

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 17-CV-00904-KLM

MICHAEL RYAN,
SHARON MOLINA,
EARBY MOXON, and
HEATHER MYERS, on behalf of themselves,
and all others similarly situated,

Plaintiffs,

v.

KIM BIMESTEFER, in her official capacity only as
Executive Director of the COLORADO
STATE DEPARTMENT OF HEALTH
CARE POLICY & FINANCING,

Defendant.

**UNOPPOSED MOTION FOR REASONABLE ATTORNEYS' FEES AND INCENTIVE
AWARDS**

Michael Ryan, Sharon Molina, Earby Moxon, and Heather Myers (“Plaintiffs”), by and through undersigned counsel, hereby respectfully submit this Unopposed Motion for Reasonable Attorneys’ Fees and Incentive Awards (“Motion”).

The parties’ Settlement Agreement was preliminarily approved by this Court on December 4, 2018. Docket 69. The Settlement Agreement states:

The Office of Risk Management for the State shall pay a total sum of five hundred dollars (\$500.00) to each of the Class Representative Plaintiffs—Michael Ryan, Sharon Molina, Earby Moxon, and Heather Myers (the “Incentive Awards”).

The Office of Risk Management for the State shall also pay a total sum of sixty two thousand five hundred dollars (\$62,500.00) to BAKER & HOSTETLER, LLP, as Class

Counsel, for attorney fees and costs incurred during the pendency of the litigation (the “Attorney Fee Award”).¹

As demonstrated in the attached Declarations of Class Counsel, the time Class Counsel devoted to this case through the parties’ Joint Motion for Final Approval Order of Class Settlement (being filed contemporaneously herewith) far exceeds the total amount that Defendant has agreed to in settlement. By this motion, Plaintiffs respectfully request that this Court approve an award of fees and costs, and incentive awards for the agreed-upon amounts as set forth in the Settlement Agreement pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2). Pursuant to D.C.COLO.LCivR 7.1(a), Class Counsel has conferred in good faith with counsel for Defendant and is authorized to state that Defendant takes no position as to the relief requested herein, provided that the Incentive Award and Attorney Fee Award do not exceed the amounts set forth in the Settlement Agreement.

I. BACKGROUND

Plaintiffs are Colorado Medicaid enrollees who are or were diagnosed as chronically infected with the Hepatitis C Virus (“HCV”). Defendant Kim Bimestefer, in her official capacity as Executive Director of the Colorado State Department of Health Care Policy & Financing (“HCPF”), is the Department of the State of Colorado that is responsible for administering the Colorado Medicaid Program.

Plaintiffs filed their Amended Complaint (“Complaint”) on May 9, 2017, Docket 14, challenging HCPF’s use of Metavir fibrosis score in its prior authorization criteria to approve

¹ The quoted language is from the fully executed version of the Settlement Agreement, which is being filed contemporaneously with the parties’ Joint Motion for Final Approval Order of Class Settlement. This language has been modified slightly from the version that was preliminarily approved due to logistical requirements of the State Controller’s Office. *See* Docket 68 at 1, n.2. 68.

Direct Acting Antiviral (“DAA”) medications for treatment of HCV, a serious, communicable, but curable illness that afflicted Plaintiffs and the putative class. Plaintiffs asserted claims on behalf of themselves and a class of similarly-situated individuals in Colorado, alleging that Colorado Medicaid illegally denied coverage of DAA treatment for individuals based on a fibrosis score restriction in the Colorado Medicaid preferred drug list that was inconsistent with medical necessity standards. Plaintiffs’ Complaint sought to certify a class of persons who would have been eligible for coverage of DAA medication but for HCPF’s fibrosis score restriction, a permanent injunction prohibiting such restriction, class notice, a service award for named Plaintiffs, and attorneys’ fees and costs pursuant to 42 U.S.C. § 1988.

On March 7, 2017, counsel for both Parties agreed that any discovery materials exchanged in a related case, *Cunningham v. Birch*, 1:16-cv-02353-NYW (D. Colo.) (“*Cunningham*”), including written discovery responses, documents produced, and deposition testimony may be used by the parties in this action. *See* Docket 46. *Cunningham* involved an identical challenge to Colorado Medicaid’s HCV treatment access policy, and was dismissed without prejudice for lack of standing, based on an intermediate policy change made by the Defendant.

On May 12, 2017, Plaintiffs filed a Motion for Class Certification. Docket 18. Defendant filed her opposition on June 2, 2017, Docket 29, and Plaintiffs filed their reply on June 16, 2017. Docket 33. On September 21, 2017, the Court granted Plaintiffs’ Motion for Class Certification, Docket 59, certifying a class defined as follows:

All individuals who are or will be enrolled in the Colorado Medicaid Program; who have been or will be diagnosed with HCV; who are prescribed DAA medication by an infectious disease specialist, gastroenterologist, or hepatologist or by a primary care provider in consultation with one of these specialists; and who would be eligible for

coverage of DAA medication but for the fibrosis score threshold included in HCPF's policy.

On May 23, 2017, Defendant filed a motion to dismiss Plaintiffs' first and second claims for relief. Docket 22. Plaintiffs opposed that motion on June 13, 2017, Docket 32; Defendant filed her reply on June 27, 2017, Docket 35; and the Court denied the motion on September 5, 2017. Docket 55.

