Not Reported in A.3d, 2012 WL 2813813 (N.J.Super.A.D.)
(Cite as: 2012 WL 2813813 (N.J.Super.A.D.))

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
John Ivan SUTTER, M.D., P.A., on behalf of himself and all others similarly situated, Plaintiff–Respondent/Cross–Appellant,
and
Mario Criscito, M.D., Niranjan V. Rao, M.D., Robert I. Oberhand, M .D., and Alexander Dlugi, M.D., Plaintiffs/Objectors–Appellants/Cross–Respondents,
v.
HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY, Defendant–Respondent.
Union County Medical Society, Mercer County Medical Society, New Jersey Pediatric Society, New Jersey Association of Osteopathic Physicians and Surgeons, 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, Orthopedic Surgeons of New Jersey, and the New Jersey Chapter of the American College of Cardiology, Appellants/Cross–Respondents.

Argued March 21, 2012.
Decided July 11, 2012.

On appeal from Superior Court of New Jersey, Law Division, Essex County, L–3685–02.
Neil L. Prupis argued the cause for appellants/cross-respondents Niranjan V. Rao, M.D., Robert I. Oberhand, M.D. and Alexander Dlugi, M.D. (Lampf, Lipkind, Prupis & Petigrow, and Chasan, Leyner & Lamparello, P.C., attorneys; Mr. Prupis, Bassel Bakhos, and Steven L. Menaker, on the joint brief).

Charles X. Gormally argued the cause for appellants/cross-respondents New Jersey Association of Osteopathic Physicians and Surgeons, 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, Orthopedic Surgeons of New Jersey, and New Jersey Chapter of the American College of Cardiology (Brach Eichler, L.L.C., attorneys; Mr. Gormally, on the joint brief).

Eric D. Katz argued the cause for respondent/cross-appellant John Ivan Sutter, M.D., P.A. (Mazie Slater Katz & Freeman, L.L.C., attorneys; Mr. Katz and David A. Mazie, of counsel and on the brief; John D. Gagnon, on the brief).

John M. Murdock (Benton Potter & Murdock, P.C.) of the Virginia and Washington D.C. bar, admitted pro hac vice, argued the cause for respondent Horizon Blue Cross Blue Shield of New Jersey (Epstein Becker & Green, P.C., and Mr. Murdock, attorneys; Mr. Murdock and Maxine H. Neuhauser, of counsel and on the brief; Michael J. Slocum, on the brief).

Kern Augustine Conroy & Schoppman, P.C., attorneys for appellants/cross-respondents Mario Criscito, M.D., Union County Medical Society, Mercer County Medical Society, and New Jersey Pediatric Society (Steven I. Kern, on the joint brief).

Before Judges FUENTES, KOBLITZ and HAAS.

PER CURIAM.

*1 This case returns to us after we ordered a hearing on remand in *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, 406 *N.J.Super.* 86 (App.Div.2009). It involves the settlement of a class-action lawsuit instituted on April 12, 2002, by New Jersey physicians against Horizon Blue Cross Blue Shield of New Jersey, Inc. (Horizon), a major medical insurance provider. The objecting class-member physicians (objectors) appeal from the June 16, 2010 order, arguing that the settlement was not fair and reasonable and that the attorneys' fees awarded to class counsel were not properly considered under the law. Plaintiff class cross-appeals, arguing that appellants' claims regarding the fairness of the settlement should be dismissed as they admitted in another proceeding that the settlement provided value

to them. After reviewing the record in light of the contentions advanced by both sides on appeal, we affirm.

We incorporate in this opinion the pertinent facts from our prior opinion. *Sutter, supra*, 406 *N.J.Super.* at 95–96. The original suit alleged that Horizon delayed and impeded compensation to the doctors whose patients were covered by Horizon. It was settled pursuant to an agreement that Horizon would simplify and expedite its claims processing and provide other relief through various specific measures. No financial relief was provided for class members.

Teresa Waters was retained by plaintiffs to value the settlement. Ms. Waters has a Ph.D. in economics with a concentration in health economics and industrial organization. She completed a valuation of the settlement's worth in 2006.

