SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE

CHAMBERS OF
STEPHEN J. BERNSTEIN, J.S.C.
CRIMINAL DIVISION

VETERANS COURTHOUSE BUILDING
NEWARK, NEW JERSEY 07102

February 2, 2007

Eric Katz, Esq.
David Mazie, Esq.
Mazie Slater Katz Freeman, LLC
103 Eisenhower Parkway
Roseland, N.J. 07068

Re: Sutter v. Horizon Blue Cross Blue Shield of New Jersey
ESX-L-3585-02

Dear Counsel:

Enclosed please find my decision and Order in the above referenced action granting your Application for Final Approval of the Class Action Settlement, for Award of Attorneys' Fees and Reimbursement of Costs, and for Award of Plaintiff's Stipend.

Very Truly Yours,

HON. STEPHEN J. BERNSTEIN, J.S.C.

Enclosures
Cc: John M. Murdock, Esq.
Maxine H. Neuhauser, Esq.
Steven I. Kern, Esq.
Steven L. Menaker, Esq.
Charles X. Gormally, Esq.
Myrna B. Tagayun, M.D., Pros Se

Re: Sutter v. Horizon Blue Cross Blue Shield of New Jersey
ESX – L – 3585 – 02

This matter was opened to the Court on Plaintiffs' application for Final Approval of the Class Action Settlement Agreement, Award of Attorneys' Fees and Reimbursement of Costs, and for Award of Plaintiff's Stipend. At the direction of the Court, a hearing was held on December 20, 2006, wherein the parties presented their arguments in support of approving the settlement and any objectors were afforded an opportunity to be heard. This memorandum constitutes the Court's determination with respect to the fairness of the proposed settlement and remaining requests.

I.
Facts and Procedural History

This matter arises out of a class action complaint filed in April of 2002 by Dr. John Ivan Sutter, on behalf of classes of health care providers throughout the State of New Jersey who render or have rendered medical services to patients who are members of healthcare plans sponsored by Defendant Blue Cross Blue Shield of New Jersey, Inc. Plaintiffs' Amended Complaint alleges that Horizon Blue Cross Blue Shield ("Horizon") engaged in repeated, improper, unfair, and deceptive acts and practices which were designed to delay, deny, impede, and reduce compensation to the plaintiffs for the medical services they provide to the Defendant's plan members. In particular, Plaintiffs alleged that Defendant's practices included continuing and systematic (i) failure to make prompt and timely payment of medical claims; (ii) refusal to provide compensation for a particular medical procedure by improperly contending that this procedure is routinely included in another procedure performed on the same date of service – known as "bundling" of claims; (iii) unilateral and retroactive reduction of the amount of compensation paid for medical services provided by changing the procedure code (CPT code) to a procedure of less complexity – known as "downcoding" of claims; and (iv) refusal to pay the appropriate compensation in cases where additional medical services are required to treat more complex medical conditions or separate and unrelated conditions – known as the refusal to recognize "modifiers."

Moreover, Plaintiffs contend that because Horizon's claims processing practices were secretive, it was necessary to hire additional staff or have current staff expend time and effort in order to get claims paid or deal with failures to pay claims. Plaintiffs assert that this time and effort could have been spent more productively by providing medical services to patients.

On July 27, 2004, the Honorable James S. Rothschild, Jr., J.S.C. granted Plaintiffs' Motion to Certify the "prompt payment class" for all New Jersey physicians. However, Judge Rothschild denied the Motion to Certify a class action for all New Jersey physicians on downcoding, bundling, and refusal to recognize modifiers, with the exception that a class action may be maintained on those issues for pediatricians only.

Judge Rothschild also certified the class on the alleged capitation issues. With respect to the New Jersey physicians who are not pediatricians, Judge Rothschild concluded that the Court would allow an application seeking injunctive relief only on downcoding, bundling, and refusal to recognize modifiers.

After 4 ½ years of litigation, the parties agreed to a settlement literally on the eve of trial and a Preliminary Order of Approval was signed by this Court on October 24, 2006. Following the preliminary approval, Plaintiffs sent out a Notice of the Proposed Settlement to all class members. According to the affidavit filed by the Settlement Administrator, there were a total of 991 valid and timely requests for exclusion and 74 untimely requests for exclusion. The affidavit also specified that there were 9 timely requests for exclusion where the exclusion had one primary signature acting as a representative for multiple individuals. These nine exclusion requests comprised a total of 191 names.

Upon issuing the notice, several individual physicians and medical societies filed objections to the settlement, a Motion to Intervene in the action, and a Motion to Disqualify Class Counsel. The motions were denied by this Court on December 15, 2006. However, the objectors were given an opportunity to file their objections and be heard at the December 20th Fairness Hearing. The following is my ruling as to the fairness of the settlement.

II.

The Adequacy of the Notice

The constitutional mandate of due process and the New Jersey Court Rules requires adequate notice of the proposed settlement. In order to satisfy due process, notice to class members must be "reasonably calculated under all the circumstances to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Lechance v. Harrington, 965 F.Supp. 630, 636 (E.D. Pa. 1997)(quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). It is found that the notice provided in this case met the requirements of due process. The Preliminary Approval Order directed Class Counsel to cause copies of the Notice of Proposed Settlement of Class Action to be mailed by first class mail to all potential class members to the extent that such class members can be identified with reasonable diligence from the records maintained by the New Jersey Board of Medical Examiners, and to the extent that such records can be obtained by Class Counsel for this purpose within the schedule for notice provided in the Order. Class Counsel was also required to publish a Summary Notice of Pendency and Proposed Settlement of Class Action in the legal notices section of the Star Ledger.

The Notice includes descriptions of the lawsuit, the criteria for membership in the class, the terms of the proposed settlement and how to ascertain additional information. It also describes, in detail, how to opt out of the class. The Notice informs the recipient of the date and venue of the settlement hearing and provides information on the right class of members to appear and the procedures for filing objections to the settlement. The names and contact information of the relevant attorneys are also included. After a review of the foregoing, it is clear that the substance was adequate to satisfy the concerns

of both due process and R. 4:32-2(b). *See e.g.,* In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 328 (3d Cir. 1998)

III.

The Proposed Settlement Agreement

The class consists of certain health care providers who provided services to any person who is a subscriber of, or is insured by, Horizon at any time between April 12, 1996 and October 24, 2006. In particular, the Settlement is intended to cover three different "sub-classes" that resulted from Judge Rothschild's certification Order. The first sub-class is known as the "Prompt Pay Sub-Class" and is defined as:

> All individual physicians and physician groups...regardless of specialty and network status, who provided services eligible for coverage to any person who, at the time such services were provided, was/is a subscriber of or insured by Horizon Blue Cross Blue Shield of New Jersey, and eligible for coverage of the services represented by such claims, which services were rendered at any time during the Class period of April 12, 1996 through October 24, 2006 and were billed in compliance with Horizon's criteria and requirements.