The Court entered a Scheduling Order on July 26, 2017, Docket 46; and on August 15, 2017, the parties filed a stipulated Motion for Protective Order, which was granted by the Court in a Minute Order dated September 5, 2017. Docket 57.

On December 1, 2017, HCPF approved modified prior authorization criteria, which no longer consider fibrosis score in evaluating a members' eligibility for DAA treatment. The new criteria took effect on January 1, 2018. As a result, the parties engaged in arms-length negotiations to resolve this matter through a proposed Settlement Agreement, which this Court preliminarily approved on December 4, 2018. Docket 69. This came after over two years of litigation, which included HCPF's motion to dismiss; Plaintiffs' successful motion for class certification; the review of thousands of documents produced in *Cunningham* (which the parties stipulated would be applicable to this case); collection, review and production of Plaintiffs' medical records totaling approximately 1,000 pages²; collection, review and analysis of approximately 10,000 pages of documents produced by Defendant in discovery³; numerous

² See Declaration of Sara Neel in Support of the Parties' Joint Motion for Final Approval Order of Class Settlement at ¶ 5 (being filed contemporaneously herewith).

³ See *id.*

disclosures and discovery requests and responses; and preparation of materials and pleadings related to efforts to resolve this case in order to reach Final Approval.

Pursuant to the Settlement Agreement at § 6, HCPF has agreed not to implement any restrictions to coverage for DAAs based on an individual's fibrosis score for two years commencing on January 1, 2018. HCPF may revise its preferred drug list criteria for DAA treatment to include fibrosis score prior to January 1, 2020, if medical standards and guidance for treatment of Hepatitis C viral infections change, or if relevant Medicaid law changes. Docket 68-1 at § 6.1. HCPF is required to provide class counsel with notice 30 days prior to any changes of this nature taking effect. *Id.* Further, HCPF agreed to distribute two types of notices: one for current Medicaid HCV Class members who were previously denied DAA coverage and are currently enrolled in Medicaid, *id.* at § 5, and a second notice intended for individuals who originally qualified within the Medicaid HCV Class definition, but who no longer qualify because they are no longer enrolled in Medicaid. *Id.* at § 5.1. HCPF has also agreed to provide class counsel with certain public documents related to the treatment of HCV with DAAs, and to publish information for providers about the updated DAA criteria in the Provider Bulletin and produce a webinar to educate providers about the pharmacy prior authorization process. *Id.* at §§ 7, 8. In return for these benefits, the named Plaintiffs and the Medicaid HCV Class will release all claims for injunctive and declaratory relief relating to HCPF's previous denial of coverage for DAAs based on fibrosis score. *Id.* at § 12.

After agreeing on these terms, the Parties discussed and agreed, subject to Court approval, that HCPF will pay Class Counsel a lump sum of \$62,500 for attorneys' fees and costs

through Final Approval, along with incentive awards of \$500 for each named Plaintiff. *See id.* at § 4.

Class Counsel received several inquiries regarding the class notices, but no one has requested to be excluded from the Settlement Agreement. To date, the parties are unaware of any written objections filed with the Court. The deadline to file objections is March 4, 2019.

II. COUNSEL

Class Counsel consists of attorneys from three organizations: BakerHostetler, the American Civil Liberties Union Foundation of Colorado (“ACLU of Colorado”), and Center for Health Law and Policy Innovation of Harvard Law School. Lead counsel is Paul Karlsgodt, a partner at BakerHostetler who received his J.D. in 1997 from the University of Denver Sturm College of Law. Declaration of Paul Karlsgodt in Support of Plaintiffs’ Motion for Reasonable Attorneys’ Fees and Incentive Awards (“Karlsgodt Decl.”) ¶ 2. Mr. Karlsgodt’s practice has focused primarily on class action litigation since the early 2000s. *Id.* He has litigated numerous putative class actions over the course of his career, frequently representing defendants. *Id.* Mr. Karlsgodt has extensive experience litigating complex class actions and is intimately familiar with class action procedure, writing and speaking regularly on the subject. *Id.*; *see, e.g.*, PAUL G. KARLSGODT ET AL., *WORLD CLASS ACTIONS* (Oxford Univ. Press 2012); Paul G. Karlsgodt & Dustin M. Dow, *The Practical Approach: How the Roberts Court Has Enhanced Class Action Procedure by Strategically Carving at the Edges*, 48 AKRON L. REV. 884 (2015).

Mr. Karlsgodt has been assisted in this matter by David McMillan, who received his J.D. from Fordham University School of Law in 2009, *id.* ¶ 3, and Samantha Tillotson, who received her J.D. in 2016 from the University of Denver Sturm College of Law. *Id.* ¶ 4. Both Mr.

McMillan and Ms. Tillotson are associates in BakerHostetler's complex commercial litigation group. *Id.* ¶¶ 3, 4.