After our remand, Waters completed a new valuation of the settlement and testified at the fairness hearing. Waters worked with Research and Polling, Inc. (RPI), a survey research company, to construct a telephone survey about the value of the settlement to the class members. Waters calculated the value to the class in time saved by the more efficient insurance claim processing procedures. Her approach attributed value to time; in other words, a physician's billing clerk could spend his or her time performing other tasks if not handling Horizon issues. Overall, Waters opined that the settlement was worth $35.01 million for a class of just over 20,000 physicians, which worked out to $1741 per physician for the five-year period, or $348 per physician per year. The objectors did not present an expert, although they cross-examined Waters about her assumptions and technique.

Testimony was also taken at the remand hearing regarding class counsel's fee request. Class counsel Eric D. Katz testified that the firm had a contingent fee agreement with Sutter, as it did with "virtually all" of its other clients. Katz had "no idea" about his hourly billing rate. His partner, David A. Mazie, testified that three years earlier, in a declaratory judgment action, in addition to his contingency fee, the court awarded him an hourly rate of $525 an hour, which was an "arbitrary number" that he chose for the fee application. Other than that, he did not have any hourly clients; he handled only contingency fee cases.

*2 The judge admitted into evidence a certification submitted by Mazie to the United States District Court for the District of New Jersey in connection with *Beye v. Horizon*, 568 *F.Supp.*2d 556 (D.N.J.2008), in which he and a former partner were arguing over the division of fees, which showed hourly rates for Mazie ranging from $375 to $560, and for Katz from $275 to $435 in 2006–2008. Two other attorneys in the office billed at about $360 per hour, one at $425 per hour, and several billed between $160 and $270 per hour. Mazie claimed that these were only arbitrary "placeholder" rates necessitated by the office computer program, not actual rates billed to clients. He then said, "[I]f I were an hourly lawyer, and I'll concede this, these are the rates that we would charge."

After a five-day remand hearing, the judge issued a revised written opinion, incorporating the findings he made in the first decision and confirming the settlement, but reducing counsel fees and costs by 28% from $6,500,000 to $4,685,285.

I

In their cross-appeal, plaintiffs argue that the objectors' appeal regarding the settlement's value should be dismissed in its entirety because they admitted that one settlement provision had a value of at least $30 million. This argument rests on an incomplete reading of the objectors' pleading in a companion case, in which they indicated that plaintiffs had valued this provision in excess of $30 million. This argument is without sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E).

II

The objectors argue that the judge should not have approved the settlement as it provided nothing of value to the class members. The court can approve a settlement "only after a hearing and on finding that the settlement ... is fair, reasonable, and adequate." *R.* 4:32–2(e)(1)(C). "If the settlement is fair and reasonable, it may be approved even though individual members of the class refuse to consent." *Chattin v. Cape May Greene*, 216 *N.J.Super.* 618, 627 (1987) (citations omitted). A settlement may be approved even if the majority of the class disapproves of its terms, but the overwhelming opposition of class members to a proposed settlement "is a significant consideration militating against court approval." *Id.* at

627–28 (citing *Pettway v. American Cast Iron Pipe Co.*, 576 *F.*2d 1157, 1215–18 (5th Cir .1978), *cert. denied,* 439 *U.S.* 1115, 99 *S.Ct.* 1020, 59 *L. Ed.*2d 74 (1979)).

The court has "considerable discretion" in determining whether a settlement is fair and reasonable, and, thus, its determination will be reversed only for an abuse of discretion. *Bryan v. Pittsburgh Plate Glass Co.*, 494 *F.*2d 799, 801 (3d Cir.) *cert. denied,* 419 *U.S.* 900, 95 *S.Ct.* 184, 42 *L. Ed.*2d 146 (1974); [FN1] *Chattin, supra,* 216 *N.J.Super.* at 628. An appellate court may find an abuse of discretion where the trial court's decision rests upon "a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 *F.*3d 768, 783 (3d Cir.), *cert. denied,* 516 *U.S.* 824, 116 *S.Ct.* 88, 133 *L. Ed.*2d 45 (1995). An appellate court may not substitute its findings for that of the trial court; it may only make an assessment of whether there is enough evidence to support such findings. *Cox v. Keystone Carbon Co.*, 894 *F.*2d 647, 650 (3d Cir.), *cert. denied,* 498 *U.S.* 811, 111 *S.Ct.* 47, 112 *L. Ed.*2d 23 (1990). Further, "[w]hen there are two permissible views of the evidence, the [trial court's] choice of one view cannot be clearly erroneous." *Ezold v. Wolf, Block, Schorr & Solis–Cohen,* 983 *F.*2d 509, 525 (3d Cir .1992).