The second sub-class is known as the "Contract Claim Sub-Class" and is defined as:

> All individual pediatric physicians and pediatric physicians groups...practicing in New Jersey who are/were Horizon network providers, providing services to any person who was/is a subscriber of or insured by Horizon, and submitted claims for covered services provided to persons eligible for coverage of the services represented by such claims by Horizon that were/are processed through claim adjudication computer software at any time during the Class period of April 12, 1996 through October 24, 2006.

The third sub-class is known as the "Capitation Sub-Class" and is defined as:

> All individual physicians and physician groups...practicing in New Jersey who are/were Horizon network providers regardless of specialty, providing covered services to any person who was/is a subscriber of or insured by Horizon eligible for coverage of the services represented by such claims and who had selected that provider to be their primary care physician, and which providers were compensated on a capitated basis with respect to such subscribers or insureds at any time during the Class period of April 12, 1996 through October 24, 2006.

The Settlement requires Horizon to engage in business reforms and improvements for the purpose of increasing the transparency of processing and paying claims, reducing administrative overhead, and improving interactions between Horizon and physicians. These business reforms are more fully detailed in Section 7 of the Settlement Agreement but are summarized in Plaintiffs' brief as follows:

(a) Availability of Posting of Fee Schedules

Horizon will make complete fee schedules available to participating physicians electronically, by CD-ROM or in writing for CPT and HCPS Level II codes the physician in the same specialty typically uses and allow physicians to annually request fee schedules for up to 100 additional CPT or HCPCS Level II codes that the physician actually bills or anticipates billing.

(b) Disclosure and Posting of Significant "Edits" That Result in a Reduction or Denial of Compensation to Class Members

Horizon will disclose and post the significant automated claims "edits" it utilizes that result in the reduction or denial of payment to physicians through one or more of the following adjustments: (i) payment made based on some but not all of the CPT or HCPCS Level II codes submitted with a claim; (ii) payment made on different codes than those submitted with the claim; (iii) payment for one or more codes included in the claim being reduced by the application of multiple procedure logic; and/or (iv) payment for one or more codes being denied.

(c) Investments and Initiatives to Improve Provider Relations

Horizon will continue to undertake efforts to improve provider relations in addition to the business initiatives described herein and will publicize such investments to providers. In this regard, since the parties reached a settlement in principal, Horizon has instituted numerous additional business practice changes – in addition to those set forth in the agreement – and has publicized them to Class Members, including: (i) improvements in the online referral submission process; (ii) improved statement of payment reports; (iii) enhancements in its provider computer portal; and (iv) the systematic recognition of CPT code modifier 25 when appropriately billed by physicians with CPT Evaluation and Management codes in accordance with AMA guidelines.

(d) Greater Notice to Class Members of Policy and Procedure Changes that Horizon Intends to Implement

Horizon will provide greater notice to physicians of any material changes to its provider agreements, policies, and procedures.

(e) Rights of Class Members to Close Their Practices to All New Horizon Patients

Participating primary care physicians will be allowed to close their practices to new patients covered by Horizon.

(f) Standardization of Fee Schedules and Greater Notice as to Fee Schedule Changes

Horizon will maintain standard fee schedules within geographic regions and will not reduce most fees more than once per year, if at all.

(g) Limitation on Horizon's Ability to Recover Overpayments Made to Physicians

Horizon agrees not to recover overpayments to physicians after more than 18 months of the original payment and to provide more notice and information regarding any overpayment recoveries.

(h) Limitation on Horizon's Rights to Revoke Medical Necessity Determinations

Horizon will not subsequently revoke a medical necessity determination absent evidence of fraud, material error, or material change in the condition of a patient prior to service.

(i) Provisions by Horizon of Designated Personnel to Resolve Capitation Problems, Facilitate, and Expedite Correct Capitation Payment and Capitation Reporting

Horizon will dedicate personnel to resolve capitation inquiries and capitation payment inquiries typically raised by physicians and will make best efforts to facilitate the prompt payment of any capitation payment due to the physician. In addition, Horizon will supply timely and detailed monthly capitation reports.

(j) Prohibition of Horizon's Use of Pharmacy Risk Pools

Horizon will not require the use of pharmacy risk pools, i.e., an agreement whereby amounts payable to physicians could be reduced due to pharmacy utilization by patients.

(k) Prohibition of Horizon's Use of Gag Clauses in Provider Agreements

Horizon will not include gag clauses in its provider agreements and will encourage the free, open, and unrestricted exchange of information between the physicians and patient.

(l) Prohibition of Horizon's Use of So-Called "Most Favored Nations" Clauses in Provider Agreements

Horizon will not include most favored nations clauses in its provider agreements, i.e., requiring the most advantageous terms and conditions, including reimbursement rates, that a participating physician has with any other payer.

(m) Annual Monitoring of Horizon's Compliance With Initiated Business Reforms and Enforcement Provision

Horizon has agreed to several provisions to ensure that it complies with its obligations under this agreement. Significantly, pursuant to the agreement, this Court maintains jurisdiction over this matter. As a result, the Class maintains its right to seeks enforcement of any settlement provision by immediately coming back to the Court should Horizon fail to implement or delay in implementing any of the business reforms.

The Plaintiffs claim that while they believe these business practices are not susceptible to precise economic valuation, they are worth not less that $39 million. This figure is based on the opinion of Plaintiffs' expert Teresa M. Waters, Ph.D.

In exchange for these reforms, Plaintiffs have agreed to release certain claims for services that were submitted to Horizon prior to the *[Effective Date]* of the agreement.[1]

[1] In particular, Section 10.1 of the Settlement Agreement releases "any and all claims, rights, and liabilities of any nature, including but not limited to actions, demands, cause of action, obligations, damages, debts, charges, attorneys' fees, costs, arbitrations, forfeitures, judgments, indebtedness and liens ("Causes of Action") against (i) Horizon, and any of its former, present, and future assigns, predecessors, successors, affiliates, parent companies, subsidiaries, controlled companies, employees, officers, directors, principals, agents, insurers, attorneys, participants, members, and parties with whom Horizon contracts for the purpose of providing healthcare services (including without limitation, employee benefit plans and the entities that sponsor them, but only to the extent such claims, rights and liabilities are or could have been alleged in the Complaint) and all Persons who provided Claims processing services, software, proprietary guidelines or

These claims do not include claims related to services for which no claim had been filed with Horizon as of the *[Effective Date]* or where such a claim had been filed but not finally adjudicated by the Defendant.[2] In addition, it should be noted that this arrangement allows the class members to benefit from any settlement in Love v. Horizon Blue Cross Blue Shield Association, CV-03-21296, a federal class action simultaneously pending in the Southern District of Florida.