Class Counsel also consists of Sara Neel and Mark Silverstein of the ACLU of Colorado. Declaration of Mark Silverstein in Support of Plaintiffs' Motion for Reasonable Attorneys' Fees and Incentive Awards ("Silverstein Decl.") ¶¶ 3, 5. Mr. Silverstein received his J.D. in 1989 from the Illinois College of Law. *Id.* ¶ 4. After graduation, he served as a law clerk for the Honorable Judge James Moran of the United States District Court for the Northern District of Illinois and spent an additional year clerking for the Honorable Judge Harry Pregerson of the United States Court of Appeals for the Ninth Circuit. *Id.* Mr. Silverstein began working for the American Civil Liberties Union in 1991, where he has served Legal Director for the ACLU of Colorado since 1996. *Id.*

Mr. Silverstein has been assisted in this matter by Ms. Neel, a staff attorney at the ACLU of Colorado who has represented numerous clients in civil rights cases involving constitutional law, federal civil rights statutes and Colorado law. *Id.* ¶ 5. Ms. Neel received her J.D. from Indiana University in 2005. *Id.* Prior to joining the ACLU of Colorado, Ms. Neel served as an Associate Attorney at Killmer, Lane & Newman LLP, where she represented clients in a broad spectrum of civil rights cases. *Id.*

Class Counsel additionally includes Kevin Costello, Director of Litigation at the Center for Health Law and Policy Innovation of Harvard Law School. Declaration of Kevin Costello in Support of Plaintiffs' Motion for Reasonable Attorneys' Fees and Incentive Awards ("Costello Decl.") ¶ 1. Mr. Costello received his J.D. from the University of Pennsylvania Law School in 2001. *Id.* ¶ 2. After graduation, Mr. Costello served as a law clerk to the Honorable Francis X.

Spina of the Massachusetts Supreme Judicial Court and to the Honorable Joseph H. Rodriguez of the U.S. District Court for the District of New Jersey in Camden. *Id.* ¶ 3. Mr. Costello began teaching and practicing law at Harvard Law School in 2015. *Id.* ¶ 4. Mr. Costello has over eleven years of experience representing plaintiffs and classes in complex civil litigation, and currently leads the Center for Health Law and Policy Innovation’s mission of improving access to health care for low-income and other vulnerable groups of consumers. *Id.*

III. ARGUMENT

The parties’ Settlement Agreement provides that HCPF will pay Class Counsel reasonable attorneys’ fees and costs in the amount of \$62,500. Class Counsel respectfully request that the Court approve this amount pursuant to Federal Rule of Civil Procedure 23(h), which permits the Court to award “reasonable attorney’s fees and nontaxable costs that are authorized by . . . the parties’ agreement.” Class Counsel also requests approval of reasonable incentive awards of \$500 for each of the named Plaintiffs in recognition of their work and contribution to this case.

A. The Agreed-Upon Amount For Attorneys’ Fees and Costs is Reasonable

Attorneys’ fees are typically assessed using the ‘lodestar’—the number of hours reasonably expended multiplied by reasonable hourly rates—and then adjusted, if appropriate, by considering one or more of the factors in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).⁴ *See In re Davita Healthcare Partners, Inc.*, No. 12-CV-2074-WJM-CBS,

⁴ The *Johnson* Factors are: (1) the time and labor required by counsel; (2) the novelty and difficulty of the legal question presented; (3) the skill required to represent the class appropriately; (4) the preclusion of other employment by the attorneys due to the acceptance of this case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys, (10) the “undesireability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Decoteau v.*

2015 WL 3582265, at *4 (D. Colo. June 5, 2015) (citing *Anchondo v. Anderson, Crenshaw & Assocs., L.L.C.*, 616 F.3d 1098, 1102–04 (10th Cir. 2010) and *Homeward Bound, Inc. v. Hissom Mem'l Ctr.*, 963 F.2d 1352, 1355–56 (10th Cir. 1992)). The lodestar method yields a fee that is presumptively appropriate. See *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010).

Class Counsel's lodestar is itself a reasonable fee for this two-plus year litigation that advocated for Colorado Medicaid enrollees' access to a breakthrough life-saving medication for HCV. Class Counsel's lodestar is approximately \$347,063, including \$182,423 incurred by BakerHostetler,⁵ \$105,150 incurred by the Center for Health Law and Policy Innovation of Harvard Law School and \$59,490 incurred by the ACLU of Colorado. See Karlsgodt Decl. ¶ 10; Costello Decl. ¶ 10; Silverstein Decl. ¶ 12. In addition, Class Counsel has collectively incurred approximately \$30,000 in costs and expenses, which reduces the attorneys' fee award even further. See Karlsgodt Decl. ¶ 10; Costello Decl. ¶ 10; Silverstein Decl. ¶ 12. These figures do not include fees or costs incurred in connection with the related *Cunningham* case, in which some of Class Counsel were involved.

The agreed-upon amount of \$62,500 for fees and costs is a small fraction of the amount that Class Counsel has incurred, and is therefore eminently reasonable. See, e.g., *Decoteau v. Raemisch*, No. 13-CV-3399-WJM-KMT, 2016 WL 8416757, at *9 (D. Colo. July 6, 2016) (granting unopposed motion for attorneys' fees and costs in the amount of \$410,000, considering

Raemisch, No. 13-CV-3399-WJM-KMT, 2016 WL 8416757, at *8 (D. Colo. July 6, 2016) (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1979)).