> FN1. Since the New Jersey class action rule is modeled after the federal class action rule, federal cases are persuasive authority. *Saldana v. City of* Camden, 252 *N.J.Super.* 188, 194 n. 1 (App.Div.1991).

A

***3** Objectors first argue that the approval of the settlement should be reversed because the judge did not consider the impact of a settlement from a similar case in Florida, *Love v. Blue Cross & Blue Shield Ass'n,* No. 03–21296, (S.D. Fla. April 20, 2008).

The *Love* lawsuit was instituted in the United States District Court for the Southern District of Florida after the *Sutter* suit was begun and raised largely the same issues against Horizon. The parties in *Love* reached a settlement agreement similar to this one, and the court entered a final order approving the *Love* settlement on April 20, 2008, which was after the *Sutter* final approval (February 2, 2007), but before our decision remanding for an expanded fairness hearing (March 25, 2009).

On remand, the judge acknowledged objectors' contention that he should consider the *Love* settlement when determining the fairness of this settlement "because *Love* settled (with a settlement agreement encompassing many of the same terms as the *Sutter* settlement), [the objectors] are receiving nothing of value in this matter." He rejected this argument, writing that,

> it would be improper to allow [o]bjectors to argue in hindsight that they have received nothing of value because of a subsequent settlement. The interplay between the *Sutter* settlement and *Love* settlement is nothing new to the parties and was a risk anticipated during the *Sutter* settlement negotiation. Furthermore, it could be equally argued that the *Love settlement may not have been as valuable had they not copied provisions from the Sutter settlement.*
>
> It should be noted that the *Love* settlement was not a factor that the Appellate Division directed this [c]ourt to consider on remand; no party raised this concern before the Appellate Division despite the fact that the *Love* settlement occurred while the appeal was going on. Nevertheless, if this [c]ourt considers any impact of the *Love* settlement, it would be that the [c]lass is likely to be without any cause of action if this settlement agreement is not approved, because *Love* potentially extinguishes the *Sutter* cause of action.
>
> [emphasis in the original.]

We agree and adopt the reasoning of the judge in this regard. He considered the *Love* settlement as it reasonably applied to the issues.

B

Objectors argue that the proposed settlement fails under the analysis set forth in *Girsh v. Jepson,* 521 *F.*2d 153 (3d Cir.1975), which is to be used when determining whether a class action settlement is fair and reasonable. [FN2] In *Girsh,* the United States Court of Appeals for the Third Circuit set forth nine factors to consider in determining whether a class action settlement is fair and reasonable. Those factors are:

> FN2. On January 10, 2011, plaintiffs moved for summary dismissal of this portion of appellants' brief pursuant to *Rule* 2:8–3(b), arguing that the *Girsh* factors were not part of our 2009 remand. The motion was deferred and we now deny this motion.

(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** (4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the 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 to a possible recovery in light of all the attendant risks of litigation.

[*Id.* at 157.]

The proponents of the settlement bear the burden of proving that the factors weigh in favor of approval. *In re Gen. Motors, supra,* 55 *F.*3d at 785–86. However, the findings required by the *Girsh* test are factual and will be upheld unless they are clearly erroneous. *Id.* at 786.

In his original opinion, the judge reviewed each of the *Girsh* factors in depth. The original appeal claimed that the *Girsh* factors were not properly addressed. *Sutter, supra,* 406 *N.J.Super.* at 99. Although we noted that assertion, we did not substantively review appellants' arguments regarding the *Girsh* factors.

In his second opinion, the judge noted that we had acknowledged his "extensive" review of the *Sutter* settlement. He therefore incorporated his February 2007 opinion into his second opinion and did not readdress the *Girsh* factors. We affirm substantially for the reasons expressed by the judge in his written opinion in which he reviewed each factor and the facts applicable to those factors.

The judge noted that, conservatively, there were 18,000 members of the class. There were 991 timely requests for exclusion and 74 untimely requests. Only six individuals and various medical societies, which are not members of the class, objected to the settlement. The judge's *Girsh* findings were not "clearly erroneous." *In re Gen. Motors, supra,* 55 *F.*3d at 785.

