

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CIVIL PART
ESSEX COUNTY, NEW JERSEY
DOCKET NO.: ESX-L-4216-05
DOCKET NO.: ESX-L-109-08
A.D. # _____

KIRSCH, D.D.S.,
Plaintiff,
vs.
HORIZON BLUE CROSS BLUE
SHIELD OF NEW JERSEY,
Defendant.

TRANSCRIPT
OF
HEARING

Place: Essex County Veterans
Courthouse
50 West Market Street
Newark, New Jersey 07102

Date: July 23, 2012

BEFORE:

HONORABLE PAUL J. VICHNESS, J.S.C.

TRANSCRIPT ORDERED BY:

ERIC D. KATZ, ESQ., (Mazie, Slater, Katz &
Freeman, LLC)

APPEARANCES:

ERIC D. KATZ, ESQ., (Mazie, Slater, Katz &
Freeman, LLC),
Attorney for the Plaintiff Class.

JOHN M. MURDOCK, ESQ., (Benton, Potter & Murdock),
Attorney for the Defendant.

MAXINE NEUHAUSER, ESQ., (Epstein, Becker & Green),
Attorney for the Defendant.

TRANSCRIBER: Kristin Gangerelli
KING TRANSCRIPTION SERVICES
FRANK H. ULRICH
901 Rt. 23 South, Center Suite 3
Pompton Plains, New Jersey 07444

Recording Opr:

1 APPEARANCES (continued):

2 THOMAS ESCHLEMAN, ESQ., (Horizon Blue Cross Blue
3 Shield Assistant General Counsel)

4 THOMAS A. GENTILE, ESQ., (Lampf, Lipkind, Prupis
and Petigrow),
5 Attorney for the Objectors.

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1 THE COURT: This is in the matter of Kirsch
2 versus Horizon Br -- B1 -- Blue Cross Blue Shield of
3 New Jersey, docket numbers L-4216-05 and 109-8. Can I
4 have appearances?

5 MR. KATZ: Good morning, Your Honor; Eric
6 Katz of the law firm of Mazie, Slater, Katz and
7 Freeman, on behalf of the Plaintiff Class.

8 MR. MURDOCK: Good morning, Your Honor; John
9 Murdock with the law firm of Benton, Potter and
10 Murdock, with me is Maxine Neuhauser with the law firm
11 of Epstein, Becker and Green; representing the
12 defendant, Horizon Blue Cross Blue Shield. And with us
13 is Assistant General Counsel for Horizon, Thomas
14 Eschleman.

15 THE COURT: Okay.

16 MR. GENTILE: Good morning, Your Honor;
17 Thomas Gentile of Lampf, Lipkind, Prupis and Petigrow,
18 for the objectors, Dr. Krugman (phonetic) and Dr. --.

19 THE COURT: Well, come -- come have a seat.

20 MR. GENTILE: Thank you, Your Honor.

21 THE COURT: Now, I -- I understand that
22 there's a substitution of attorney filed; I haven't
23 seen it.

24 MR. GENTILE: I can give you a copy, Your
25 Honor.

1 THE COURT: Okay; and I haven't received any
2 opposition from you. I've got Mr. Bortek's (phonetic)
3 opposition.

4 MR. GENTILE: Yes, Your Honor; we -- we were
5 appearing on Mr. Bortek's papers.

6 THE COURT: Okay.

7 MR. GENTILE: May I approach, Your Honor?

8 THE COURT: Sure.

9 MR. GENTILE: Thanks.

10 THE COURT: Okay, so I assume when this says,
11 "Consents to a substitution as counsel for the
12 plaintiff", you meant the defendant.

13 MR. GENTILE: Yes, Your Honor; I apologize.

14 THE COURT: Okay.

15 MR. MURDOCK: -- no, I'm sorry, Your Honor.

16 MS. NEUHAUSER: -- (inaudible) --

17 MR. MURDOCK: Horizon's the defendant.

18 Plaintiff's in the Plaintiff Class. So, you're
19 appearing --

20 THE COURT: Well, it would be as --

21 MR. GENTILE: We are appearing --

22 THE COURT: -- as --

23 MR. GENTILE: -- on behalf of the objectors.

24 THE COURT: -- as counsel to the objectors.

25 MR. GENTILE: Yes, Your Honor; on behalf of

1 the objectors.

2 THE COURT: Okay, the record should reflect
3 that on July 16th, Mr. Bortek sent a letter asking that
4 this matter be adjourned because he was going on
5 vacation as of yesterday. I was on vacation when that
6 happened, but my law clerk advised him that we weren't
7 going to adjourn this. Notwithstanding the fact that
8 the notice said that it could be adjourned. We're
9 talking about notice that went to 17,000 people; some
10 of whom required notices sent to more than one
11 location. And so the opportunity between a -- a letter
12 dated July 16th and now, to renotify, it -- it -- it
13 would have been just way to remote and require an
14 incredible amount of work, in an incredibly short
15 period of time.

16 So, at -- the objections that have been filed
17 seem to deal with, most particularly, (A) the legal
18 fees; and (B), the amount of the settlement to the
19 members of the class.

20 MR. GENTILE: Yes, Your Honor; there's
21 actually two aspects to the objection. The first
22 aspect of the objection incorporates both of what you
23 just said; it is the disproportionality between the
24 legal fees and the amount being paid to each class
25 member under this proposed settlement.

1 The second aspect of the objection has to do
2 with the supposed business reforms under the settlement
3 agreement. The objection -- objectors are concerned
4 that these proposed business reforms do not object --
5 do not address the core claims in the case of bundling,
6 downcoding. That there's nothing in these proposed
7 business form -- reforms that in any way restrain
8 Horizon from continuing, in the future, to do exactly
9 what this class action lawsuit was about. So those are
10 the two aspects of the objections.

11 THE COURT: Okay, leaving aside the monetary
12 part; Mr. Katz, you want to be heard just on the second
13 part of it?

14 MR. KATZ: Yes; there were various aspects to
15 these lawsuits and what they were about. To use Mr.
16 Gentile's terminology that the "core claims" of the
17 case, they involved essentially two a -- two -- three
18 aspects -- excuse me, three aspects. One is violation
19 of the prompt pay laws. The second is Horizon's
20 alleged bundling and downcoding policies. And the
21 third is the hassle factor of what class members for
22 years have been having to deal with, with Horizon in
23 terms of the claim submission follow-up processes.
24 What's going to happen to their claims? Where is the
25 money? When can they expect to get paid? Having to

1 devote many people at exorbitant overhead, large
2 overhead, to deal with claim submission and follow-up
3 processes.

4 THE COURT: There's also -- as I recall --
5 complaints about Horizon Blue Cross Blue Shield
6 changing their schedule of payments.

7 MR. KATZ: Correct; they -- that's -- that's
8 -- that's an issue too; where there's fee schedule
9 issues, where they're not being paid according to the
10 fee schedule.