⁵ Although payment will be made to BakerHostetler in the first instance, following reimbursement for costs and expenses advanced in connection with the litigation, BakerHostetler will be disbursing all attorneys' fees to the ACLU of Colorado and the Center for Health Law and Policy Innovation of Harvard Law School. BakerHostetler will not be the recipient of any attorney's fees or costs awarded by the Court.

the effort expended by class counsel, the risks and difficulties inherent similar litigation, the skill required, and the dedication displayed); *Reiskin v. Reg'l Transportation Dist. Colorado*, No. 14-CV-03111-CMA-KLM, 2017 WL 5990103, at *5 (D. Colo. July 11, 2017) (finding that \$375,000 in fees was eminently reasonable given amount of work required of Plaintiffs' counsel).

As set forth in the attached Declarations of Paul Karlsgodt, Kevin Costello and Mark Silverstein, the time spent by Class Counsel on this matter was reasonably expended. *See* Karlsgodt Decl. ¶ 11; Silverstein Decl. ¶ 13; Costello Decl. ¶ 11. Class Counsel achieved significant success in the litigation, not only securing class certification, but also defeating HCPF's motion to dismiss and negotiating settlement terms that ensure class members' long-term access to DAA treatment without regard to their fibrosis score. *See* Karlsgodt Decl. ¶¶ 8-9; Silverstein Decl. ¶¶ 10-11; Costello Decl. ¶¶ 8-9. The parties only began to contemplate settlement after HCPF notified Plaintiffs' counsel in November 2017 that it had revised its prior authorization criteria for DAA coverage approval to omit any requirement related to Metavir fibrosis score. During those negotiations, Class Counsel achieved key substantive relief for the class by securing HCPF's agreement to impose a two-year prohibition on HCPF's DAA treatment fibrosis score restriction. Class Counsel also secured HCPF's agreement to provide notice to the now-certified class, \$500 incentive awards for each class member, and public and provider education about the policy change. The time spent by Class Counsel to achieve these results was appropriate and reasonable, and the agreed-upon amount for fees and costs should be approved. *See Martinez v. Maketa*, No. 10-CV-02242-WYD-KLM, 2011 WL 2222129, at *1 (D. Colo. June 7, 2011) (granting unopposed motion for attorneys' fees for \$60,000, considering

“Plaintiffs’ downward departure from their calculated lodestar of approximately \$90,000, the significance and scope of the case, the fact that Plaintiffs achieved in settlement all of the relief sought in their complaint, Defendant’s continuing defense against Plaintiffs’ claims, and Defendant’s agreement that Plaintiffs’ fee request in this case is reasonable.”).

B. The Agreed-Upon Incentive Award Payment to Each Named Plaintiff is Reasonable

A class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class. *Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1010 (D. Colo. 2014) (citing *UFCW Local 880–Retail Food Emp’rs Joint Pension Fund v. Newmont Mining Corp.*, 352 Fed.Appx. 232, 235–36 (10th Cir. 2009)). Incentive awards are within the Court’s discretion, and may be awarded upon considerations of (1) the actions the class representative took to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; and (3) the amount of time and effort the class representative expended in pursuing the litigation. *Id.* (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.1998); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005)).

The Settlement Agreement provides for an incentive award to each named Plaintiff in the amount of \$500. The requested awards are reasonable, appropriate and justified. By agreeing to serve as class representatives, the named Plaintiffs necessarily agreed to be identified publicly as having HCV and to accept the stigma that comes along with it. Moreover, each Plaintiff invested significant time participating in the development of the case, including multiple meetings with counsel as the litigation theory was put together and due diligence was performed on their medical condition and history. Each Plaintiff remained invested in the case as it evolved, from pleadings to dispositive motion practice to certification to discovery, in their role as

class representatives for a putative class that was ultimately certified by the Court. Each Plaintiff also had to agree to have their medical records disclosed to Class Counsel and ultimately to HCPF, which required them to spend significant time and effort coordinating authorizations for release of records to numerous medical providers and third parties. Given that the named Plaintiffs agreed to assume these burdens, and based on awards approved in other cases, an incentive award of \$500 per Plaintiff is more than justified. *See, Lucken Family Ltd. P'ship, LLLP v. Ultra Res., Inc.*, No. 09-CV-01543-REB-KMT, 2010 WL 5387559, at *6 (D. Colo. Dec. 22, 2010) (incentive award of \$10,000 was reasonable where plaintiff devoted significant time and effort to the litigation, provided responsive documents and information, and provided other substantial assistance to class counsel); *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 463 (9th Cir. 2000) (approving \$5,000 incentive award to each plaintiff where settlement was valued at \$1.75 million); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (approving incentive award of \$25,000 for named plaintiff where settlement was valued at \$13 million); *Enterprise Energy*, 137 F.R.D. at 251 (approving incentive award totaling \$300,000 to class representatives out of a settlement fund of \$56.6 million, which was 0.56% of the common fund).

IV. CONCLUSION

WHEREFORE, for the reasons set forth herein, Plaintiffs respectfully request the Court enter an order (a) approving a payment to Class Counsel of \$62,500 in attorney's fees and costs, and (b) approving \$500 in incentive awards for each of the named Plaintiffs, as set forth in the Settlement Agreement. A proposed order is being submitted herewith.