C

Objectors also attack the settlement by alleging flaws in Waters' October 2006 valuation and claiming that the judge should have considered these shortcomings in ruling on Waters' credibility and trustworthiness regarding her 2009 report. We find no abuse of discretion in the judge's determination to view Waters' more recent and more scientific report without reference to her earlier report. Although precise results may not be obtained through social science techniques, such as a telephone survey asking the responders to approximate future time-saving, it is an acceptable method of determining value in a case such as this. Objectors presented no expert testimony to the contrary.

The judge recognized that the use of questions regarding prospective estimates "are regularly used in survey research, and both governmental and private entities rely on such surveys to undertake future planning and forecasting." That finding was based on the evidence, as RPI's president testified that asking respondents to prospectively estimate something is "common" and "perfectly fine" in the survey field. He cited examples of the University of Michigan and the federal government using similar approaches in surveys. Because the reforms had not been implemented, the survey respondents would have had no basis on which to respond other than their opinion of the prospective savings.

***5** Next, appellants argue that Waters' evaluation was flawed because the survey assumed that any savings of time would translate to dollar savings. The judge's opinion accurately reflected the credible tes-

timony that the business reforms would have "value" to physicians, either in actual dollars recouped or in time saved that would lead to fewer staff, or allow personnel to focus on other matters.

We find the other issues raised by objectors regarding Waters' evaluation to have insufficient merit to discuss in a written opinion and affirm substantially for the reasons expressed in the judge's opinion. *R.* 2:11–3(e)(1)(E).

The record provides ample support for the judge's decision that the settlement is fair.

III

Objectors further maintain that the judge erred in multiple respects by awarding counsel fees and costs to class counsel. As part of the settlement, defendant agreed to pay a maximum of $6.5 million in counsel fees and costs. The class does not receive the difference between the agreed-upon cap on fees and the amount awarded by the judge.

Rule 4:32–2(h) states that "in an action certified as a class action, an application for the award of counsel fees and litigation expenses, if fees and costs are authorized by law, rule, or the parties' agreement, shall be made in accordance with *R.* 4:42–9." *Rule* 4:42–9(b) requires that an application for counsel fees be supported by an affidavit addressing pertinent factors, including those listed in *RPC* 1.5(a). *RPC* 1.5(a) lists "factors to be considered in determining the reasonableness of a fee," which includes the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer:
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

There are two different methods for determining the fee—the lodestar method and the percentage of recovery method. *In re Gen. Motors, supra,* 55 *F.*3d at 820–21. Each has "distinct attributes suiting them to particular types of cases." *Id.* at 821. A "court making or approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees." *Ibid.* The ultimate choice of methodology rests within the court's discretion. *Ibid.*

The judge originally awarded class counsel $6 million in fees, plus $500,000 for unreimbursed costs, using the "percentage of recovery" method. *Sutter, supra,* 406 *N.J.* at 103. We determined that the judge did not adequately review the counsel fee application and remanded for reconsideration, suggesting that the lodestar method was more appropriate under the circumstances. *Id.* at 105–06.

***6** The lodestar method uses the number of hours reasonably expended by counsel as its starting point. *In re Gen. Motors, supra,* 55 *F.*3d at 821. The number of reasonable hours is then multiplied by an hourly rate appropriate for the region and the lawyer's experience to get the "lodestar." *In re AremisSoft Corp. Sec. Litig.,* 210 *F.R.D.* 109, 128 (D.N.J.2002); *Rendine v. Pantzer,* 141 *N.J.* 292, 333–34, 337 (1995). "[T]he trial court's determination of the lodestar amount is the most significant element in the award of a reasonable fee because that function requires the trial court to evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application." *Rendine, supra,* 141 *N.J.* at 335.

The court "should satisfy itself that the assigned hourly rates are fair, realistic, and accurate, or should make appropriate adjustments." *Id.* at 337. The hourly rate should be based on the current figure to account for the delay in payment, rather than those rates in

effect when the services were performed. *Id.* at 337. In determining the reasonable hourly billing rate, the court should consider the rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer. *In re AremisSoft, supra,* 210 *F.R.D.* at 134. The court should also evaluate the rate of class counsel in comparison to rates "for similar services by lawyers of reasonably comparable skill, experience, and reputation in the community." *Furst v. Einstein Moomjy, Inc.*, 182 *N.J.* 1, 22 (2004) (citation omitted).