IV.
Fairness of the Proposed Settlement

"New Jersey courts have found that the settlement of litigation ranks high in the public policy of the State [and]...its courts have actively encouraged litigants to settle their disputes." Puder v. Buechel, 183 N.J. 428, 437-438 (N.J. 2005). However, it is important to recognize that "settlements of class actions are treated differently from other settlements." Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 626 (1987). While the majority of cases can be settled without the involvement of the court, see Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div. 1983), *certif. den.* 94 N.J. 600 (1983), the court rules require notice be given to the members of a class and for a settlement to be approved by the court. *See* Morris Cty. Fair Hous. Council v. Boonton Tp., 197 N.J. Super. 359, 368-370 (Law Div. 1984), aff'd o.b. 209 N.J. Super 108 (App. Div. 1986). This requirement is embodied in R. 4:32-4 which provides:

> A class action shall not be dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

---

technology to Horizon (including but not limited to NASCO), and any of their former, present, and future assigns, predecessors, successors, affiliates, parent companies, subsidiaries, controlled companies, employees, officers, directors, principals and agents (to the extent that such Person or entity's services or work done pursuant to a contract with Horizon or one of its subsidiaries or affiliates (the "Released Parties") whether known or unknown, whether asserted or unasserted, whether asserted by any Releasing Party on its own behalf or on behalf of any other Person or entity, arising on or before the Effective Date, whether in contract, express or implied, tort, at law or in equity, or arising under or by virtue of any statute or regulation ("the Released Claims"), shall be deemed released, discharged, abandoned, and forever waived by and on behalf of all Class Members who have not validly and timely requested to Opt-Out of this Agreement, and their respective predecessors, successors, assigns, affiliates, principals, agents and heirs (to the extent that any such Person or entity's claims are derived by contract or operation of law from the claims of the Class Members (the "Releasing Parties"). Further the Releasing Parties agree not sue the Released Parties as to Released Claims, and represent and warrant that they have not, individually or collectively, assigned to any Person or entity, and agree that they will not assign to any Person or entity, any such causes of action.

[2] The relevant portion of Section 10.1 of the Settlement Agreement states: Notwithstanding the foregoing, the Releasing Parties are not releasing claims for payment of services provided to Horizon Plan Members prior to or on the Effective Date as to which, as of the Effective Date: (i) no Claim with respect to such services has been filed with Horizon; or (ii) a Claim with respect to such services has been filed with Horizon but such Claim has not been finally adjudicated by Horizon (each a "Retained Claim" and collectively, the "Retained Claims").

Notably, this rule mirrors FED. R. CIV. P. 23(e) which provides that "a class action shall not be dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

"The evident purpose of these requirements is to protect class members from a settlement which is not in their best interests." Chattin, 216 N.J. Super. at 627. Indeed, "while an individual litigant can protect his own interests by refusing to agree to a settlement which he conceives to be inadequate, most class members ordinarily are not involved in settlement negotiations." Id. Additionally, "class members may take differing views on whether to agree to a settlement." Id. As such, "court approval serves as a substitute for consent to a settlement by members of the class." Id.

The fundamental test for court approval of settlement of a class action in New Jersey is whether it is fair and reasonable to the members of the class. Id. (citing City of Paterson v. Paterson General Hospital, 104 N.J. Super. 472 (App. Div. 1969), aff'd 53 N.J. 421 (1969)). If the settlement meets the "fair and reasonable" standard, it may be approved even though individual members of the class refuse to consent. Id. (citing City of Paterson). Nevertheless, since court approval is a substitute for the usual rights of litigants to determine their own best interests, the overwhelming opposition of members of a class to a proposed settlement is a significant consideration militating against court approval." Id. (citing Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1215-1218 (5th Cir. 1978), *cert. den.* 439 U.S. 1115 (1979)). Moreover, if it is demonstrated that members of the class have been treated unfairly by a class representative or counsel for the class, "this too may be an important consideration militating against approval of the settlement." Id. at 628.

In Tabac v. Atlantic City, 174 N.J. Super. 519, 534 (App. Div. 1980), the Appellate Division set forth four factors for courts to consider in the settlement of class actions:

(1) The strength of plaintiff's case balanced against the amount of the settlement offer;
(2) the ability of defendants to pay;
(3) the complexity length and expense of further litigation; and
(4) the amount of opposition to the settlement.

Id. at 534 (quoting MANUAL FOR COMPLEX LITIGATION, Part 1 § 1.46 (West 1977). Class counsel correctly noted that New Jersey's class action rules were amended effective September 2006 to more closely conform the amendments of FED. R. CIV. P. 23, PRESSLER, Current N.J. COURT RULES, Comment 1 on R. 4:32-1 to 4 at (GANN 2007 ed.), and that it is appropriate for New Jersey state courts to seek guidance from federal case law in determining the requirements and standards for approval of class action settlements. Morris Cty. Fair Housing Council, 197 N.J. Super. at 369. With this in mind, Plaintiffs argue that they are able to satisfy the more onerous nine-factor test implemented by the Third Circuit Court of Appeals for approving class action settlements. Therefore, in the interest of completeness, and considering that the federal test encompasses all of the factors employed by New Jersey courts, an analysis under that standard will be undertaken.

The Third Circuit first announced its test for determining whether a class action settlement is fair, reasonable, and adequate in Girsh v. Jepson, 521 F.2d 153 (3rd Cir. 1975). The nine Girsh factors are:

(1) The complexity, expense, and likely duration of the litigation;
(2) the reaction of the class to the settlement;
(3) the stage of the proceedings and the amount of discovery completed;
(4) the risks of establishing liability;
(5) the risks of establishing damages;
(6) the risks of maintaining the class action through trial;
(7) the ability of the defendants to withstand a greater judgment;
(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
(9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

Girsh, 521 F.2d at 157.

Each of these factors shall be addressed in turn, bearing in mind that the proponents of a settlement bear the burden of proving that these factors weigh in favor of approval. In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig., 55 F.3d. 768, 785 (3d Cir. 1995). However, it is important to note that these factors are a guide and the absence of one or more does not necessarily preclude a court from approving a settlement. Rather, the court must look at the entirety of the circumstances and gauge whether the agreement is in the range of reasonableness. *See* In re Orthopedic Bone Screws Prods. Liab. Litig., 176 F.R.D. 158, 184 (E.D. Pa. 1997).

(1) The First Girsh Factor: Complexity, Expense, & Likely Duration of Litigation

This factor captures 'the probable costs, in both time and money, of continued litigation.'" In re Cendant Corp. Litig., 264 F.3d 201, 233 (3rd Cir. 2001) (quoting General Motors, 55 F.3d at 812. By examining the costs "of continuing on the adversarial path, a court can gauge the benefit of settling the claim amicably." General Motors, 55 F.3d at 812.

This case has been heavily litigated for the last 4 ½ years. In pursuing their claims, Plaintiffs had to argue issues of first impression which led to a finding of an implied private right of action. Had a proposed settlement not been reached, Plaintiffs were set to begin trial on only one of the three different subclasses of class members. Therefore, if the proposed settlement is rejected not only would the parties have to go to trial on the first subclass, but there would clearly need to be additional, lengthy and expensive discovery in order to prepare the claims of the other two subclasses for trial. Moreover, such trials would be fairly complex and time consuming as both parties would require extensive expert testimony. Furthermore, even if the claims of all three subclasses are tried, there would likely be years of appeals that would follow particularly with the unique issues involved. Finally, the possibility exists that if the settlement is rejected and the Love case settles, which appears to be a likely event given the news of a potential settlement, this case may become moot. In view of these points, I find that the

complex nature of this case coupled with the expense and delay inherent in continued litigation weigh strongly in favor of approval of the settlement.