Respectfully submitted this 19th day of February 2019.

s/ Paul G. Karlsgodt

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **PLAINTIFFS' UNOPPOSED MOTION FOR REASONABLE ATTORNEYS' FEES AND INCENTIVE AWARDS** was served on February 19, 2019, via the Court's ECF system to all counsel of record.

/s/Carolyn Bahr_____

**BEIN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 17-CV-00904-KLM

MICHAEL RYAN,
SHARON MOLINA,
EARBY MOXON,
and HEATHER MYERS,
on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SUSAN E. BIRCH, in her official capacity only as
Executive Director of the COLORADO STATE DEPARTMENT
OF HEALTHCARE POLICY & FINANCING,

Defendant.

**DECLARATION OF PAUL KARLSGODT IN SUPPORT OF PLAINTIFFS' MOTION
FOR REASONABLE ATTORNEYS' FEES AND INCENTIVE AWARDS**

I, Paul Karlsgodt, declare under penalty of perjury and in accordance with the laws of the United States and of Colorado that:

1. I am one of the lead attorneys for the Plaintiffs in this case. I am licensed to practice law in the State of Colorado. My registration number is 29004.

2. I am a 1993 graduate of Purdue University, and a 1997 graduate of the University of Denver Sturm College of Law. Following law school, I served as a law clerk to the Honorable D. Brook Bartlett, Chief Judge of the United States District Court for the Western District of Missouri. I have been associated with the law firm of Baker & Hostetler LLP since 1999, upon completing that clerkship. I became a Partner with the firm in 2005. My practice has focused primarily on class action litigation since the early 2000s. I have litigated scores of putative class actions over the course of my career and have extensive experience with class actions and class action procedure. I write and speak regularly on the subject. My publications on class action procedure include: PAUL G. KARLSGODT ET AL., *WORLD CLASS ACTIONS* (Oxford Univ. Press 2012); Paul G. Karlsgodt & Dustin M. Dow, *The Practical Approach: How the Roberts Court Has Enhanced Class Action Procedure by Strategically Carving at the Edges*, 48 AKRON L. REV. 884 (2015) in addition to numerous articles in trade journals and bar association publications. I

am also editor and primary contributor to a legal blog on the subject, Paul G. Karlsgodt, CLASSACTIONBLAWG.COM (May 11, 2017, 12:00 PM), <https://classactionblawg.com/>. My average billable hourly rate over the duration of this litigation was \$585.65 per hour.

3. David McMillan has assisted me in this matter. Mr. McMillan is an associate in the BakerHostetler's litigation group whose practice centers on class action defense, securities litigation, bankruptcy and other types of general commercial litigation. Mr. McMillan obtained his bachelor's degree from Cornell University in 2004, his master's degree from Pace University in 2006, and graduated with his J.D. from Fordham University School of Law in 2009. Since obtaining his law degree, Mr. McMillan has worked extensively on a number of high-profile fraud cases involving the financial industry, including representation of the SIPA Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC (BLMIS). Mr. McMillan also defends clients in significant securities-related government investigations and securities fraud class actions, has spoken on a number of panels discussing cutting-edge issues in class action law, and writes frequently on current trends in class action and securities litigation. Mr. McMillan's average billable hourly rate over the duration of this litigation was \$330 per hour.

4. Sammantha Tillotson, an associate in BakerHostetler's complex commercial litigation group, has also assisted me in this matter. Ms. Tillotson obtained her bachelor's degree from the Metropolitan State University of Denver in 2011 and her J.D. from the University of Denver Sturm College of Law in 2016. Ms. Tillotson has experience litigating a wide-range of complex issues, including products liability, contractual disputes, labor and employment matters, data breach and privacy class action litigation, and state and federal appeals. Ms. Tillotson's average billable hourly rate over the duration of this litigation was \$248.75 per hour.

5. Based on my experience in class civil litigation, these billing rates are reasonable for attorneys of comparable skill, reputation and experience in Colorado.

6. In the instant litigation, three named Plaintiffs filed their Complaint [Docket 1] on April 13, 2017, challenging the Colorado State Department of Health Care Policy & Financing's ("HCPF") use of Metavir fibrosis score in its prior authorization criteria to approve Direct Acting Antiviral (DAA) medications for treatment of HCV, a serious, communicable, but curable illness that afflicted Plaintiffs and the putative class. Plaintiffs asserted claims on behalf of themselves and a class of similarly-situated individuals in Colorado, and alleged that Colorado Medicaid illegally denied coverage of DAA treatment for individuals based on a fibrosis score restriction in the Colorado Medicaid preferred drug list that was inconsistent with medical necessity standards.