11 All of these aspects of these claims are
12 dealt with in this settlement. And let me first
13 preface this by saying this is a settlement that offers
14 very significant value; both monetarily and we
15 discussed this based upon -- in -- in this -- in the
16 lengthy submissions to the Court -- based upon class
17 counsel's research, this is one of the largest dental
18 class action settlement funds in a claims adjudication
19 case that there's ever been.

20 And the amount that's being paid to class
21 members, who submit the claim -- under a very simple
22 claims submission process -- of \$167.70, trumps the
23 amounts that have been paid in other highly touted
24 managed care class actions over the years. Both prior
25 dental class actions, as well as the -- settlement --

1 which is a national class action settlement, which Mr.
2 Gentile's firm is very familiar with, since his firm
3 has -- has repeatedly objected to settlements that have
4 been resolved by my law firm; both as to Sutter, which
5 is the physician consolidated case, and this case. So
6 in terms of one of the core claims, in terms of -- of
7 money that would be owed to the class, the \$2.85
8 million settlement fund is certainly a sizable
9 settlement fund to deal with that particular claim.

10 With regard to the bundling and downcoding
11 claims -- and I'm not going to get into this right now,
12 unless Your Honor has questions, but we addressed the
13 issues -- the legal issues that we would of had to deal
14 with if this litigation continued to go forward. But
15 with regard to the bundling and downcoding claims,
16 there are -- there is one reform, in particular, the
17 advisory committee that's been set up. That has been
18 highly touted in other litigations because it brings
19 the parties together.

20 You've got to understand, what these lawsuits
21 are ultimately about -- they do business together. The
22 idea is to bring the combatants -- if you will --
23 together. And one of the significant issues with the
24 advisory committee is to deal with making
25 recommendations -- formulating and making

1 recommendations that deal with bundling policies on a
2 going forward basis. So that core claim -- if you will
3 -- is also being dealt with in this litigation.

4 And another issue that's been raised, you
5 talk about not being paid according to fee schedules.
6 I'm going to -- I'm going to bunch that in -- if you
7 will -- with the hassle factor. That's all part of
8 what we call the "hassle factor", with class members
9 either not getting paid what they expected to get paid,
10 or being given -- if you will -- the run around.

11 What's going on with my claim? When can I expect to
12 get paid?

13 There are numerous business reforms in this
14 settlement that address those; including the fact that
15 fee schedules are going to be provided upon request;
16 including the fact that there are now dedicated e-mail
17 addresses that are being set up that require Horizon to
18 respond in a timely fashion to questions about, what
19 was I paid, what is the fee that I expected to get
20 paid, what's going on with my claim, where's my
21 capitation payment. These are reforms that were
22 already found to be valuable in the Sutter case, over
23 Mr. Gentile's firm's objection, recently affirmed by
24 the Appellate Division.

25 So I would submit to the Court that all of

1 the core claims have been more than fairly and
2 adequately dealt with in this settlement. And the only
3 other thing I would say, Your Honor, is -- and we cited
4 to this case law, and we're all attorneys, we all
5 understand this -- settlement is a compromise. There
6 is no such thing as a perfect settlement.

7 THE COURT: Well par -- particularly -- I
8 mean, part of their settlement is Horizon still says,
9 "We didn't do anything wrong. We're settling the case,
10 but we don't admit that anything that we did was
11 wrong." I mean, I can tell from my experience with the
12 case -- I remember the first time I met Mr. Murdock.
13 And Mr. Murdock told me, "Judge, you can put this down
14 on your calender, there is no way this case will ever
15 settle. Horizon is dedicated to trying this case,
16 because we haven't done anything wrong and we're going
17 to prove it this time." And up until, fairly recently,
18 he'd smile, but his position never changed.

19 So this isn't a case where you started the
20 suit; they said, okay, we're going to give in, now
21 let's negotiate the terms. This is a case that was
22 ready to go to trial. When you submitted -- the
23 mediation with former Magistrate Hedges -- and -- and I
24 assume from the papers that I've read, that with his
25 help, you were able to come up with what I have in

1 front of me now, which is not everything you wanted.
2 It's certainly not everything that they wanted to give,
3 but something -- as all good settlements are -- that
4 both sides could live with.

5 MR. KATZ: That's right, Your -- that's
6 right, Your Honor. And I -- if I could just expand
7 briefly on that point? This settlement was achieved,
8 essentially, after almost seven years of hotly fought,
9 sometimes contentious litigation. This is -- in our
10 papers with over 20 -- with 25 depositions, over 30
11 days of deposition testimony, well over 100,000
12 documents produced, gigabytes of data of all types that
13 were produced, electronic claims discovery, member
14 claims discovery, various electronic discovery about
15 Horizon's claims processing practices, and negotiations
16 that ultimately led to this settlement were the product
17 of a year's worth of -- of -- of negotiations going
18 back and forth. Business reforms, settlement proposals
19 of cash, going back and forth for several months under
20 the very watchful eye of former Federal Magistrate
21 Ronald Hedges. And the settlement was only achieved
22 due to his invaluable assistance of -- essentially --
23 banging heads together and bringing us to a resolution.

24 And I just want to add one more thing to that
25 because I know this will be an issue that we dealt --

Argument - Mr. Gentile

1 deal with later. The issue of fees, which was also
2 resolved -- counsel fees, which was also resolved with
3 the invaluable assistance of Judge Hedges, was not an
4 issue that was even remotely broached until all of the
5 settlement terms were done and we closed the book on
6 the class benefits. Only then, did we turn to the
7 issue of attorneys' fees and an incentive award to Dr.
8 Kirsch. And again with Judge Hedges's invaluable
9 assistance, we were able to reach an agreement on -- on
10 that in terms of what Horizon would not oppose, but
11 ultimately it's Your Honor that makes the call on that.

12 THE COURT: Okay.

13 MR. GENTILE: Thank you, Your Honor. With
14 regard to the core claims in this case -- prompt pay,
15 downcoding, and bundling -- class counsel is
16 emphasizing the supposed importance of the advisory
17 committee. I think it's important to remember here
18 that this advisory committee has no binding power.
19 There's nothing that this advisory committee can do,
20 that will change Horizon's practices regarding prompt
21 pay, downcoding, and bundling. It's all relying on the
22 supposed good faith of everyone to being -- being
23 brought together and doing what's right.

24 And the objectors are opposed to that because
25 there is no guarantee to them that these pro --

1 practices will change in the future. When you look at
2 the settlement agreement, and you look at the business
3 reforms that are set forth in the settlement agreement,
4 you see the same phrase again and again; "Horizon will
5 continue its current practice. Horizon will continue
6 its current practice." These business reforms amount
7 to nothing more than Horizon now promising that they're
8 going to do the things that they had already promised
9 that they had done before, but never did. And --

10 THE COURT: Well, to -- to some extent. I
11 mean, for instance, one of the complaints -- as I
12 recall -- was the fact that the schedules of payments
13 would change. And that it would be difficult for the
14 dentists to know, when they were providing services,
15 exactly what they were going to get paid, because these
16 things were constantly changing. Horizon, for
17 instance, has now agreed they're going to change it
18 once a year. And when they change it, they're going to
19 post the changes. So that, at least for a year, there
20 should be no question about what the schedules are.