(2) The Second Girsh Factor: The Reaction of the Class

In order to evaluate the reaction of the class to the terms of the settlement, "the number and vociferousness of the objectors" must be examined. General Motors, 55 F.3d at 812. When there exists a vast disparity between the number of potential class members who received notice of the settlement and the number of objectors, a strong presumption that this factor weighs in favor of settlement is created. Cendant, 264 F.3d at 235.

As set forth previously, the class members in this matter have been given notice and an opportunity to be heard. Judging the reaction of the class first requires knowing how many members are in the class and how many have objected. Plaintiffs claim that there are 60,000 health care providers throughout New Jersey that make up the class. This figure is disputed by some of the objectors who claim that there are only 30,000 licensed physicians in the state with probably no more than 18,000 actually practicing in New Jersey and many of these physicians do not participate with Horizon. While the true number of class members may lie somewhere in between Plaintiffs' estimation and the objectors' estimation, the Court is satisfied that even if it were to treat the class as numbering around 18,000 members, the outcome would be the same.

Prior to the Dec. 20th Fairness Hearing, the Court received objections from six individual physicians and a number of medical societies. On November 27, 2006, the Court received a letter from Steven Kern, Esq. of the law firm Kern Augustine Conroy & Schopman, P.C. stating that it represented Mario Criscito, M.D., and Barry Prystowsky, M.D., as well as the Union County Medical Society, Mercer County Medical Society and the New Jersey Pediatric Society. (hereinafter referred to as "Kern Objectors.") That same day the Court received a letter from Charles Gormally, Esq. of the firm WolfBlock Brach Eichler indicating that they represented the interests of the New Jersey Association of Osteopathic Physicians and Surgeons, the American College of Emergency Physicians, Vascular Society of New Jersey, New Jersey Pathology Society, Radiological Society of New Jersey, New Jersey Academy of Ophthalmology, New Jersey State Society of Anesthesiologists, and the Orthopeadic Surgeons of New Jersey. (hereinafter referred to as "Gormally Objectors.") Also on that day, the Court received an objection filed by the husband of Myrna B. Tagayun, M.D. On November 28, 2006, the Court received a letter from Steven Menaker, Esq. of the firm Chasan Leyner & Lamparello stating that it represented three individual physicians named Narnjan V. Rao, M.D., Robert Oberhand, M.D., and Alexander Dlugi, M.D. In total, the Court received objections by six individual physicians and eleven professional organizations. (hereinafter collectively referred to as "Objectors.")

According to the Settlement Administrator's affidavit filed on Dec. 19, 2006, there were also a total of 991 valid and timely requests for exclusion and 74 untimely requests for exclusion. The affidavit also specified that there were 9 timely requests for exclusion where the exclusion had one primary signature acting as a representative for multiple individuals. These nine exclusion requests comprised a total of 191 names.

In evaluating the above objections, the Court recognizes that the objections of the societies raise certain standing issues. Clearly, the Societies themselves are not class

members as they are not health care providers doing business with Horizon. Moreover, Counsel for the objecting societies did not submit any individual objections for the members they purport to represent other than the few individuals named above. This is not to say, however, that the validity of the Objectors' arguments is premised upon the number of objectors. The Objectors do raise legitimate concerns about the settlement; however, they appear focused more on the amount of fees that Class Counsel is going to receive despite the fact that the fees do not reduce the benefits to the class. What's more, the Objectors strongly criticize the settlement proposal yet provide no examples or requests for better alternatives. The Court also has some question as to whether certain objections were motivated by the possibility of monetary gain on the part of Counsel for the Objectors particularly where the same Counsel had moved to intervene and disqualify current Class Counsel. In other words, one of the primary objections raised, which was that Class Counsel was motivated by the fees to enter into this agreement, applies to the Objectors' motivations for raising the objections. Other than a handful of named objectors represented by only a few firms, the Court has no way of knowing whether or not a majority or even a significant number of the societies' members stand behind these objections.

Putting these concerns aside, this factor is ultimately concerned with the reaction of the class as measured by the objections and opt-outs. In this case, there were at most 1000 properly submitted opt-outs[3] and 6 properly filed objections out of a class that numbered in the tens of thousands. Assuming the class actually consists of only 18,000 physicians, which is about the lowest number alleged, the number of class members that reacted negatively to the settlement represents only about 5.588 percent. Given the reaction of such a small percentage of the overall class, I find that this factor weighs in favor of settlement.

(3) The Third Girsh Factor: The Stage of the Proceedings

This factor captures the degree of case development that Class Counsel has accomplished prior to settlement. Through this lens, courts can determine whether Counsel has had an adequate appreciation of the merits of the case before negotiating.'" Cendant, 264 F.3d at 235. (quoting General Motors, 55 F. 3d at 813). The stage of the proceedings are measured "by reference to the commencement of proceedings either in the class action at issue or in some related proceedings." General Motors, 55 F.3d at 813.

The settlement proposed in this case was reached after years of litigation and extensive discovery by the Plaintiffs. Indeed, at least with respect to the "Prompt Pay Sub-Class," the Court is satisfied that Counsel fully appreciated the merits of the case. This is evidenced by the fact that they were prepared to proceed with an imminent trial on those claims.

It is true that additional discovery may have been required to prepare the "Contract Claim Sub-Class" and the "Capitation Sub-Class," however, as Class Counsel noted, before Judge Rothschild stayed the non-prompt pay claims the parties served interrogatories on each other and exchanged thousands of documents pertaining to these claims. Accordingly, the fact that Plaintiffs may have needed additional discovery to

[3] This assumes that in addition to the 991 valid and timely opt-outs that the 9 individuals who filed opt-outs on behalf of others properly did so for themselves.

craft the intricacies of their trial strategy on the remaining claims does not mean that they possessed insufficient information to evaluate their position in settlement negotiations. Therefore, I find that this factor weighs in favor of settlement.

(4) & (5) The Fourth and Fifth Girsh Factors: The Risks of Establishing Liability and Damages

A court considers the risk of establishing liability in order to examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them.'" Cendant, 264 F.3d at 237 (quoting General Motors, 55 F.3d at 814). With respect to the risks of establishing damages, "this inquiry attempts to measure to expected value of litigating the action rather than settling it at the current time." General Motors, 55 F.3d at 816.

This case has had a high level of risk since its inception. In fact, Plaintiffs had to establish the existence of the implied private right of action under which they are now suing. If litigation continued and the case was tried, it is likely that Horizon would appeal many decisions, which, if overturned, might preclude the class members from recovering anything. This case has also been risky in terms of establishing damages. Plaintiffs required expert opinion to evaluate the damages in this case and their expert has had to continually evaluate information produced through ongoing and lengthy discovery.