7. Plaintiffs' Complaint sought the certification of a class of persons who would have been eligible for coverage of Direct Acting Antiviral medication but for HCPF's fibrosis score restriction, a permanent injunction prohibiting such restriction, class notice, a service

award for named Plaintiffs, and attorneys' fees and costs pursuant to 42 U.S.C. § 1988. Docket 1 pp. 26-27. On May 9, 2017, Plaintiffs filed their Amended Complaint [Docket 14], adding a fourth named Plaintiff. On September 5, 2017, after full briefing by the parties, the Court denied HCPF's Motion to Dismiss [Docket 55]. On September 21, 2017, after the parties fully briefed issues of class certification, the Court granted Plaintiff's Motion to Certify Class. [Docket 59]. Thereafter, the parties entered into settlement negotiations. On January 1, 2018, HCPF eliminated fibrosis score restrictions in its prior authorization criteria. On October 26, 2018, the parties filed a Joint Motion to Approve Class Notice and Preliminary Approval of Settlement Agreement [Docket 68], which the Court granted on October 29, 2018 [Docket 69].

8. The Settlement Agreement reached by the parties provides for substantive relief for the class by imposing a two-year prohibition on HCPF's DAA treatment fibrosis score restriction. It also provides for notice to be sent to the now-certified class, \$500 incentive awards for each class member, and public and provider education about the policy change.

9. Counsel in this matter, including myself, Mr. McMillan, and Ms. Tillotson have obtained significant success in this instant litigation, achieving not only class certification, but also defeating HCPF's Motion to Dismiss and negotiating settlement terms that ensure class members long-term access to DAA treatment without regard to their fibrosis score.

10. As shown in the below summary chart, as of February 12, 2019, Baker & Hostetler attorneys have spent 558.4 hours working in furtherance of this litigation. Multiplying these hours by the applicable hourly rate, Baker & Hostetler has expended \$182,423 in attorneys' fees. In addition to these attorneys' fees, Baker & Hostetler has incurred \$19,330 in paralegal costs, \$7,974 in technical support services, and \$10,031.58 in other costs, which include but are not limited to automated research, database hosting, delivery services, and filing fees.

Category	Hours	Billable Rate	Total
Paul Karlsgodt, Attorney	63.7	\$585.65	\$37,306
David McMillan, Attorney	271.5	\$330	\$89,595
Sammantha Tillotson, Attorney	223.2	\$248.75	\$55,522
Paralegal Work	74.2	\$175	\$12,985
Technical Support Services			\$7,974
Costs			\$10,031.58
Total			\$213,413.58

11. In my opinion, based on my extensive experience as a civil litigator in complex class action cases, these hours were reasonably expended, encompassing the pleading stage, motion to dismiss briefing, class certification briefing, and settlement negotiations. This is especially true given that this litigation required specialized knowledge of the medical and pharmaceutical studies and evidence underlying Plaintiffs' claims.

Dated: February 19, 2019

/s/ Paul Karlsgodt
Paul Karlsgodt

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MICHAEL RYAN, SHARON MOLINA, and EARBY MOXON,
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Executive Director of the COLORADO STATE DEPARTMENT
OF HEALTHCARE POLICY & FINANCING,

Defendant.

**DECLARATION OF MARK SILVERSTEIN IN SUPPORT OF PLAINTIFFS' MOTION
FOR REASONABLE ATTORNEYS' FEES AND INCENTIVE AWARDS**

I, Mark Silverstein, declare under penalty of perjury and in accordance with the laws of the United States and of Colorado that:

1. My name is Mark Silverstein. I am over the age of eighteen years and competent to testify as to all matters contained in this Affidavit.

2. I am an attorney licensed to practice law in the State of Colorado. My registration number is 26979. I am a member of the bar on inactive status in Illinois and California. I have been admitted to practice before the United States Supreme Court, the U.S. Court of Appeals for the Ninth Circuit, the U.S. Court of Appeals for Tenth Circuit, the U.S. Court of Appeals for the District of Columbia, and the U.S. District Courts for the Northern and Central Districts of California

3. I am counsel for the Plaintiff in this case. I am submitting this Affidavit in support of Plaintiffs' Motion for Reasonable Attorneys' Fees and Incentive Awards.

4. I received my JD in 1989 from the Illinois College of Law, where I graduated first in my class. I also served as a member of *The University of Illinois Law Review*. I served one year as a law clerk for Judge James Moran of the United States District Court for the Northern District of Illinois and an additional year as a law clerk for Judge Harry Pregerson of the United States Court of Appeals for the Ninth Circuit. I currently serve as Legal Director for the

American Civil Liberties Union Foundation of Colorado (“ACLU of Colorado”), a position I have held since 1996. I began working for the American Civil Liberties Union in 1991 as a staff attorney in Los Angeles for the ACLU of Southern California. In my capacity as Legal Director for the ACLU of Colorado, I oversee litigation in a wide variety of cases raising issues of civil liberties and constitutional rights. I have also taught criminal procedure as an adjunct professor at the Sturm College of Law at the University of Denver. I have extensive experience representing class plaintiffs in complex civil litigation. My billing rate is \$500 per hour.

5. Sara Neel has assisted me in this matter. Ms. Neel is a staff attorney at the ACLU of Colorado. She is licensed to practice in the state of Colorado and joined the ACLU of Colorado in 2011. Prior to joining the ACLU of Colorado, Ms. Neel served as an Associate Attorney at Killmer, Lane & Newman LLP, where she represented clients in civil rights cases involving constitutional law, federal civil rights statutes and Colorado law. Ms. Neel received her JD from Indiana University in 2005. In both positions, Ms. Neel has litigated exclusively civil rights cases on behalf of plaintiffs. Ms. Neel has been awarded the Colorado Trial Lawyers Association Access to Justice Award. Ms. Neel is also a former President of the Colorado Plaintiff Employment Lawyers Association and former Vice-Chair of the Civil Rights Committee of the Colorado Bar Association. Ms. Neel’s billing rate is \$400 per hour.