21 MR. GENTILE: Well, it's going to -- it --
22 it's going to be changed and it's going to be posted,
23 Your Honor; that's correct. But what the objectors
24 would have liked to have seen is the schedule set forth
25 in the settlement agreement, saying you're going to be

1 getting this and the practices going forward will be
2 this. And there will be an enforcement mechanism --

3 THE COURT: Well the -- but there is an
4 enforcement mechanism, which is to come back to court,
5 which hopefully will never have to be used. But that's
6 my hope, since at least until they retire me, it'll be
7 coming back to me. But -- I mean, it -- I can't say --
8 and -- and I would imagine that Horizon Blue Cross Blue
9 Shield is never going to agree that, here's our
10 schedule and we're never going to change it. I mean,
11 why would they do that?

12 And as -- as conditions change -- what they
13 have agreed and -- and would seem to me to be a major
14 agreement, is to do it only once a year, so that people
15 can plan going forward. And -- and they've agreed to
16 post it as part of this settlement. So, the complaint
17 that they don't -- you know, that dentists don't know
18 what it is, they've agreed to make all of this stuff as
19 -- as -- as part of this settlement; their policies,
20 their procedures. It -- it -- I don't know how you can
21 say that this agreement, this settlement, isn't making
22 this into a more transparent situation. It -- it --
23 you know, e -- everybody I -- I -- I hear and -- and I
24 read Mr. Bortek's objections.

25 In -- I guess I've been involved in this case

1 for five years, six years; nobody else came forward to
2 represent the dentists. Nobody else was willing to
3 spend a half a million dollars of their own money and
4 expenses. Nobody else was willing to invest the
5 thousands and thousands of hours that they invested,
6 not knowing whether or not they were ever going to get
7 paid anything for this case.

8 Certainly you have a right to object, but the
9 objection lacks a -- a -- you know, a -- a little bit
10 of credibility, when the only party whoever came
11 forward to represent this class was Mr. Katz's firm.
12 And they're the only one who fronted the money in this
13 case. I mean, nobody said, geez this is so important,
14 we're going to collect the money and we're going to
15 make sure that the half a million dollars in expenses
16 that you've got -- or I think it's 488,000, but let's
17 call it -- round it up to half a million, it -- it --
18 that's -- it's so important that we're going to go, and
19 the 17,000 dentists who are in the class, are all going
20 to contribute so that even if they don't get any money,
21 at least it won't come out of pocket. No -- nobody did
22 that.

23 I mean, we'll get to that discussion and --
24 and the whole -- you know, in -- in doing fees, that
25 all comes into -- but -- but it -- it's easy to stand

1 back and -- and complain. But -- I mean, I know
2 Horizon's position. I've seen their papers. I know
3 their position is if we litigated it -- they're
4 position was from the start -- that your expert is
5 never going to qualify to be an expert in this case.
6 You're not going to have anyone who can quantify in
7 money, what you say your damages are. And -- and it
8 was a basic disagreement. It wasn't -- you know, it --
9 we think the numbers should be this. Their position
10 was that her entire method was invalid, and that they
11 were going to have no expert to testify to quantify in
12 money damages any amount of money.

13 The prompt pay -- the position was that the
14 law was changing; portions of it have changed. And --
15 and therefore -- although at the time the litigation
16 started, that there were provisions in the prompt pay
17 law, that at least the plaintiff's firm felt were
18 valid. -- portions of those have been revoked, and
19 changed, and -- and called into question.

20 So, I mean, it -- it -- it -- this is not a
21 case of Horizon simply saying, we don't think you're
22 going to win. And -- and -- you know, the plaintiff
23 saying, well -- you know, that's your opinion, but
24 you've got nothing to back it up. In fact, I -- I
25 don't think it was posturing. We -- we were about at

1 the point where there were going to be dispositive
2 motions in this case. If the case didn't settle before
3 the dispositive motions, there's a chance that Mr.
4 Katz's firm and -- on behalf of the class, would have
5 won them all; in which event, maybe there would be more
6 money available. On the other hand, there's a chance
7 that the class would lose; in which event, Horizon's
8 position I'm sure would have been, well you can get no
9 money from us; where you going?

10 Now, once that happens, once I have to make a
11 decision, then where are the negotiations going? So,
12 is -- is it the perfect settlement? No. Is it a fair
13 settlement? And -- and we'll discuss it, but I think
14 it's fair to both sides. And -- you know, any good
15 settlement is a settlement that both sides can live
16 with; not necessarily a settlement that either side is
17 really happy with. Because if one side is really
18 happy, and the other side is --, then it's probably not
19 a fair settlement for the side that isn't real happy,
20 and is probably too good for the side who's really
21 happy.

22 So it doesn't address to the detail that I
23 know Mr. Katz would have liked on behalf of the class.
24 Given a perfect world, there would be more that he
25 would be asking for. Monetarily there would be more.

1 In changes there would be more. But do I believe that
2 he got everything he could have gotten? Yes, I think
3 he did. It -- as you sit here, from my perspective,
4 and -- and you watch the fighting, and -- and to say it
5 was content -- contentious at times, it was the
6 majority of the times. I mean -- you know, fortunately
7 it never got to name calling; it never got to those
8 things. But dirty looks -- right from the start as
9 long as I've been in this case. Both sides believed
10 their cases. And both sides fought, as good lawyers
11 do, very hard for their cases.

12 If either side could have written a
13 settlement, would they have written this settlement?
14 I'm sure not, but that's why it's a fair settlement.
15 Because it addresses the problems that the case have
16 and take into account, what's the most that you can get
17 by way of -- not just money, but by way of making
18 procedures more transparent, easing procedures for the
19 dentists, having at least the ability to have an
20 advisory committee that they're -- that Horizon's
21 willing to work with. Is it going to work, as
22 everybody hopes it's going to work? I don't know. I
23 can't tell you; I don't think anybody can tell you.

24 Is this being done with an eye towards being
25 able to work together? I believe that. I don't

1 believe that Horizon is doing this because they want to
2 pull the wool over everybody's eyes. That doesn't mean
3 that there aren't going to be disagreements. That
4 doesn't mean that there aren't going to be portions
5 where parties with potentially adverse interests aren't
6 going to disagree. It does have the advantage of
7 retaining jurisdiction in this court, so there's
8 someplace to go without having to start a lawsuit all
9 over again, if there are disagreements.

10 I -- I -- I hear your objections and we
11 haven't talked about money at all and -- and I
12 understand that. But you -- your position and the
13 position of your clients, that this isn't as good a
14 settlement as we should have, is too little, too late.
15 Okay; it -- it is -- I believe, from all the papers
16 that I've reviewed and -- and they're extensive, both
17 in opposition and on behalf of this, as good a
18 settlement, as far as these changes could go.

19 Money, quickly -- I haven't seen a specific
20 objection to the \$17,500 for Dr. Kirsch, as the class
21 representative. Is -- is there objection to that?

