

24 4. This Court also has jurisdiction to approve the Settlement’s release of
25 claims by Class Members over which the Court has jurisdiction, even if the Court would not
26 independently have jurisdiction over those released claims. *See Grimes v. Vitalink*

1 *Communications*, 17 F.3d 1553, 1563 (3d Cir. 1994) (citing *Class Plaintiffs v. City of Seattle*, 955
2 F.2d 1268, 1287-88 (9th Cir. 1992) (“[A] federal court may release not only claims alleged in the
3 complaint, but also state claims arising from the same nucleus of operative facts over which the
4 court would not have jurisdictional competence.”); *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*,
5 442 F.3d 741, 748 (9th Cir. 2006) (quoting *Class Plaintiffs*, 955 F.2d at 1287-89).

6 5. Pursuant to the Preliminary Approval Order, individualized notice was sent
7 to each Class Member by first-class mail. The notices informed Class Members of the terms of
8 the Settlement, their right to a share of the settlement proceeds, their right to comment on the
9 Settlement or opt out of the Settlement and pursue their own remedies, and their right to appear in
10 person or by counsel at the final approval hearing and be heard regarding approval of the
11 Settlement. Adequate periods of time were provided by each of these procedures.

12 6. The Court finds and determines that this notice procedure afforded
13 adequate protections to Class Members and provides the basis for the Court to make an informed
14 decision regarding approval of the Settlement based on the responses of Class Members. Notice
15 was accomplished in the manner prescribed by the Settlement. The Court finds and determines
16 that the notice provided in this case was the best notice practicable, which satisfied the
17 requirements of law and due process.

18 7. On May 25, 2011, Premera served upon the Attorney General of the United
19 States and the appropriate state officials of Washington, Oregon, Idaho, and California a notice of
20 the Settlement consisting of: a copy of the complaint in this action; a notice of the scheduled
21 judicial hearings in this class action; copies of the Settlement; the proposed Notice; and the names
22 of Class Members and their estimated proportionate share of the entire Settlement. The Notice of
23 Settlement also invited comment on the Settlement. The Court has received the following
24 responses from those five officials: _____.

25 8. The Court finds and determines that Premera’s notice of Settlement was
26 adequate and compliant with the statutory requirements of CAFA. Accordingly, 28 U.S.C.

1 section 1715(e) has no application to the Settlement.

2 9. For the reasons stated in the Preliminary Approval Order, this Court finds
3 and determines that the proposed Settlement Class, as defined in the definitions section of the
4 Settlement and in section II of its Preliminary Approval Order, meets all of the legal requirements
5 for class certification under Federal Rule of Civil Procedure 23 (“Rule 23”) (a) and (b)(3), and it
6 is hereby ordered that the Settlement Class is finally approved and certified as a Class for
7 purposes of settlement of this action.

8 10. For the reasons stated in the Preliminary Approval Order, this Court finds
9 and determines that the action meets all of the legal requirements for certification as a collective
10 action under section 16(b) of the FLSA, 29 U.S.C. § 216(b), for the three-year period preceding
11 the filing of Plaintiff’s complaint, and it is hereby ordered that the action is certified as a
12 collective action for purposes of settlement of this action.

13 11. Pursuant to Rule 23(e), the Court further finds and determines that the
14 terms of the Settlement are fair, reasonable and adequate to the Class and to each Class Member
15 and that the Class Members who have not opted out will be bound by the Settlement, that the
16 Settlement is ordered finally approved, and that all terms and provisions of the Settlement should
17 be and hereby are ordered to be consummated. The Court specifically finds that the Settlement is
18 rationally related to the strength of Plaintiff’s claims given the risk, expense, complexity, and
19 duration of further litigation. This Court also finds that the Settlement is the result of arms-length
20 negotiations between experienced counsel representing the interests of the Class Members and
21 Premera, under the supervision of an experienced and independent third-party mediator, after
22 thorough factual and legal investigation. *Staton v. Boeing*, 327 F.3d 938, 960 (9th Cir. 2003);
23 *Class Plaintiffs*, 955 F.2d at 1291.

24 12. The Court further finds that the response of the Class Members to the
25 Settlement supports settlement approval. Of the 133 Class Members, only two opted out of the
26 Settlement. One Class Member filed a written objection to the Settlement as part of this notice

1 process. The Court has reviewed and considered this objection. The objection argues that
2 Premera's decision to classify the Class Members as exempt and the Class Members' long work
3 hours are appropriate, concluding that the lawsuit is meritless. It also questions Plaintiff's
4 motives in bringing the action. The objection underscores the difficulties Plaintiff would have
5 faced in proving his claims on behalf of himself and the class. It therefore supports the
6 reasonableness of the settlement, which provides real benefits to the Class Members in light of
7 the difficulty of recovery in litigation.

8 13. The Court finds and determines that the payments to be made to the Class
9 Members as provided for in the Settlement are fair and reasonable. The proposed plan of
10 allocation is rationally related to the relative strengths of the respective claims asserted. The
11 Court hereby gives final approval to and orders the payment of those amounts be made to the
12 claimants out of the \$1,450,000 Settlement Payment in accordance with the terms of the
13 Settlement.