"[A] thorough judicial review of fee applications is required in all class action settlements." *In re Gen. Motors, supra,* 55 *F.*3d at 819. This is because " 'a defendant is interested only in disposing of the total claim asserted against it [and] the allocation between the class payment and the attorneys' fees is of little or no interest to the defense.' " *Id.* at 819–20 (quoting *Prandini v. Nat'l Tea Co.*, 557 *F.*2d 1015, 1020 (3d Cir.1977)). Further, the "divergence in financial incentives ... creates the 'danger ... that the [class] 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.' " *Id.* at 820 (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 *F.*2d 518, 524 (1st Cir.1991)). Therefore, there is an "especially acute need for close judicial scrutiny of fee arrangements" in class action suits. *Ibid.*

On remand, the judge reexamined the fee application under the lodestar method. With regard to the number of hours reasonably expended, the judge stated:

> In this case the plaintiff's counsel has presented a reasonably detailed list of hours expended by each participating attorney in the firm. This court having had the benefit of handling the case for many years was aware of the nature and extent of the contested litigation both before the settlement between the original parties and after the settlement with the objectors. With almost 10 years of litigation, this court finds that the detailed number of hours and nature of the services appears reasonable and the court will approve the 5,528 hours as detailed in the certification submitted by class counsel.

*7 The judge then addressed the "more difficult task" of determining a reasonable hourly rate, given that "neither party provided comprehensive information in support of what the appropriate lodestar rate should be." In the absence of such information, the judge relied on his "experience in fee applications" and familiarity with rates awarded in other class action suits. Taking into account the "complicated nature" of the litigation and "the experience and reputation of class counsel's firm," the judge applied a "blended rate" and calculated the lodestar to be $2,987,750.

Citing *Rendine, supra,* the judge noted that the multiplier should be in the twenty-five to thirty-five percent range and, based on the contingent nature of the case and the out-of-pocket expenses expended by counsel (more than $600,000), used "the higher end" multiplier of thirty-five percent to reach a total fee of $4,685,285.

Fee determinations will be disturbed on appeal "only on the rarest occasions, and then only because of a clear abuse of discretion." *Rendine, supra,* 141 *N.J.* at 317.

A

Objectors maintain it was error to award counsel current rates. As stated previously, the reason for using "current rates" is to account for the "delay factor" in contingent cases. *Rendine, supra,* 141 *N.J.* at 337. Although *Rendine* was a fee-shifting case, as was the case it cited as authority for using current rates, *Pennsylvania v. Delaware Valley Citizens' Council,* 483 *U.S.* 711, 107 *S.Ct.* 3078, 97 *L. Ed.*2d 585 (1987), there is no authority to support appellants' claim that the "current rate" method is applicable only in fee-shifting cases. The United States Supreme Court recognized:

> When plaintiffs' entitlement to attorney's fee depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later[.] Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect present value.
>
> [*Pennsylvania v. Del. Valley Citizens' Council, supra,* 483 *U.S.* at 716, 107 *S.Ct.* at 3081–82, 97 *L. Ed.*2d at 592.]

The reasons supporting the "current rate" rule in

fee-shifting cases are no different than in contingent litigation. Indeed, we cited and applied *Rendine's* counsel fee directive previously in *Yueh v. Yueh*, 329 *N.J.Super.* 447, 464–69 (App.Div.2000), a matrimonial case.

In support of their counsel fee application, class counsel presented their "effective hourly rate" by taking the actual fees collected in contingency cases by the two principal lawyers, Katz and Mazie, over the past three calendar years, and dividing them by the number of hours expended, yielding an "effective hourly rate" for Mazie of $2152 and for Katz of $1307. After the remand hearing, class counsel offered an "alternative analysis" using a "blended" rate for all lawyers in the firm of $995 per hour based on their actual fees in the contingency cases divided by the hours of all the firm's attorneys.