22 MR. GENTILE: No, Your Honor; there's no
23 objection to the --

24 THE COURT: Okay.

25 MR. GENTILE: -- representative plaintiff's.

1 THE COURT: I was going to say he's -- he's
2 -- he's the guy who came forward and took the step.
3 Let's talk about the \$2,850,000. And -- and I
4 understand part of your objection is the provision in
5 the agreement which says, "If you don't file, that
6 money goes back to Horizon." Okay, does it put a
7 responsibility on the class members to come forward?
8 It absolutely does. Is that a major burden? I think
9 they've made the opportunity to file a claim, about as
10 easy as you can do it. It -- we're not talking about
11 something that all the dentists are going to have to go
12 out and hire lawyers to review and file. It requires,
13 on the part of the members of the class, a minor effort
14 to get their money.

15 Part of the reason that the \$167 and change
16 is so little, is because the class is 17,000 people.
17 Presumably one would hope that they at least read what
18 they've been sent; the opt-out rate is unbelievably
19 small. I -- I believe it's 13, although I've heard
20 that it might be a 14th person.

21 MR. KATZ: That's correct, Judge; --

22 UNIDENTIFIED MALE: That's correct, it is --

23 MR. KATZ: -- it's 14.

24 UNIDENTIFIED MALE: -- 14.

25 THE COURT: Okay; out of 17,000 people. Now

1 I realize it takes something to opt-out. It's always
2 -- you know, more difficult if you have to do
3 something. But once again, not a difficult procedure
4 to opt-out. \$2,850,000 is a -- is a lot of money. Is
5 it going to be \$2,850,000? We won't know until people
6 file their claims and they've got till the middle of
7 August. But there's nothing that Horizon, as the
8 defendant in this case, can or will do to discourage
9 members of the class from filing a claim. They're
10 depositing this money, so that it's easily available
11 for people who file a claim. They're not saying, wait
12 till after it's all done, and then we'll write the \$167
13 checks as they come. They're depositing the money, as
14 I believe.

15 Then we get the legal fees. And I -- I -- I
16 understand -- I think -- all the various objections
17 that you've made and -- and I'll be glad to hear you
18 again, or if you want to supplement as far as your
19 objection to the legal thing.

20 MR. GENTILE: Your Honor, unless you have
21 specific questions, we're happy to --

22 THE COURT: Okay.

23 MR. GENTILE: -- you know, rest on what's --

24 THE COURT: No, I --

25 MR. GENTILE: -- set forth in the papers.

1 THE COURT: -- I -- I don't have any
2 questions. I -- I've done a lot of reading; I've done
3 a lot of studying. I find -- although it's not the
4 same case -- the decision in -- in Sutter versus
5 Horizon Blue Cross and Blue Shield -- it's interesting,
6 other than Sutter, the next named plaintiff in the
7 case, I've got litigation involving him in the breakup
8 of his practice, but that has nothing to do with
9 anything.

10 But -- but this is a case that was decided on
11 July 11th, 2012 -- or the appeal -- the most recent
12 appeal of that case -- and -- and there are a lot of
13 similarities between the complaints that the doctors
14 had. This case talks about a maximum class number of
15 approximately 18,000, as opposed to 17,000 here. In --
16 interestingly, it -- it talks about the number of opt-
17 outs which -- let me see if I can find it. Yes, 18,000
18 members; there was 991 timely requests for exclusion;
19 and 74 untimely requests. So -- you know, 14 to
20 17,000; 991 to 18,000.

21 We're talking about the same firm. We're
22 talking about the amounts of money that were paid to
23 each attorney. And we were talking about a hearing
24 which was done with a -- a blended rate, which the
25 Appellate Division approved of. And -- and a lodestar,

1 given the type of litigation, (A) that there's public
2 interest in this litigation, as there was with the
3 doctors. Anything that can be more efficient for the
4 provision of billing for healthcare, certainly benefits
5 the public at large, not just the 17,000 dentists.

6 But once again, a -- a position, as I
7 mentioned before, where it's not like we had five
8 different lawyers, each starting this lawsuit, fighting
9 to be designated class counsel. There was no
10 competition for the honor of spending a half a million
11 dollars of their own money, not knowing whether or not
12 they were going to get any of it back and whether or
13 not they were going to get paid anything. There's
14 litigation that's gone on for some seven years, and
15 they've gotten not a penny paid back to them for seven
16 years.

17 And -- and I'm not saying that they did this
18 virtuously. Obviously, they hoped to get paid and paid
19 well for what they did, but no guarantees. I mean,
20 it's like any contingency case, there's never a
21 guarantee. The difference is that the amount of time
22 spent and the amount of effort put into the case; the
23 tremendous amount of discovery, more than 25
24 depositions. Heaven knows the motion practice, that
25 I've observed, which has been extensive.

1 I -- I've gone through their bill. And in --
2 in the objection it talks about duplication of -- of
3 effort. And -- and there is some of that, but if you
4 look at the decision of -- I guess it's Judge Graves,
5 if I remember correctly. Well we can't -- we don't
6 know, because it's a *per curiam* decision. But -- but
7 they talk about that it's not unreasonable for two
8 lawyers to receive compensation for working together on
9 class action litigation. It -- it -- it talked about
10 -- and I guess in -- in that case it was Judge
11 Bernstein, who handled the case, and -- and -- both the
12 first and the second hearings as far as fees.

13 There -- there was sometimes where there was
14 duplication of -- two people at a deposition, for
15 instance. But given the complexity of what we're
16 talking about, it -- it -- it certainly is not unusual
17 to have, not just one lawyer at a deposition, but it
18 certainly cuts down on the amount of time spent at the
19 deposition. For one lawyer to be able to do
20 questioning, and another lawyer being able to give him
21 documents, find places in discovery; those types of
22 things. In the long run, it probably saved money to be
23 able to do it that way.

24 But what -- what I think is significant here
25 is if you look at the hours spent by members of the

1 firm, the vast majority of the hours of Mr. Katz's -- I
2 believe that if you add Mr. Katz's hours and Mr.
3 Mazie's hours, you're up over 75 percent of the hours.
4 Subtract the 100 hours for the law clerk; that's really
5 handled separately and -- and in a blended rate, we
6 don't even blend those hours, but -- because they're so
7 much lower. But if -- if you look at the effort, I --
8 I believe that the amount of hours certified to were
9 spent. I believe that the hours spent were necessary.

10 They talk about a -- a blended rate of \$650;
11 probably not inapplicable, even though in -- in Sutter,
12 I believe, it was 550 that was used. But if -- you --
13 you got to look at the end result. So if I use a
14 blended rate of \$600 instead of 650, which is probably
15 low -- particularly since Mr. Mazie and Mr. Katz did 75
16 percent of the work. But if I use \$600, at -- at \$600
17 times 2,940 hours, comes out to \$1,000,764 -- \$64,000.
18 There are eight hours for the law clerk at \$100 an
19 hour; that's another \$800. So it comes out to
20 \$1,000,764 -- \$764,800.