The prompt pay clams were originally in the range of $400 million and were amended and decreased on several occasions such that the claim was down to approximately $100 million. This Court had already ruled that the Defendant had shown sufficient issues before trial that a Rule 104 Hearing was necessary to determine whether there were adequate factual and scientific bases as well as sufficient reliability to allow the computer analysis and opinions of Dr. Waters to be presented to the jury. Without these opinions, clearly the Plaintiffs had no proof as to damages. In addition, even if this Court permitted Dr. Waters to give her opinion on damages, this was still a highly contested report as to whether Dr. Waters considered all the relevant computer data in her calculations and she would have been subject to vigorous cross examination and refutation by Defendant's expert. Under these circumstances, the value of the Plaintiff's claim for settlement purposes did not come close to approaching the values set by Dr. Waters. The mere fact that Dr. Waters changed her evaluation of the damages so many times gave the Defendant ammunition to put some serious doubt into the minds of jurors on her credibility. These factors illustrate just some of the risks inherent in this case and weigh heavily in favor of a negotiated settlement.

(6) The Sixth Girsh Factor: The Risks of Maintaining the Class Action Through Trial

The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits." General Motors, 55 F.3d at 817. The prospects of obtaining and maintaining class certification, therefore, have a "great impact on the range of recovery one can expect to reap from the action." Id. In both New Jersey state and federal courts, "there will always be a risk or possibility of decertification, and

consequently the court can always claim that this factor weighs in favor of settlement." In re Safety Components Inc., 166 F. Supp. 2d at 91 (quoting In re Prudential Ins. 148 F. 3d at 321); *see also*, In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 437 ("R. 4:32 vests in the trial court substantial control over management of a class action. A trial court can mold the class, as the trial court has done here, and, in an appropriate case, can even decertify a class").

The Defendant has continued to claim that the damages are not easily subject to class evaluation and require individual analysis on a claim by claim basis. This approach could destroy the basis for a class action. They have continually disputed Plaintiffs' ability to evaluate the damages based on a computer analysis without looking at individual factors that might affect the timing of payments. Part of Defendant's attack on Dr. Waters report was directed to this issue.

Not only is there the ever-present risk of decertification in this case, but there is the added risk posed by a settlement in the Love action. If that case settles, this court may lose jurisdiction or the case may become moot. Either way, this factor weighs in favor of settlement.

(7) The Seventh Girsh Factor: The Ability of Defendants to Withstand a Greater Judgment

This factor is concerned with "whether the defendants could withstand a judgment for an amount significantly greater than the settlement." Cendant, 264 F.3d at 240. There is really no dispute as to whether the Defendant in this matter can withstand a greater judgment and that any judgment will be paid. Horizon is an extremely large company with tremendous resources; thus this factor weighs in favor of rejecting the settlement. However, this factor alone will not render the settlement unfair. All factors must be considered when rendering a final decision.

(8) & (9) The Final Girsh Factors: The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of the Litigation Risks

These two factors inquire as to "whether the settlement is reasonable in light of the best recovery and the risks that the parties would face if the case went to trial." In re Prudential Ins., 148 F.3d at 322. This evaluation requires the Court to assess "the present value of the damages Plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing...compared with the amount of the proposed settlement." In re Prudential, 148 F.3d at 322 (quoting Manuel for Complex Litigation 2d § 30.44 at 252). "The primary touchstone of this inquiry is the economic valuation of the settlement." GM Trucks, 55 F.3d at 806. In making this assessment, "the evaluating court must recognize that the settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement based on the court's view of the merits of the litigation." Finally, in determining the fairness, adequacy, and reasonableness of the proposed settlement, significant weight should also be given to "the belief of experienced counsel that settlement is in the best interest of the class," so long as the Court is satisfied

that the settlement is the product of good faith, arms length negotiations. In re Bone Screw Prod. Liability Litig., 176 F.R.D. 158, 180 (E.D. Pa. 1997).

In this case, Class Counsel has negotiated business reforms that their expert estimates to be worth not less than $39 million dollars. This settlement must be viewed in light of the best recovery taking into account all the risks of litigation. Obviously, the best recovery would be a monetary payout that covers each physician's damages and the objectors point glaringly to the fact that class members are receiving no direct payments. Assuming Plaintiffs could negotiate such a cash payout, even as many as the claimed $100 million; this would still need to be distributed among as many as 60,000 class members. This would work out to an average of $1666.66 per class member. This "best recovery" figure would still be reduced by the attorneys' fees, costs, and the cost of appeals that would likely follow. In addition, even if the Plaintiffs could recover this amount, it would still require additional expenses to fairly distribute the funds.

The risks of continued litigation in this matter are numerous. First, there is the possibility that a jury might not return a favorable award. This is a complex case and establishing damages might prove very difficult at trial. Next, even if Plaintiffs did recover at trial there is still the possibility that the class may get nothing because on appeal there could be a finding that there is no private right of action for Plaintiffs' largest claim. Third, there is the danger that the Love case settles effectively ending this litigation.

In assessing the value of the current settlement, the Court notes the following points. The benefits of the settlement, while hard to calculate on an individual level, may exceed the value of any monetary recovery. The proposed business reforms will last for years providing potential benefits in streamlining and simplifying the claims handling process as well as facilitating better communication between the parties. For example, the posting of CPT and HCPCS Level II codes that result in the reduction or denial of payment will allow doctors to more easily determine whether they have been reimbursed properly and to decide how certain procedures they may be interested in performing will be reimbursed by Horizon. Similarly, the ability of physicians to request up to 100 additional codes that the physician actually bills or anticipates billing will help in the same regard. Horizon has also agreed not to recover overpayments to physicians after more than 18 months of original payment and has agreed to dedicate personnel to resolve capitation inquiries and capitation payment inquiries typically raised by physicians. It is likely that these reforms will provide substantial benefits in terms of time, effort, and money saved, possibly more than the actual, provable damages that would be payable to class members.

The Court also recognizes that any monetary settlement would likely be in the form of a one time payout, after which, Horizon would be free to go back to its former practices dissuaded only by the prospect of another lawsuit. The negotiated settlement benefits the class members because it gives them a contractual guarantee, enforceable in court, that will institute certain business reforms rather than relying upon a statutory right of action that could be modified or found to provide no private right of action other than to complain to the Department of Banking and Insurance. In particular, the agreement requires Horizon to provide detailed annual reports to Class Counsel addressing Horizon's performance as to all critical business changes. This enforcement provision

allows Class Counsel to immediately go back to Court to enforce any aspect of the agreement with no cost to the individual physicians.

Finally, the negotiated settlement allows the class members to receive any benefits provided by the outcome of the Love action. This provision of the settlement raises the possibility that the Plaintiffs in this action may still receive monetary damages or other benefits in addition to the relief at issue in this case.

Many of the objections raised to this settlement have largely focused on the $6,000,000 in fees and approximately $500,000 in costs that Horizon has agreed to pay Class Counsel. In particular, the objectors claim that Class Counsel has essentially been bought off to settle the case. This Court must thoroughly analyze the fee application "even where the parties to the class action have consented to an award of attorneys' fees because of the danger...that the lawyers might urge a class settlement at a low figure or on a less than-optimal basis in exchange for red-carpet treatment for fees." In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 128 (D.N.J. 2002) (quoting Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991).