14 14. The Court confirms as final the appointment of Plaintiff Jeff Sherrill as the
15 Class Representative of the Washington Class under Rule 23 and as Class Representative of the
16 nationwide FLSA Class under section 16(b). The Court finds and determines that the award of
17 the Class Representative Payment of \$5,000 to Plaintiff for his services as the Class
18 Representative, in addition to his individual Settlement Share, is fair and reasonable. The
19 Plaintiff has satisfied the criteria as set forth in *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir.
20 2003). Under *Staton*, such awards should be evaluated using ““relevant factors, includ[ing] the
21 actions the Plaintiff has taken to protect the interests of the class, the degree to which the class has
22 benefited from those actions, . . . the amount of time and effort the Plaintiff expended in pursuing
23 the litigation . . . and reasonabl[e] fear[s] of workplace retaliation.”” *Staton*, 327 F.3d at 977
24 (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)) (ellipses in original). Here,
25 Plaintiff's initiation of the lawsuit caused him personal exposure and potential adverse
26 consequences with future employers. Plaintiff's assertion of Washington state law claims on

1 behalf of his fellow Class Members tolled the statutes of limitations for those state law claims, to
2 the benefit of the Class Members who worked or work in Washington. Furthermore, Class
3 Counsel attests that Plaintiff was substantially involved throughout the litigation, educating
4 Plaintiff's counsel on Class Members' job duties and Premera's policies and procedures. Plaintiff
5 submitted a declaration regarding his Premera work experiences, which contributed to the
6 settlement. Plaintiff also attended the Parties' settlement negotiations. The Court hereby gives
7 final approval to and orders that the Class Representative Payment of that amount be made to
8 Plaintiff out of the Qualified Settlement Fund in accordance with the terms of the Settlement.

9 15. The Court confirms as final the appointment of the following law firms and
10 attorneys as class counsel ("Class Counsel") for the Rule 23 and FLSA Classes: Kelly M.
11 Dermody, Jahan C. Sagafi, and Anne B. Shaver of Lieff, Cabraser, Heimann & Bernstein LLP,
12 and Michael C. Subit of Frank Freed Subit & Thomas LLP. The Court finds and determines that
13 the payment of \$362,500 in attorneys' fees and \$13,206 in litigation costs and expenses, for a
14 total payment of \$375,706 to Class Counsel, is fair and reasonable. The Court hereby gives final
15 approval to and orders that that payment of that amount be made to Class Counsel out of the
16 Qualified Settlement Fund in accordance with the terms of the Settlement.

17 16. Nothing in this Final Approval Order will preclude any action to enforce
18 the Parties' obligations under the Settlement or under this order, including the requirement that
19 Premera make the Settlement Payment in accordance with the terms of the Settlement.

20 17. Upon completion of administration of the Settlement, the Settlement
21 Administrator will provide written certification of such completion to the Court and counsel for
22 the Parties.

23 18. By operation of the entry of this Final Approval Order and pursuant to the
24 Settlement, all Participating Class Members are permanently barred from prosecuting against the
25 Premera Parties any Participating Class Member Released Claim as set forth in section XV of the
26 Settlement. The Court has reviewed the release in section XV of the Settlement and finds it to be

1 fair, reasonable, and enforceable under Rule 23, the FLSA and all other applicable law.

2 19. If, for any reason, the Settlement ultimately does not become Final (as
3 defined in the Settlement, section I(K)), this Final Approval Order will be vacated; the Parties
4 will return to their respective positions in this action as those positions existed immediately
5 before the parties executed the Settlement; and nothing stated in the Settlement or any other
6 papers filed with this Court in connection with the Settlement will be deemed an admission of any
7 kind by any of the Parties or used as evidence against, or over the objection of, any of the Parties
8 for any purpose in this action or in any other action.

9 20. The Parties entered into the Settlement solely for the purpose of
10 compromising and settling disputed claims. Premera in no way admits any violation of law or
11 any liability whatsoever to Plaintiff and the Class, individually or collectively, all such liability
12 being expressly denied by Premera. Premera in no way admits that this action could have been
13 properly maintained as a collection action or a class action if it had not been settled.

14 21. By means of this Final Approval Order, this Court hereby enters final
15 judgment in this action, as defined in Federal Rule of Procedure 58(a)(1).

16 22. Without affecting the finality of the Court's judgment in any way, the
17 Court retains jurisdiction over this matter for purposes of resolving issues relating to
18 interpretation, administration, implementation, effectuation and enforcement of the Settlement.

19 23. The Parties are hereby ordered to comply with the terms of the Settlement.

20 24. This action is dismissed with prejudice, each side to bear its own costs and
21 attorneys' fees except as provided by the Settlement and the Court's orders.

22 Dated: _____, 2011

23 The Honorable Thomas S. Zilly
United States District Judge

24 Presented By:
25 /s/ Jahan C. Sagafi
Jahan C. Sagafi
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Judge Thomas S. Zilly

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

<p>JEFF SHERRILL, <i>et al.</i>, Plaintiffs, vs. PREMERA BLUE CROSS, <i>et al.</i>, Defendants.</p>	<p>Case No.: 2:10-cv-00590-TSZ CERTIFICATE OF SERVICE</p>
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I hereby certify that on May 27, 2011, I caused to be electronically filed the documents listed below 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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Documents:

MOTION for Final Approval *Notice of Motion and Motion for Final Approval of Settlement; Memorandum in Support of Motion* by Plaintiff Jeff Sherrill. (Attachments: # 1 Proposed Order) Noting Date 6/10/2011 (Docket No. 46).

DECLARATION of Jahan C. Sagafi filed by Plaintiff Jeff Sherrill re 46 MOTION for Final Approval *Notice of Motion and Motion for Final Approval of Settlement; Memorandum in Support of Motion* (Docket No. 47).

DECLARATION of Mark Patton filed by Plaintiff Jeff Sherrill re 46 MOTION for Final Approval *Notice of Motion and Motion for Final Approval of Settlement; Memorandum in Support of Motion* (Docket No. 48) (Attachments: # 1 Exhibit A; # 2 Exhibit B)

Dated this 27th day of May, 2011.

/s/ Anne B. Shaver
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