21 The lodestar effect -- the effect to be given
22 to them because they took a case that was not popular,
23 they took a case that but for the ability to get some
24 sort of reward, wouldn't be taken. The lodestar as --
25 as you look at the cases, generally are someplace

1 between 25 percent and 35 percent; they want 35
2 percent. I won't give them 35 percent. Let's assume I
3 give them 30 percent, that would make the lodestar at
4 \$529,440; or a total of \$2,294,240. Let's assume I go
5 to the bottom of the range, 25 percent. At 25 percent,
6 the lodestar comes out to -- or the 25 percent comes
7 out to \$441,200; for a total of \$2,206,000. They've
8 asked for expenses -- and I believe they're expenses --
9 of 488,100 -- \$488,184.08. If I add that to a \$600
10 blended rate, plus 25 percent, it's over the \$2.5
11 million.

12 So that they've agreed to be capped at a
13 number under what a low blended rate would give them,
14 and a 25 percent kicker rather than a 35 percent
15 kicker. So even reducing everything below where they
16 want it, they're still over the 2.5 million they've
17 agreed to take. I -- I know the feeling is that
18 they're being greedy; I don't think they're being
19 greedy. I -- I -- they've agreed to cap it at \$2.5
20 million. And they're the ones who took all the chances
21 here. The only one who had a financial stake that they
22 could lose, was the law firm.

23 How do you get law firms to take this type of
24 case, without giving them a return, if they win or
25 settle the case? How are they -- how are you going to

1 say to a law firm, "Look we'll give you \$200,000 for
2 your 2,940 hours of work"? I mean, who's going to take
3 it? The only people who would take it are brand new
4 lawyers, who have no idea how to handle this type of
5 litigation. I'm fortunate Mr. Katz learned on other
6 people; okay, you've got to learn some time. But he's
7 not learning now. I mean, he's got a lot of experience
8 now in doing this kind of work. It doesn't mean that
9 people are happy, but if you don't give them just
10 compensation -- if they win or if they settle -- you'll
11 have none of this kind of litigation. It would make
12 Mr. Murdock happy.

13 But I don't think it makes the consumer, or
14 the clients -- there won't be clients, because everyone
15 will want to be paid hourly. I mean, I -- I don't see
16 this kind of litigation starting on an hourly basis.
17 And if it was done on an hourly basis, knowing what
18 they bill now, they'd be making far more than \$2.5
19 million.

20 So, I -- I -- I think it's fair; I think it's
21 just. I think they're probably entitled to more than
22 \$2.5 million, but they were willing to cap it; I'm not
23 going to exceed their cap. They're not going to pay
24 more than the cap.

25 So, now let -- let's get to --

1 MR. KATZ: Your Honor, excuse me, if I may?
2 Just so the record is -- is clear. We had submitted a
3 supplemental certification on Friday that updated our
4 hours, because our initial hours were through May 21 --

5 THE COURT: And -- and -- I know, and it
6 didn't include, among other things, any of the
7 preparation for --

8 MR. KATZ: Well, it -- it included the
9 additional hours to deal with the objection and -- and
10 -- and settlement administration related issues. But
11 just so the record's clear, and the Court doesn't have
12 to redo the calculations, but the total number of
13 hours, as of today -- before coming into the courtroom
14 today, which I'm not including, nor am I going to
15 address the further settlement administration issues.
16 As Your Honor knows the class members have till mid-
17 August to file claim forms. And I keep getting calls
18 every day about the settlement, what to do, and so
19 forth.

20 But as of Thursday, July 19th, the total
21 hours that we submit are reasonably expended are 3,035;
22 which is an additional 87 hours from the calculations
23 Your Honor did. Plus there was an additional \$529 of
24 out-of-pocket expenses that primarily dealt with
25 copying the vol -- copying charges for the voluminous

1 papers that were submitted as part of the final
2 approval process. So, the total out-of-pocket expenses
3 we're seeking reimbursement for are \$488,713.28 --
4 488,713.28. And the total number of hours are 3,035 as
5 of July 19th. Thank you.

6 THE COURT: Okay; whi -- which just makes it
7 -- you're still willing to be capped at the \$2.5
8 million?

9 MR. KATZ: Oh yes; yes. It -- oh --

10 THE COURT: I -- I --

11 MR. KATZ: -- well I just want the record to
12 be clear --

13 THE COURT: No, no, the expenses become
14 important because they're not income to you, among
15 other things. It's a pay back of expenses.

16 MR. KATZ: And I just believe it further
17 buttresses the lodestar analysis which would believe is
18 fair and reasonable in this case.

19 THE COURT: Okay; this case has two parts to
20 it -- or the settlement of this case has two parts.
21 One is the money, \$2,850,000 -- or up to \$2,850,000;
22 whether it's that amount of money or somewhat less, is
23 going to be dependent upon the members of the class.
24 If everybody files, that's what the number's going to
25 be. If people don't file, the number's going to be

1 less. But the Plaintiff Class is who's going to
2 determine how much it's going to be.

3 Then there are -- let's call them "business
4 reforms", and they include -- and I'm not going to go
5 into great detail, but -- but they include changing the
6 provider portal -- that -- that's the website used by
7 dentists in submitting claims. So that there's more
8 information on how to file claims; when claims have
9 been paid; identifying what dental codes have to be on
10 any claims; requiring what codes require what
11 information, like medical explanations of what was
12 done.

13 There's the establishment of a dedicated fax
14 number so that dentists can submit predetermination
15 forms, knowing that they're going to one location, and
16 not just mailing them in. Giving a -- a guaranteed
17 answer time to those predetermination requests.
18 Providing for a procedure where select dental claims
19 will be reviewed by Horizon's dental consultants, for
20 the purpose of assessing the quality and consistency of
21 the determinations that are made on those types of
22 claims.

23 Establishing an advisory committee of Horizon
24 participating assis -- dentists. And as I understand
25 it, with the cooperation of the New Jersey Dental

1 Association, for the purpose of recommending clinical
2 edit policies and practices with regard to the -- Blue
3 Cross's insured dental plans. Providing a dedicated
4 liaison to address participating dentists' inquiries
5 concerning capitation payments. Providing a dedicated
6 e-mail address to accept questions from participating
7 dentists about the adjudication of certain claims, or
8 the status of certain claims, or the appeals of certain
9 claims. Providing detailed annual compliance reporting
10 of the implementation of all of these items. Those are
11 some of the benefits that the dentists are acquiring.

12 Clearly, if -- if you read them, there is
13 clearly a hope of better communication, and easier
14 communication, between Horizon and the class. If it
15 works, it has an unbelievable effect, both on Horizon,
16 but on behalf of the class. I don't know how you put a
17 number on the benefit of an easier process to submit
18 claims, a better understanding of the process, an
19 advisory board on which the Dental Association is
20 willing to participate so that the relationship gets
21 better not worse.