6. Arash Jahanian has also assisted me in this matter. Mr. Jahanian is a staff attorney at the ACLU of Colorado. Mr. Jahanian joined the ACLU of Colorado as a staff attorney in May 2017. He previously worked at the civil rights firm Rathod Mohamedbhai LLC, where he represented victims of police brutality, prison abuse, and employment discrimination. Arash has served as Chair of the Denver LGBTQ Commission and past president of the Colorado LGBT Bar Association. He was recognized as the Colorado Bar Association’s Outstanding Young Lawyer in 2015, and was part of three different teams winning the Colorado Trial Lawyers Association’s Case of the Year Award. A graduate of Georgetown Law, Arash has also worked as an associate in Crowell & Moring LLP’s Washington, DC office, a judicial clerk for the Honorable Wiley Y. Daniel of the United States District Court for the District of Colorado, and a middle school teacher in Chicago through Teach For America. Mr. Jahanian’s billable rate is \$350 per hour.

7. Based on my experience in class civil litigation, these billing rates are reasonable for attorneys of comparable skill, reputation and experience in Colorado.

8. In the instant litigation, three named Plaintiffs filed their Complaint [Docket 1] on April 13, 2017, challenging the Colorado State Department of Health Care Policy & Financing’s (“HCPF”) use of Metavir fibrosis score in its prior authorization criteria to approve Direct Acting Antiviral (DAA) medications for treatment of HCV, a serious, communicable, but curable illness that afflicted Plaintiffs and the putative class. Plaintiffs asserted claims on behalf of themselves and a class of similarly-situated individuals in Colorado, and alleged that Colorado Medicaid illegally denied coverage of DAA treatment for individuals based on a fibrosis score restriction in the Colorado Medicaid preferred drug list that was inconsistent with medical necessity standards.

9. Plaintiffs' Complaint sought the certification of a class of persons who would have been eligible for coverage of Direct Acting Antiviral medication but for HCPF's fibrosis score restriction, a permanent injunction prohibiting such restriction, class notice, a service award for named Plaintiffs, and attorneys' fees and costs pursuant to 42 U.S.C. § 1988. Docket 1 pp. 26-27. On May 9, 2017, Plaintiffs filed their Amended Complaint [Docket 14], adding a fourth named Plaintiff. On September 5, 2017, after full briefing by the parties, the Court denied HCPF's Motion to Dismiss [Docket 55]. On September 21, 2017, after the parties fully briefed issues of class certification, the Court granted Plaintiff's Motion to Certify Class. [Docket 59]. Thereafter, the parties entered into settlement negotiations. On January 1, 2018, HCPF eliminated fibrosis score restrictions in its prior authorization criteria. On October 26, 2018, the parties filed a Joint Motion to Approve Class Notice and Preliminary Approval of Settlement Agreement [Docket 68], which the Court granted on October 29, 2018 [Docket 69].

10. The Settlement Agreement reached by the parties provides for substantive relief for the class by imposing a two-year prohibition on HCPF's DAA treatment fibrosis score restriction. It also provides for notice to be sent to the now-certified class, \$500 incentive awards for each class member, and public and provider education about the policy change.

11. Counsel in this matter, including myself, Ms. Neel, and Mr. Jahanian have obtained significant success in this instant litigation, achieving not only class certification, but also defeating HCPF's Motion to Dismiss and negotiating settlement terms that ensure class members long-term access to DAA treatment without regard to their fibrosis score.

12. As shown in the below summary chart, as of February 12, 2019, attorneys from the ACLU have spent 143.2 hours working in furtherance of this litigation. Multiplying these hours by the applicable hourly rate, the ACLU of Colorado has expended \$59,490 in attorneys' fees. In addition to these attorneys' fees, the ACLU of Colorado has incurred \$4,080 in administrative expenses and \$2,287.88 in costs.

Category	Hours	Billable Rate	Total
Mark Silverstein, Attorney	37.7	\$500.00	\$18,850.00
Sara Neel, Attorney	74.3	\$400.00	\$29,720.00
Arash Jahanian, Attorney	31.2	\$350.00	\$10,920.00
Administrative Services	27.2	\$150	\$4,080.00
Costs			\$2,287.88
Total			\$63,570.00

13. In my opinion, based on my extensive experience as a civil litigator in complex class action cases, these hours were reasonably expended, encompassing the pleading stage, motion to dismiss briefing, class certification briefing, and settlement negotiations. This is especially true given that this litigation required specialized knowledge of the medical and pharmaceutical studies and evidence underlying Plaintiffs' claims.

Dated: February 19, 2019

/s/ Mark Silverstein
Mark Silverstein

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 17-CV-00904-KLM

MICHAEL RYAN, SHARON MOLINA, and EARBY MOXON,
on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SUSAN E. BIRCH, in her official capacity only as
Executive Director of the COLORADO STATE DEPARTMENT
OF HEALTHCARE POLICY & FINANCING,

Defendant.