"The amount and the award of attorney's fees and expenses is controlled by the Court and is within its sound discretion." In re Gen. Motors Corp., 55 F.3d at 783, 821. "Attorneys who represent a class and aid in the creation of a settlement fund are entitled to compensation for legal services offered to the settlement fund under the common fund doctrine." In re AremisSoft Corp, 210 F.R.D. at 128. "'Common fund' principles and the inherent management powers of the court have been utilized to award fees to lead counsel in cases that do not actually generate a common fund." Id. Courts within the Third Circuit have expressed a preference for the percentage of recovery method in common fund cases. Under this method, "a court must (1) value the proposed settlement and (2) decide what percentage of the proposed settlement should be awarded as attorney's fees." Id. There is no set standard for determining a reasonable percentage and awards have ranged from 19% to 45 % of a settlement fund. Id.

"In common fund cases where the fees and the award stem from the same source and the fees are based on a percentage amount of the clients' settlement; a...court should consider several factors in setting a fee award." Id. at 129. Those factors are known as the Gunter factors and they include:

> (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the...fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

The settlement in this case is not the type normally encountered in traditional common fund cases because the negotiated relief is in the form of business reforms rather than money. However, the Court will adhere to common fund principles as much as

possible by engaging in a quasi-percentage-of-recovery analysis and applying the Gunter factors whenever possible in order to evaluate the reasonableness of the fees.

The first analysis that needs to be undertaken is to determine whether the proposed attorney fees are disproportionately excessive to the value of the benefit conferred on the class. The Court will use Dr. Water's valuation of the settlement despite that fact that it has some concerns about her overall accuracy. She valued the settlement at "not less than $39 million dollars." The proposed fee award is $6.5 million dollars. That figure represents about 16.7% of the value of the settlement. However, if the fee award is decreased by $500,000 to account for Class Counsel's out-of-pocket expenses, the percentage falls to 15.3% of the settlement value. This percentage falls squarely within the range of reasonable fees in class action cases. Perhaps even more importantly, the payment of fees to Class Counsel in no way reduces the benefits to the class members. This may call into question the value of the comparison but certainly does not weigh in favor of rejecting the settlement.

With respect to the Gunter factors, the Court is satisfied that they generally weigh in favor of granting the fee application. The negotiated business reforms that are to be implemented by Horizon represent significant benefits that will assist tens of thousands of physicians in their interactions with Horizon. Of these tens of thousands of class members, there were only 6 objections filed and none of the Objectors provided any evidence of collusion between Class Counsel and Defendants. In fact, it was represented in Class Counsel's application and on the record that the benefits to the class were fully negotiated before any agreement regarding fees became final.[4] Class Counsel conducted themselves in a skilled and efficient manner despite the complex nature and long duration of the case. Moreover, during this lengthy litigation, there existed the possibility that Plaintiffs would receive nothing through either the reversal of the trial court's finding of an implied private right of action or divestiture resulting from the Love action. Finally, while this is not a traditional common fund case, the percentage of value obtained for the class and the fees awarded to Class Counsel are sufficiently proportionate to be within the range of reasonableness.

After careful scrutiny of the terms of the settlement and award of attorneys' fees, I find that the settlement as presently structured is reasonable and Plaintiffs' application is hereby **GRANTED**.

The Court is not approving any list of class members or making any determination as to which individuals have properly opted out or are bound by the settlement. Based on the affidavit of the Settlement Administrator, there is some dispute as to the timeliness of certain opt-outs as well as whether one person may opt-out on behalf of others. Rendering a decision as to the binding effect of the settlement on a specific class member would require a factual finding on notice to any opt-out class member who is disputed by the Defendants. The Court is not in a position to make this determination based on the record before it and this issue may be moot unless a disputed opt-out class member brings a subsequent action.

[4] The Court notes that there are better ways to isolate the settlement negotiations from the negotiations for attorneys' fees but there is no direct evidence that the fee award influenced the negotiations.

NAGEL RICE & MAZIE, LLP
103 Eisenhower Parkway
Roseland, New Jersey 07068
(973) 618-0400
Attorneys for Plaintiff Class

JOHN IVAN SUTTER, M.D., P.A., on behalf of himself and all others similarly situated, Plaintiff, vs. HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ESSEX COUNTY DOCKET NO. ESX-L-3685-02 CIVIL ACTION **ORDER APPROVING SETTLEMENT AMONG HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY, PHYSICIANS AND PHYSICIAN GROUPS, CERTIFYING CLASS AND DIRECTING ENTRY OF FINAL JUDGMENT**

THIS MATTER having been opened to the Court on the joint motion submitted by the Plaintiff Class and Horizon Blue Cross Blue Shield of New Jersey for final approval of the settlement concerning claims against defendant, Horizon Blue Cross Blue Shield of New Jersey ("Horizon"); and having reviewed and considered the terms and conditions of the proposed settlement (the "Settlement") as set forth in the Settlement Agreement, a copy of which has been submitted to the Court; and having reviewed and considered the applications of Class Counsel for an award of attorneys' fees and expenses and for an award of fees to the Representative Plaintiff; and the Court having held a Settlement Hearing after being satisfied that notice to the Class had been provided in accordance with the Court's Order Preliminarily Approving the Proposed Settlement Among Horizon, Physicians and Physician Groups, Setting Form and Content of Notice to the Class and Scheduling Settlement Hearing entered on Oct. 24, 2006 2006 (the "Preliminary Approval Order"); and the Court having taken into account the objections, if any, submitted prior to the Settlement Hearing in accordance with the provisions of

the Preliminary Approval Order; and all prior proceedings had in this litigation; and for good cause having been shown;

IT IS on this 2 day of February 2007, hereby

ORDERED as follows:

Findings of the Court

1. The Court has jurisdiction over the subject matter of this action pursuant to the Rules Governing the Courts of the State of New Jersey ("New Jersey Court Rules") and the laws of the State of New Jersey, and all acts within this Action, and over all Parties to this Action, and all members of the Class.

2. Capitalized terms used in this Order that are not otherwise defined herein have the meaning assigned to them in the Settlement Agreement.

3. The Class conditionally certified in the Preliminary Approval Order has been appropriately certified for settlement purposes. Class Counsel, Eric D. Katz, and the Representative Plaintiff, John Ivan Sutter, M.D., have fairly and adequately represented the Class for purposes of entering into and implementing the Settlement.

4. Notice to members of the Class and other potentially interested parties has been provided in accordance with the notice requirement specified by the Court in the Preliminary Approval Order. Such notice:

(a) constituted the best notice to members of the Class that was practicable under the circumstances;

(b) constituted notice that was reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Action, their right to object and to appear at the

Settlement Hearing or to exclude themselves from the Settlement, and the binding effect of a class judgment;

(c) was reasonable and constituted due, adequate and sufficient notice to persons entitled to be provided with notice; and

(d) fully complies with the requirements of due process and the New Jersey Court Rules.

5. The Court has held a hearing to consider the fairness, reasonableness and adequacy of the Settlement, has been advised of all objections to the Settlement and has given fair consideration to such objections.

6. The Settlement is the product of good faith, arm's length negotiations between the Representative Plaintiff and Class Counsel, on the one hand, and Horizon, on the other hand.