***8** The judge rejected class counsel's suggestions, finding that the rates were "artificially high based on the success of the firm on contingency cases as opposed to usual hourly billing rates." Instead, the judge cited to *In re Schering–Plough/Merck Merger Litigation*, No. 09–CV–1099, (D.N.J. March 25, 2010) (slip op. at 57), a settlement of a class-action suit in which the attorneys were awarded an hourly fee ranging from $465 to $681, as evidence of an appropriate rate in the community of class-action attorneys. Relying on *Schering–Plough* and other "similar situations" of which he was aware, the "experience and reputation" of class counsel and the "complicated nature" of the litigation, the judge reached the blended hourly rate of $550 for all attorneys. In setting the figure, he noted that over seventy-five percent of the work was completed by Mazie and Katz, and the other twenty-five percent was performed by other attorneys. He separated law clerks from the figure, and assigned a rate of $100 per hour for their work.

The *Rendine* Court recognized that there is "no such thing as a market hourly rate in contingent litigation." *Rendine, supra*, 141 *N.J.* at 342 (citation omitted). The hourly rate awarded by another court is therefore indicative of the prevailing rate. "Blended rates," in which one rate is used for all of the attorneys who worked on the case at differing rates, have been applied in other class-action cases. *See In re Rite Aid Corp. Securities Litigation*, 396 *F.*3d 294, 306 (3d Cir.2005). The judge did not abuse his discretion in considering prior hourly rates awarded counsel and deciding $550 was the appropriate rate.

B

Objectors next argue that the judge failed to make the necessary fact findings to support his acceptance of the hours class counsel claimed it expended on this litigation and had he made a careful review, the number of hours would have been reduced considerably. Objectors contend that it was improper to award fees for both lawyers to prepare for and attend hearings, depositions and conferences, and for "several hours of research into basic class action litigation issues." In their appellate brief, objectors contest many of the hours for which fees were awarded, such as all work done on the prior appeal.

Objectors had an opportunity to cross-examine class counsel on the hours they expended and failed to do so. It is not unreasonable for two lawyers to receive compensation for working together on class action litigation. The judge based his acceptance of the hours submitted in detailed certifications and time sheets on his many years of familiarity with the course of the litigation.

Counsel is entitled to be compensated for all time necessarily spent to obtain benefits for the client, including on appeals and activity after remand. *Pennsylvania v. Del. Valley Citizens' Council, supra*, 478 *U.S.* at 557–61, 106 *S.Ct.* at 3094–96, 92 *L.Ed.*2d at 451–54; *Tanksley v. Cook*, 360 *N.J.Super.* 63, 67 (App.Div.2003).

***9** Class counsel would have been entitled to attorney fees for time spent on the fee application, although they did not include such time in their certifications. *Hernandez v. Kalinowski*, 146 *F.*3d 196, 198–201 (3d Cir.1998). New Jersey courts have relied on *Hernandez* in holding that time spent on preparing counsel fee petitions is compensable. *R.M. v. Supreme Court of N.J.*, 190 *N.J.* 1 (2007) (claim brought under Civil Rights Act, 42 *U.S.C.* § 1983); *Tanksley, supra*, 360 *N.J.Super.* at 67 (claim brought under New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8–1 to –20). *See also, Courier News v. Hunterdon Co. Prosecutor's Office*, 378 *N.J.Super.* 539, 547 (App.Div.2005) (compensation permitted for time spent preparing counsel fee petition in case brought under the Open Public Records Act, *N.J.S.A.* 47:1A–1 to –13). Furthermore, class counsel properly sought payment for appellate work done in this matter, including their

defense of the original fee award.

The court should reduce hours if they are "excessive, redundant, or otherwise unnecessary." *Rendine, supra,* 141 *N.J.* at 335 (quoting *Copeland, supra,* 641 *F.*2d at 891) (quoting *Rode v. Dellarciprete,* 892 *F.*2d 1177, 1183 (3d Cir.1990)). The judge did not abuse his discretion by accepting the totality of the hours submitted by class counsel.