**DECLARATION OF KEVIN COSTELLO IN SUPPORT OF PLAINTIFFS' MOTION
FOR REASONABLE ATTORNEYS' FEES AND INCENTIVE AWARDS**

I, Kevin Costello, declare under penalty of perjury and in accordance with the laws of the United States and of Colorado that:

1. I am the Director of Litigation at the Center for Health Law and Policy Innovation of Harvard Law School and one of the lead attorneys for the Plaintiffs in the above-captioned action.

2. I am a 1996 honors graduate of Boston College, and a 2001 honors graduate of the University of Pennsylvania Law School.

3. After graduation, I served as a law clerk to the Honorable Francis X. Spina of the Massachusetts Supreme Judicial Court and to the Honorable Joseph H. Rodriguez of the U.S. District Court for the District of New Jersey in Camden. I have extensive experience advocating on behalf of vulnerable classes of people. After law school internships with legal aid organizations in New York and San Francisco, I was an Independence Fellow and staff attorney at the Elderly Law Project of Community Legal Services in North Philadelphia, helping seniors navigate the health care system.

4. I have over eleven years of experience representing plaintiffs and classes in complex civil litigation. I began this work in 2008 at Roddy, Klein & Ryan, LLP and continued there until 2011. At that time, together with two law partners, I formed the law firm of Klein,

Kavanagh, Costello, LLP. My law firm was devoted to the enforcement of consumer rights in groundbreaking cases challenging predatory lending and debt collection practices, racial discrimination in the origination or residential mortgages, broken promises by lenders in the context of a major federal housing program, and antitrust violations by national broadcasters and sports leagues. I began teaching and practicing law at Harvard Law School in 2015. In my current role as Direct of Litigation, I work to achieve the Center for Health Law and Policy Innovation's mission of improving access to health care for low-income and other vulnerable groups of consumers.

5. My billing rate is \$500 per hour. Based on my experience in class civil litigation, this billing rate is reasonable for attorneys of comparable skill, reputation and experience.

6. In the instant litigation, three named Plaintiffs filed their Complaint [Docket 1] on April 13, 2017, challenging the Colorado State Department of Health Care Policy & Financing's ("HCPF") use of Metavir fibrosis score in its prior authorization criteria to approve Direct Acting Antiviral (DAA) medications for treatment of HCV, a serious, communicable, but curable illness that afflicted Plaintiffs and the putative class. Plaintiffs asserted claims on behalf of themselves and a class of similarly-situated individuals in Colorado, and alleged that Colorado Medicaid illegally denied coverage of DAA treatment for individuals based on a fibrosis score restriction in the Colorado Medicaid preferred drug list that was inconsistent with medical necessity standards.

7. Plaintiffs' Complaint sought the certification of a class of persons who would have been eligible for coverage of Direct Acting Antiviral medication but for HCPF's fibrosis score restriction, a permanent injunction prohibiting such restriction, class notice, a service award for named Plaintiffs, and attorneys' fees and costs pursuant to 42 U.S.C. § 1988. Docket 1 pp. 26-27. On May 9, 2017, Plaintiffs filed their Amended Complaint [Docket 14], adding a fourth named Plaintiff. On September 5, 2017, after full briefing by the parties, the Court denied HCPF's Motion to Dismiss [Docket 55]. On September 21, 2017, after the parties fully briefed issues of class certification, the Court granted Plaintiff's Motion to Certify Class. [Docket 59]. Thereafter, the parties entered into settlement negotiations. On January 1, 2018, HCPF eliminated fibrosis score restrictions in its prior authorization criteria. On October 26, 2018, the parties filed a Joint Motion to Approve Class Notice and Preliminary Approval of Settlement Agreement [Docket 68], which the Court granted on October 29, 2018 [Docket 69].

8. The Settlement Agreement reached by the parties provides for substantive relief for the class by imposing a two-year prohibition on HCPF's DAA treatment fibrosis score restriction. It also provides for notice to be sent to the now-certified class, \$500 incentive awards for each class member, and public and provider education about the policy change.

9. Counsel in this matter, including myself, have obtained significant success in this instant litigation, achieving not only class certification, but also defeating HCPF's Motion to Dismiss, and negotiating settlement terms that ensure class members long-term access to DAA treatment without regard to their fibrosis score.

10. As of February 12, 2019, I have spent 211.1 hours working in furtherance of this litigation. Multiplying these hours by my hourly rate of \$500, I have expended \$105,150 in

attorneys' fees. In addition to these attorneys' fees, the Center for Health Law and Policy Innovation of Harvard Law School has incurred approximately \$5,530 in costs and expenses, including but not limited to travel costs and website hosting fees.

11. In my opinion, based on my extensive experience as a civil litigator in complex class action cases, these hours were reasonably expended, encompassing the pleading stage, motion to dismiss briefing, class certification briefing, and settlement negotiations. This is especially true given that this litigation required specialized knowledge of the medical and pharmaceutical studies and evidence underlying Plaintiffs' claims.

Dated: February 19, 2019

/s/ Kevin Costello
Kevin Costello