22 I -- I -- I can't tell you that I can put a
23 value on it, but I do note that for similar type
24 reforms in Sutter, that Dr. Waters put a value of some
25 place around \$31 million. I'm not saying that these

1 are worth \$31 million. I don't have the testimony to
2 do it; I couldn't do it. I can say that it has a
3 substantial effect on behalf of the dentists because --
4 not only will they have a better idea of the process
5 and how to do it, it'll simplify the process. Thus
6 reducing the paperwork and the amount of time that
7 dentists need to do to simply get some of the
8 information, that better procedures are now set up for
9 them to have. And -- and clearly, it has a substantial
10 benefit for the class.

11 As -- as far as fairness of a settlement, a
12 -- a hearing to determine the fairness of the
13 settlement isn't a trial, or adjudication on which side
14 was right in this case or which side would have won the
15 case. It merely comes under the Court's responsibility
16 to determine, based on the relative strengths and
17 weaknesses of the parties' positions, whether the
18 settlement is fair and reasonable. Whether it
19 adequately protects the interest of the person on whose
20 behalf -- the 17,000 dentists -- were brought.

21 Obviously in the State of New Jersey, as in
22 most states, there is a strong public policy favoring
23 settlement; and not just of class actions, but of all
24 cases, but certainly of class actions. In determining
25 it, the factors set out in Girsh versus Jesp -- Jepson,

1 which is a Third Circuit case from 1975, at 521 F.2d
2 153. And -- and they laid out nine factors which ought
3 to be reviewed. One is "the complexity and the
4 duration of the litigation." The complexity of this
5 litigation is great. It -- it has so many offshoots
6 that would have had to have been addressed in the
7 litigation. The duration of litigation, and I believe
8 it's in excess of seven years.

9 "The reaction of the class to the
10 settlement." The only way that I can handicap that is
11 out of 17,000 dentists, 14 have opted out. That's an
12 overwhelmingly -- it would seem to be, an
13 overwhelmingly favorable reaction. Although I do
14 understand that some of those people just may not have
15 gotten around to taking a position of opting out.

16 "The stage of the proceedings." In the stage
17 of the proceedings, we're at the end. It -- it was
18 dispositive motions and trial. We were talking about
19 trial dates when this case settled.

20 "The risk of establishing liability." If --
21 if in fact, Horizon's attack on Dr. Waters -- and --
22 and we were talking about scheduling a Daubert hearing
23 or modified Frye hearing, to discuss the scientific
24 reliability of her testimony. If -- if -- if that went
25 down and the changes to the prompt pay had a

1 detrimental effect, there were extreme risks to
2 establishing liability in this case. I don't want you
3 to take too much comfort in that and say, well if there
4 was that great a risk, we don't want to settle the
5 case.

6 "The risk of establishing damages." Once
7 again, we get back to Dr. Waters who was the
8 plaintiff's expert. If sh -- her testimony isn't
9 allowed, there's no testimony on monetary damages.

10 "The risk of maintaining the class action."
11 If -- if the class action goes down, nobody in the
12 class is getting anything. No one person on their own
13 could incur the type of expense that's been incurred
14 here. That's the whole idea behind a class action.

15 "The ability of the defendants to withstand a
16 greater judgment." Without looking at their balance
17 sheet, I assume that Horizon Blue Cross Blue Shield
18 could have withstood a greater judgment than what we're
19 talking about here.

20 "The range of reasonableness of set -- of the
21 settlement in light of the best recovery." The amount
22 of the settlement, and more importantly -- or at least
23 as important, the changes in procedure, when weighed
24 against a potentially bigger monetary settlement, but
25 probably a lesser procedural settlement, weigh in favor

1 of the reasonableness of this settlement.

2 And "the range of reasonableness of the
3 settlement in light of all the attendant risks of
4 litigation." The risk would be high. There is nobody
5 else who has come to the front to try and aid in this
6 litigation.

7 So I find that the settlement is fair,
8 reasonable and adequate given all of the Girsh
9 considerations. I -- I find based on the certification
10 that I've received recently from Kathryn F. Smith,
11 Esq., on behalf of EPIQ Systems, Inc. -- I -- I find
12 that adequate notice has been given to all class
13 members that satisfies due process. If you look at her
14 certification, she talks about where things came back,
15 sending them out again, sometimes sending them out a
16 third or a fourth time if there's reason to believe
17 that addresses have changed. In short, even though
18 we're talking about 17,000 members, the effort to make
19 sure that all members of the class due process rights
20 were protected was immense. I -- I -- you know, it's
21 the advantage I suppose of using people who are used to
22 doing this, but they clearly made a -- a heroic effort
23 to make sure that all members of the class received a
24 notification.

25 Is -- is the settlement class appropriate? I

1 -- I felt it was appropriate when we first certified
2 the class and nothing has happened, and nothing has
3 come before me to indicate that anything has changed
4 making the settlement class inappropriate.

5 I've already ruled on class counsel fees
6 application. When we break it down, it's going to be
7 reimbursement of \$488,713.28 for unreimbursed expenses.
8 And the difference between that and \$2.5 million for
9 the legal fee.

10 So that being true, there are certain
11 findings that the Court needs to make. Number one, the
12 Court has jurisdiction over the subject matter of this
13 action, pursuant to court rules. The class, as I said,
14 that was conditionally certified in the preliminary
15 approval order as -- as fairly and adequately -- I'm
16 sorry, and Dr. Kirsch as the class representative, and
17 Mr. Katz and his firm as the class counsel, have fairly
18 and adequately represented the class for the purposes
19 of entering into, and a continuing implementation of
20 the settlement agreement.

21 Notice to class members have been provided in
22 conjunction with the preliminary approval order. As I
23 indicated that the method used constituted -- as far as
24 practical -- the best notice to class members. And
25 that the notice was reasonably calculated to tell each

1 class member of the pendency of the action, their right
2 to object, the right to appear at this hearing today,
3 or to exclude themselves from the settlement by opting
4 out. That this notice was adequate sufficient notice
5 to persons who were entitled to the notice and complied
6 with the requirements of due process and the New Jersey
7 Court Rules.

8 We have today held a hearing to consider the
9 fairness, reasonable and adequacy of the settlement,
10 after taking into full account the objections that were
11 filed, and having considered those objections. I find
12 that the settlement is in fact a product of good faith,
13 arm's length negotiations between the representative
14 plaintiff and class counsel on the one hand, Horizon on
15 the other hand, with the help of outside mediation in
16 the form of former Magistrate Ronald Hedges. Which
17 from everything that I have read, was a tremendous help
18 to the parties to be able to resolve this. That the
19 settlement is, in all respects, fair, reasonable and
20 adequate, and proper, and in the best interest of the
21 class as I've gone through that.

22 This conclusion includes a consideration of
23 -- among other things -- an assessment of the
24 likelihood of the class prevailing at trial, the range
25 of possible recovery available to the plaintiffs, the

1 consideration provided to class members as to any
2 possible recovery if the litigation had gone to final
3 judgment. The complexity, expense and possible
4 duration of such litigation, in the absence of such
5 settlement. And -- and as I mentioned among other
6 things, we had left to do a modified Frye hearing on --
7 on the methodology used. We had dispositive motions
8 that both sides had indicated they were going to make.
9 And we had a full blown trial, it -- all coming up.