C

When the prevailing party has entered into a contingent-fee arrangement, a trial court should decide whether that attorney is entitled to a fee enhancement to reflect the risk of nonpayment. *Furst, supra,* 182 *N.J.* at 23; *Rendine, supra,* 141 *N.J.* at 337. "In determining and calculating a fee enhancement, the court should consider the result achieved, the risks involved, and the relative likelihood of success in the undertaking." *Furst, supra,* 182 *N.J.* at 23. It is the actual risks or burdens borne by the attorneys that determines whether an upward adjustment of the lodestar is appropriate. *Rendine, supra,* 141 *N.J.* at 339–40. The court also considers the legal risks and whether the case is significant and of broad public interest. *Id.* at 340–41. The *Rendine* Court concluded that enhancements "should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." *Id.* at 343. "[E]nhancements should never exceed one-hundred percent of the lodestar, and an enhancement of that size will be appropriate only in the rare and exceptional case in which the risk of nonpayment has not been mitigated at all[.]" *Ibid.*

As part of the counsel fee award, the judge made the following findings about the multiplier:

> In this state the case law has suggested that multipliers, when used, should generally be in the 25–35% range. Considering that this litigation was contingent, the length of time that class counsel has been involved, and the fact that they expended over $600,000 in out of pocket costs that they risked not recovering, this court believes that a multiplier to enhance the fee is appropriate and that the higher end should be used. Using an enhancement of 35% equates to an adjusted fee of $4,033.463, plus net out-of-pocket expenses which this court approves in the amount of $651,822 for a total of $4,685,285.
>
> ***10** [citations omitted.]

Objectors do not contest the amount of the multiplier, but instead argue that it should not have been used at all, as the award was contrary to state and federal law. They argue that the judge should have taken heed of a recent case decided by the United States Supreme Court, *Perdue v. Kenny A.*, 559 *U.S.* ——, 130 *S.Ct.* 1662, 176 *L. Ed.*2d 494 (2010), which addressed the issue of multipliers, referred to by the United States Supreme Court as "enhancements." This issue was recently resolved by the New Jersey Supreme Court in a manner contrary to objectors' position by *Walker v. Giuffre,* 209 *N.J.* 124 (2012), which supports the judge's use of a multiplier.

D

Although objectors acknowledge that they were permitted to question Mazie and Katz at the remand hearing, they argue they were "hamstrung" in their questioning because they were not permitted to depose them. Appellants give no authority for the right to depose opposing counsel regarding a fee request, and they do not cite to the record to show either where they made this request or the judge's reasons for denying it.

Our Supreme Court has made clear: "We strongly discourage the use of an attorney-fee application as an invitation to become mired in a second round of litigation." *Furst, supra,* 182 *N.J.* at 24 (citations omitted). The Court further noted that a trial court "should be able to determine in most cases the lodestar and any entitlement to an enhancement based on the supporting and opposing papers and argument of counsel." *Id.* at 25. The court may take testimony only if counsel's certifications concerning the reasonableness of the requested fees raise a genuine factual dispute. *Id.* at 26. Here, Mazie and Katz testified as to the very subjects on which appellants claim they needed more information. They had every opportunity to inquire into the various aspects of the fee request. We reject objectors belated complaint that they were denied depositions.

Objectors attempt to paint the picture of class counsel obtaining undeserved fees at the expense of an undesirable settlement for the class. The United States Supreme Court, however, has stated that there should not be "an undesirable emphasis" placed on the importance of money damages at the expense of injunc-

tive or declaratory relief. *Blanchard v. Bergeron*, 489 *U.S.* 87, 95, 109 *S.Ct.* 939, 945, 103 *L. Ed.*2d 67, 77 (1989). Further, without the opportunity to shift fees, attorneys might face an "artificial disincentive" from "fully exploring all possible avenues of relief." *Ibid.* These policy reasons were accepted by our Court in *Szczepanski v. Newcomb Medical Center*, 141 *N.J.* 346, 357–58 (1995).

"Unitary adjudication through class litigation furthers numerous practical purposes, including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations, and allocation of litigation costs among numerous, similarly-situated litigants." *Iliadis v. Wal–Mart Stores, Inc.*, 191 *N.J.* 88, 104 (2007). Additionally, class actions help "equalize adversaries, a purpose that is even more compelling when the proposed class consists of people with small claims." *Ibid.* The equalization helps remedy the "incentive problem" of litigants who seek only a small recovery. *Ibid.* "In short, the class action's equalization function opens the courthouse doors for those who cannot enter alone ." *Ibid.*

***11** Affirmed.

N.J.Super.A.D.,2012.
Sutter v. Horizon Blue Cross Blue Shield of New Jersey
Not Reported in A.3d, 2012 WL 2813813 (N.J.Super.A.D.)

END OF DOCUMENT