7. The Settlement, as provided for in the Settlement Agreement, is in all respects fair, reasonable, adequate and proper and in the best interest of the Class. In reaching this conclusion, the Court has considered a number of factors, including:

(a) an assessment of the likelihood that the Representative Plaintiff and/or the Class would prevail at trial;

(b) the range of possible recovery available to such plaintiffs as a result of such a trial;

(c) the consideration provided to members of the Class pursuant to the Settlement, as compared to the range of possible recovery discounted for the inherent risks of litigation;

(d) the complexity, expense and possible duration of such litigation in the absence of a settlement;

(e) the nature and extent of any objections to the Settlement; and

See annexed opinion

(f) the stage of proceedings at which the Settlement was reached.

8. A list of those members of the Class who have timely elected to opt-out of the Settlement and the Class and who therefore are not bound by the Settlement, the provisions of the Settlement Agreement, this Order and the Judgment to be entered by the Court, has been submitted to the Court as an exhibit to the Affidavit of _____ sworn to on _____. A copy of such exhibit is attached hereto and incorporated by reference herein. All of the members of the Class (as permanently certified below) shall be subject to all of the provisions of the Settlement, the Settlement Agreement, this Order and the Judgment to be entered by the Court.

9. The Bar Order provision of this Order, which prohibits the assertion of certain claims against Horizon and the other Released Parties, as set forth below, is a condition of the Settlement and a significant component of the consideration afforded to Horizon in the Settlement, and that provision is reasonable under the circumstances.

Certification of the Class and Approval of Settlement

10. The Settlement and the Settlement Agreement are hereby approved as fair, reasonable, adequate and in the best interest of the Class, and the requirements of due process and R. 4:32 of the New Jersey Court Rules have been satisfied. The objections to the Settlement and the Settlement Agreement are overruled and denied in their entirety and in all respects.

11. The Court having found that each of the elements of R. 4:32-1(a) and (b)(3) of the New Jersey Court Rules are satisfied, for purposes of settlement, with respect to Horizon, as well as the other Released Parties, the Action is permanently certified as a Class Action with the following sub-classes on behalf of the following persons (the "Class"):

1. The "Prompt Pay Sub-Class," which includes:

All individual physicians and physician groups (i.e., medical doctors and doctors of osteopathic medicine) regardless of specialty and network status, who provided services eligible for coverage to any person who, at the time such services were provided, is/was a subscriber of or insured by Horizon, and eligible for coverage of the services represented by such claims, which services were rendered at any time during the Class period of April 12, 1996 through the Preliminary Approval Date and were billed in compliance with Horizon's criteria and requirements.

2. The "Contract Claim Sub-Class," which includes:

All individual pediatric physicians and pediatric physician groups (i.e., medical doctors and doctors of osteopathic medicine) practicing in New Jersey who are/were Horizon network providers, providing services to any person who is/was a subscriber of or insured by Horizon, and submitted claims for services provided to persons eligible for the coverage of the services represented by such claims by Horizon that are/were processed through claim adjudication computer software at any time during the Class period of April 12, 1996 through the Preliminary Approval Date.

3. The "Capitation Sub-Class," which includes:

All individual physicians and physician groups (i.e. medical doctors and doctors of osteopathic medicine) practicing in New Jersey who are/were Horizon network providers regardless of specialty, providing services to any person who is/was a subscriber of or insured by Horizon eligible for coverage of the services represented by such claims and who had selected that provider to be their primary care physician, and which providers were compensated on a capitated basis with respect to such subscribers or insureds at any time during the Class period of April 12, 1996 through the Preliminary Approval Date.

The persons ~~identified on the list submitted to the Court (and attached hereto as an exhibit) as~~ having timely and properly elected to opt-out from the Settlement and the Class are hereby excluded from the Class and shall not be entitled to any of the benefits afforded to the Class under the Settlement Agreement. The Court readopts and incorporates herein by reference its preliminary conclusions as to the satisfaction of the requirements of R. 4:32-1(a) and (b)(3) of

the New Jersey Court Rules as set forth in the Preliminary Approval Order and notes again that because this certification of the Class is in connection with the Settlement rather than litigation, the Court need not address the issues of manageability presented by certification of the litigation class of this Action in July 2004.

12. For purposes of the Settlement only, the Representative Plaintiff, John Ivan Sutter, M.D., is certified as the representative of the Class and Class Counsel, Eric D. Katz, is appointed counsel to the Class. The Court concludes that Class Counsel and the Representative Plaintiff have fairly and adequately represented the Class with respect to the Settlement and the Settlement Agreement.

13. Notwithstanding the certification of the foregoing Class and appointment of the class representative for purposes of effecting the Settlement, if this Order is reversed on appeal or the Settlement Agreement is terminated or is not consummated for any reason, the foregoing certification of the Class and appointment of a class representative shall be void and of no further effect and the parties to the Settlement shall be returned to the status each occupied before entry of this Order without prejudice to any legal argument that any of the parties to the Settlement Agreement might have asserted but for the Settlement Agreement, subject to the provisions of Section 12.2 of the Settlement Agreement which remains in full force and effect.

Release, Released Claims and Retained Claims

14. Upon the Effective Date (as defined in the Agreement), any and all claims, rights, and liabilities of any nature, including but not limited to, actions, demands, causes of action, obligations, damages, debts, charges, attorneys' fees, costs, arbitrations, forfeitures, judgments, indebtedness and liens **("Causes of Action")** against, (i) Horizon, and any of its former, present, and future assigns, predecessors, successors, affiliates, parent companies, subsidiaries, controlled

companies, employees, officers, directors, principals, agents, insurers, attorneys, participants, members, and parties with whom Horizon contracts for the purpose of providing healthcare services (including without limitation, employee benefit plans and the entities that sponsor them, but only to the extent such claims, rights and liabilities are or could have been alleged in the Complaint), and (ii) all Persons who provided Claims processing services, software, proprietary guidelines or technology to Horizon (including but not limited to NASCO), and any of their former, present, and future assigns, predecessors, successors, affiliates, parent companies, subsidiaries, controlled companies, employees, officers, directors, principals and agents (to the extent that such Person or entity's services or work were done pursuant to a contract with Horizon or one of its subsidiaries or affiliates) (the "**Released Parties**"), whether known or unknown, whether asserted or unasserted, whether asserted by any Releasing Party on its own behalf or on behalf of any other Person or entity, arising on or before the Effective Date, whether in contract, express or implied, tort, at law or in equity, or arising under or by virtue of any statute or regulation **(the "Released Claims"),** shall be deemed released, discharged, abandoned, and forever waived by and on behalf of all Class Members who have not validly and timely requested to Opt-Out of this Agreement, and their respective predecessors, successors, assigns, affiliates, principals, agents and heirs (to the extent that any such Person or entity's claims are derived by contract or operation of law from the claims of the Class Members) (the "**Releasing Parties**"). Further, the Releasing Parties covenant not to sue the Released Parties as to Released Claims, and represent and warrant that they have not, individually or collectively, assigned to any Person or entity, and agree that they will not assign to any Person or entity, any such causes of action.