10 The nature and extent of any objections to
11 the settlement I've gone through. And the fact that
12 we're really at the end of the proceeding, not at the
13 beginning of the proceeding, so that not only can the
14 parties assess whether or not this is a reasonable
15 settlement, the Court's in a position to assess whether
16 or not this is a fair and reasonable settlement.

17 The list of members to be supplemented by
18 one, as -- as I understand it. Ms. Smith's
19 certification has 13 opt-outs, and I understand there's
20 a 14th, so that has to be amended. But the list of
21 people who have opt-out, and therefore aren't bound by
22 the settlement and the provisions of the settlement
23 agreement at -- at -- this judgment and -- and this
24 order, will be submitted to the Court and filed with
25 the Superior Court, just so we get the name of the 14th

1 person to amend what's already been filed. And -- and
2 that list will be incorporated into the order by
3 reference.

4 The settlement and the settlement agreement
5 are hereby approved as fair, reasonable and adequate in
6 the best interest of the class and meet the
7 requirements of due process and Rule 4:32 of the New
8 Jersey Court Rules. I -- I've considered the
9 objections to the settlement and the settlement
10 agreement, and -- and I find them not to be valid and
11 they're denied in their entirety.

12 The classes is permanently certified with the
13 following settlement class: any individual dentists
14 and dentist groups, regardless of speciality and
15 network status, who submitted at least one claim for
16 reimbursement in compliance with Horizon's criteria and
17 requirements for providing dental services under
18 Horizon -- a Horizon Commercial Benefit Plan to any
19 person who, at the time such services were provided,
20 was a plan member and was eligible for coverage of the
21 services represented by such claim, which services were
22 rendered at any time during the class period of May 26,
23 1999 to April 13, 2012. Excluding from that class, the
24 14 individuals who have opted out.

25 For the purposes of this settlement, Dr.

1 Kirsch -- Michael H. Kirsch is certified as the
2 representative of the class. And Eric D. Katz of the
3 law firm of Mazie, Slater, Katz and Freeman, LLC, is
4 certified as class counsel.

5 I -- I -- I determine that both the class
6 representative and class counsel have fairly and
7 adequately represented the class with respect to the
8 negotiations for the settlement, itself, and the
9 settlement agreement. At -- upon the effective date of
10 this settlement, any and all claims, rights, and
11 liabilities of any nature, including but not limited
12 to, actions, demands, causes of action, obligations,
13 damages, debts, charges, attorneys' fees, costs,
14 expenses, arbitrations, forfeitures, judgments, and
15 indebtedness and liens against Horizon, or any of its
16 former, present, and future assigns, predecessors,
17 successors, affiliates, parent companies, subsidiaries,
18 controlled companies, employees, officers, directors,
19 principals, agents, representatives, insurers,
20 attorneys, participants, members, and parties with whom
21 Horizon is contracted for the purpose of providing
22 claims processing services for claims for dental
23 services, and all persons who provided claims
24 processing services for the claims for dental services,
25 software, proprietary guidelines or technology to

1 Horizon, whether known or unknown, whether asserted or
2 unasserted, are hereby released, discharged, abandoned,
3 and forever waived by and on behalf of all class
4 members, and their respective current or former
5 officers, principals, directors, employees, attorneys,
6 executors, administrators, agents, representatives,
7 professional corporations, partnerships, affiliates,
8 assigns, predecessors or successors, with the exception
9 of those parties who have opted out. Since they're
10 opting out, they don't release anybody.

11 The released parties, -- a -- a -- as part of
12 this agreement, obtained the fullest possible release
13 from further liability from the releasing parties to
14 any of the released claims. And -- and therefore the
15 order will go into -- in -- in more detail the extent
16 of the release. As I previously said, nothing in the
17 agreement is -- intended to relieve any party that's
18 not a release party from responsibility.

19 The releasing parties shall dismiss the
20 action with prejudice as to released parties. In
21 addition, the Horizon releasing parties shall dismiss
22 the action with regard to prejudice as to the
23 individual releasees.

24 With regard to the application for attorneys'
25 fees, I need to do the arithmetic, but it -- the fees

1 are \$488,713.28. And those are the costs, not -- the
2 fees are the \$2.5 million less the \$488,713.28. With
3 regard to Dr. Kirsch, he shall -- and -- and there's
4 been no opposition to -- he shall receive a stipend of
5 \$17,500 as the representative plaintiff to be paid --
6 both sums are to be paid by Horizon.

7 As -- as I mentioned, really at the start of
8 this, nothing in this settlement agreement or any
9 provision herein, nor any of the negotiations,
10 settlements, proceedings in connection herewith, shall
11 be construed as or be deemed to be evidence of an
12 admission or a concession on the part of the
13 representative plaintiff, class counsel, members of the
14 class, or Horizon or any released parties. This is a
15 settlement; this is not anyone admitting fault to
16 anything.

17 The terms of this settlement agreement and
18 the final order shall be forever binding on, shall have
19 *res judicata* and preclusive effect in all pending and
20 future lawsuits or other proceedings that are subject
21 to the releases. And other prohibitions that are set
22 forth in this order, that are maintained by or on
23 behalf of the releasing parties, representative
24 plaintiff, or Horizon or any other person subject to
25 those provisions of the order.

1 Judgment in the form attached to this order,
2 dismissing all released claims with prejudice as to
3 Horizon, as to all class members. Dismissing all
4 released claims without prejudice as to any class
5 member, who or which properly opted-out in all released
6 claims against representatives with prejudice as to
7 those representatives, is hereby entered and -- as the
8 Court, except as otherwise provided in the agreement.

9 It's expressly agreed and stipulated that the
10 Superior Court of Essex County -- of New Jersey, Essex
11 County Vicinage, shall have exclusive jurisdiction and
12 authority to consider, rule upon an issue of final
13 order with respect to suits, whether judicial,
14 administrative, or otherwise, which may be instituted
15 by any person, individually or derivatively, with
16 respect to this agreement. In the event of a case,
17 controversy, or dispute arising out of the negotiation
18 of, approval of, performance of, or breach of this
19 agreement, and solely for the purpose of such suit,
20 action, or proceeding, to the fullest extent that they
21 may effectively do so under applicable law, the parties
22 irrevocably waive and agree not to assert, by way of
23 motion, or as defense or otherwise, any claim or
24 objection that they may not -- are not subject to the
25 jurisdiction of this Court, in -- or that venue being

1 laid in this Court is improper or inconvenient.

2 If I -- other than my doing a little bit of
3 math, I think that's it.

4 MR. KATZ: Your Honor, if I may be heard on a
5 couple of issues?

6 THE COURT: Go ahead.

7 MR. KATZ: First of all -- and I understand
8 that Mr. Gentile has -- relied on his papers, but I
9 want the record to be clear on a couple of things. The
10 objectors have argued that they have an entitlement to
11 discovery and an entitlement to present witnesses and
12 cross-examine witnesses --

13 THE COURT: No -- nobody's made that claim
14 today. If -- if -- if in fact that's their claim, the
15 record should reflect -- because it's in your
16 certification -- there's a copy of a letter from you --

17 MR. KATZ: To Mr. Bortek.

18 THE COURT: -- to Mr. Bortek, inviting him to
19 come to your office, inspect whatever he wants to
20 inspect, including all the discovery in this case, all
21 of the papers that were submitted in connection with
22 your order; willing to make him copies of it -- not
23 only read it, but make copies of it. Now it may be
24 said that in there you've told him, you're going to
25 charge him to make copies, but I don't know why you

1 wouldn't. Okay, so -- and -- and it's -- I -- I don't
2 know because I didn't see any letter. Has an -- anyone
3 come to your office and inspected any of these things?

4 MR. KATZ: No, and -- and I can represent to
5 the Court that I got a voicemail message, which I have
6 saved, from Mr. Bortek's secretary, declining the
7 invitation to come to my office to inspect our file.
8 So as far as I'm concerned his position of the class,
9 that whatever requests for discovery they think they're
10 entitled to -- which I had offered to make available --
11 is now waived. That's -- my first point.

12 My second point with regard to presenting
13 witnesses and cross-examining witnesses, while I do not
14 agree that, that is required by this -- by our
15 Appellate Division, I -- as part of a fairness hearing,
16 which is not a trial or a plenary hearing, I want the
17 record to reflect -- and I did include a letter to this
18 effect attached to the documents I filed -- that I have
19 offered to make myself available to be cross-examined,
20 which is really unheard of in a fee application. But I
21 offered to make myself -- to -- available to be cross-
22 examined, and I will take the stand this morning if Mr.
23 Gentile wants to cross-examine me, otherwise I consider
24 that they have waived whatever right they conceivably
25 believe that they have to cross-examine. And further,

1 if Mr. Gentile's clients are here, Doctors Krugman and
2 -- Dr. Raphael (phonetic) -- which I don't think
3 they're in the courtroom -- I have no objection if they
4 want to take the stand today and both be subject to a
5 direct and cross-examination.

6 In short, I believe the opportunity has been
7 presented. There are no witnesses here to testify; Mr.
8 Gentile does not want to cross-examine me, unless he's
9 going to say something now. And I believe all that's
10 waived.

11 THE COURT: Do you want to respond?

12 MR. GENTILE: Your Honor, we maintain our
13 request for discovery as set forth in the papers. We
14 recognize that Your Honor has disposed of these issues
15 today.

16 THE COURT: Okay; I mean -- and -- and you
17 recognize that an offer was made, not to your firm
18 because your firm just recently got into the case, but
19 to your predecessor counsel to come to their office, do
20 any discovery you wanted -- they wanted?

21 MR. GENTILE: Your Honor, I recognize that,
22 that offer was made; I saw the same writing --

23 THE COURT: Okay.

24 MR. GENTILE: -- in the submission that you
25 did. I can't say I have any knowledge about the

1 voicemail that Mr. Katz mentioned, but I did see that
2 in the submission.

3 MR. KATZ: And I --

4 THE COURT: Okay, and -- and I assume he's
5 made an offer that I probably wouldn't have made, but
6 he's made an offer, if you want to cross-examine him
7 today. I -- I don't imagine that --

8 MR. GENTILE: Your Honor, our request was not
9 for a cross-examination at today's hearing; Your Honor,
10 I'm not in a position --

11 THE COURT: Okay.

12 MR. GENTILE: -- to cross-examine him today.

13 THE COURT: Okay.

14 MR. KATZ: And not to -- well, one other
15 quick housekeeping matter, Judge, just to confirm which
16 I think your understanding was, the Court will sign and
17 file the Final Approval Order today; the parties will
18 have to supplement that order with the name of the one
19 additional person, but that will be treated *nunc pro*
20 *tunc* to today's filing.

21 THE COURT: Yes, I -- it's 13, and -- and
22 you've all made me understand that there was a 14th
23 person who was in the contested, not contested; and
24 that Horizon has agreed -- even though they could
25 contest the 14th person -- they're not contesting their

1 ability to opt-out, or at least that's my
2 understanding.

3 MS. NEUHAUSER: No, that -- that's correct,
4 Your Honor. We got an opt-out that was missing a piece
5 and they sub -- subsequently provided the --

6 THE COURT: Made it good.

7 MS. NEUHAUSER: -- signed authorization that
8 was through a representative. But we might even be
9 able to give you a certification today from that person
10 and fax it to Your Honor's office -- chambers today,
11 because at that -- that -- the settlement administrator
12 has been very responsive to our --

13 THE COURT: I -- I --

14 MS. NEUHAUSER: -- requests. So we might --

15 THE COURT: I'd -- I looked at --

16 MS. NEUHAUSER: -- be able to get it to you
17 today.

18 THE COURT: -- what they did, they -- I -- I
19 guess knowing what you're doing helps.

20 MS. NEUHAUSER: Yes, but --

21 THE COURT: But -- but -- you know, when --
22 when they detailed what they did when letters came
23 back, and how they followed up, it -- you know, it's
24 not simply, hey -- you know, we sent it and it came
25 back; not our fault. I mean, they really made a heroic

1 effort to find people.

2 MS. NEUHAUSER: Yes; well, Your Honor, that
3 was part of the settlement, was that we were -- agreed
4 to that kind of effort, in order to make sure that
5 class members had adequate notice and -- to the extent
6 that we could make it available to them.

7 THE COURT: Not trusting my math, like any
8 good lawyer being terrible in math, what we're talking
9 about with expenses of \$488,713.28, is a fee of
10 \$2,011,286.82 --

11 MR. KATZ: Sorry, Judge, you'll have to --

12 THE COURT: -- 78 --

13 MR. KATZ: -- you'll have to run those
14 numbers past --

15 THE COURT: Hugh?

16 MR. KATZ: You'll have to run them past me
17 again.

18 THE COURT: Okay; I was talking about \$2.5
19 million, subtracting \$488,713.28.

20 MR. KATZ: Yes.

21 THE COURT: Which comes to \$2,011,286.82 -- I
22 guess 72 cents.

23 MR. KATZ: 72 cents; correct, Judge.

24 THE COURT: I'm using somebody with good
25 handwriting to put the numbers in.

1 (Pause in hearing)

2 THE COURT: Just the only thing I can add is
3 through the five-plus years that I've been involved in
4 this case, and notwithstanding the animosity that was
5 clearly in the case, you all behaved yourselves and
6 acted professionally. And I always appreciate that.
7 It doesn't always happen.

8 MR. KATZ: Thank you.

9 MS. NEUHAUSER: Thank you, Judge.

10 UNIDENTIFIED MALE: Thank you, Judge.

11 UNIDENTIFIED MALE: Thank you, Judge.

12 (Hearing concluded)

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Certification

I, Kristin Gangerelli, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on audio CD No. 1, from index number 10:02:54 to 11:22:38, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Kristin Gangerelli

Date: **7-28-12**

Kristin Gangerelli AOC #624

KING TRANSCRIPTION SERVICES
901 Rt. 23 South, Center Suite 3
Pompton Plains, New Jersey 07444
(973) 237-6080

(Date)