15. Notwithstanding the foregoing, the Releasing Parties are not releasing claims for payment for services provided to Horizon Plan Members prior to or on the Effective Date as to which, as of the Effective Date: (i) no Claim with respect to such services has been filed with Horizon; or (ii) a Claim with respect to such services has been filed with Horizon but such Claim has not been finally adjudicated by Horizon (each a "**Retained Claim**" and collectively, the "**Retained Claims**").

16. Nothing in this Agreement is intended to relieve any Person that is not a Released Party from responsibility for its own conduct or conduct of other persons for claims that are not Released Claims.

Bar Order

17. It is an essential element of the Agreement that the Released Parties obtain the fullest possible release from further liability from the Releasing Parties as to the Released Claims, and it is the intention of the Parties to this Agreement that the Agreement eliminates all further risk and liability of the Released Parties as to the Released Claims. Accordingly, the Parties agree that the Court shall include in the Final Order and Judgment, a Bar Order provision that, except as to Retained Claims, meets all of the following requirements:

(a) Permanently enjoins the Releasing Parties from: (i) filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding or order in any jurisdiction as to any or all Released Claims against one or more Released Parties; (ii) instituting, organizing class members in, joining with class members in, amending a pleading in or soliciting the participation of class members in, any action or arbitration, including but not limited to a purported class action, in any jurisdiction against one or more Released Parties as to any or all

Released Claims; and (iii) filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding or order in any jurisdiction based on an allegation that an action of Horizon, which is in compliance with the provisions of this Agreement, violates any legal right of any Class Member.

(b) Allows the Releasing Parties to receive the monetary and/or non-monetary, if any, benefits which may be afforded to persons who are in the plaintiff class, if one is certified in *Love, et al. v. Blue Cross Blue Shield Association, et al., CV-03-21296* in the United States District Court for the Southern District of Florida, Miami Division (previously bearing the caption of *Thomas, et al. v. Blue Cross Blue Shield Association, et al., CV-03-21296),* even if such benefits are more favorable than the benefits received by the Releasing Parties in the Action.

18. Notwithstanding any other provision of this Agreement (including, without limitation, this Bar Order), nothing in this Agreement shall be deemed to in any way impair, limit, or preclude the Releasing Parties' rights to enforce any provision of this Agreement, or any court order implementing this Agreement, either individually, jointly, or as a putative class, in a manner consistent with the terms of the Agreement.

Non-Released Persons and Non-Released Claims

19. Nothing in this Agreement is intended to relieve any Person that is not a Released Party from responsibility for its own conduct or conduct of other persons for claims that are not Released Claims.

Dismissal With Prejudice

20. The Releasing Parties shall dismiss this Action with prejudice as to Released Parties. It is the Parties' intention that such dismissal shall constitute a final judgment on the merits to which the principles of *res judicata* shall apply to the fullest extent of the law as to the Released Parties.

Applications for Attorneys' Fees and Representative Plaintiff's Stipend

21. The Court has reviewed the application for an award of fees and expenses submitted by Class Counsel, Eric D. Katz, and the exhibits, memoranda of law and other materials submitted in support of that application. The Court recognizes that in the Settlement Agreement, Horizon has agreed not to oppose an award of fees and expenses to Class Counsel up to Six Million Five Hundred Thousand Dollars ($6,500,000.00) to be paid by Horizon up to that amount. This agreement is in addition to the benefits to be provided to members of the Class under the Settlement Agreement and will not reduce in any respect the benefits of the Settlement to the Class provided for by and through the Settlement Agreement. On the basis of its review of the foregoing, the Court hereby awards fees and expenses to Class Counsel in the aggregate amount of $6,500,000 to be paid by Horizon in accordance with the provisions of the Settlement Agreement.

22. The Court has also reviewed the application for a stipend to the Representative Plaintiff, John Ivan Sutter, M.D. The Court recognizes that in the Settlement Agreement, Horizon has agreed not to oppose a stipend of up to Fifteen Thousand Dollars ($15,000.00) for the Representative Plaintiff, to be paid by Horizon. This agreement is in addition to the benefits to be provided to members of the Class under the Settlement Agreement and will not reduce in any respect the benefits of the Settlement to the Class provided for by and through the Settlement Agreement. On the basis of its review of the foregoing, the Court hereby awards a stipend of

$ 15,000 to the Representative Plaintiff, to be paid by Horizon in accordance with the provisions of the Settlement Agreement.

Other Provisions

23. Neither the Settlement Agreement nor any provision therein, nor any negotiations, statements or proceedings in connection therewith shall be construed as, or be deemed to be evidence of, an admission or concession on the part of the Representative Plaintiff, Class Counsel, any members of the Class, Horizon, Released Parties or any other Person of any liability or wrongdoing by them, or that the claims and defenses that have been, or could have been, asserted in the Action are or are not meritorious, and this Order, the Settlement Agreement or any such communication shall not be offered or received in evidence in any action or proceeding, or be used in any way as an admission or concession or evidence of any liability or wrongdoing of any nature or that the Representative Plaintiff, any member of the Class or any other Person has or has not suffered any damage; provided, however, that the Settlement Agreement, this Order and the Judgment to be entered thereon may be filed in any action by Horizon or any Released Party seeking to enforce the Settlement Agreement or the Judgment by injunctive or other relief, or to assert defenses including, but not limited to *res judicata*, collateral estoppel, release, good faith settlement, judgment, bar or reduction or any theory of claim preclusion or issue preclusion or similar defense or counterclaim. Moreover, the Settlement Agreement, this Order and the Judgment to be entered thereon may be filed in any action by the Parties to enforce any provision(s) of the Settlement or Settlement Agreement.

24. The terms of the Settlement Agreement and this Order and the Judgment shall be forever binding on, and shall have *res judicata* and preclusive effect in, all pending and future lawsuits or other proceedings that are subject to the Release and other prohibitions that are set

forth in this Order that are maintained by, or on behalf of the Releasing Parties or any other Person subject to those provisions of this Order.

25. In the event that the Effective Date cannot occur, or the Settlement Agreement is terminated in accordance with the terms and provisions of the Settlement Agreement, then this Order and the Judgment shall be rendered null and void and be vacated and all orders entered in connection therewith by the Court shall be rendered null and void, subject to Section 12.2 of the Settlement Agreement which shall remain in full force and effect.

Entry of Judgment; Continuing Jurisdiction

26. Judgment in the form attached to this Order dismissing all Released Claims with prejudice as to Horizon Blue Cross Blue Shield of New Jersey as to the Representative Plaintiff and as to all Class Members, and without prejudice as to those Class Members who or which properly opted-out, is hereby entered by the Court.

27. Without in any way affecting the finality of this Order and the Judgment, this Court hereby retains jurisdiction as to all matters relating to:

(a) the interpretation, administration, and consummation of the Settlement Agreement; and

(b) the enforcement of the injunctions described in this Order.

28. A true and correct copy of this Order shall be served on all counsel of record within five (5) days.

HONORABLE STEPHEN J. BERNSTEIN, J.S.C

H:\EDK\sutter\Horizon\Order Approving Settlement 10-4-06.doc