

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

BARBARA EDWARDS, in her capacity as Trustee in Bankruptcy of Roxbury Surgical Center, LLC, f/d/b/a Roxbury Open MRI and Surgery Center, and NORTH JERSEY AMBULATORY SURGERY CENTER, LLC, *individually and on behalf of all others similarly situated,*

Plaintiffs,

v.

HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY,

Defendant.

CIVIL ACTION NO. 08-cv-6160(KM)

**FINAL APPROVAL ORDER AND
JUDGMENT**

THIS MATTER having been opened to the Court by Bruce Nagel of Nagel Rice, LLP, and Neil Prupis, Esq., Class Counsel on behalf of Barbara Edwards, in her capacity as Trustee in Bankruptcy of Roxbury Surgical Center, LLC, f/d/b/a Roxbury Open MRI and Surgery Center (the “Representative Plaintiff”) and by Philip R. Sellinger and David Jay of Greenberg Traurig, LLP, counsel for Horizon Blue Cross Blue Shield of New Jersey (“Horizon”), by way of Plaintiff’s motion for final approval of the proposed settlement in the above Action;

WHEREAS, this Court having previously entered an order preliminarily certifying the proposed Class and approving the proposed settlement, and ordering

that notices be sent to the Class in accordance with the terms of the settlement and this Court's preliminary approval order dated March 29, 2018;

WHEREAS, this Court having reviewed and considered all submissions relating to the settlement, including the motion for final approval and supporting materials filed by the parties, the motion for attorneys' fees and expenses and class representative service fee award and supporting material filed by the parties, and having also reviewed the extensive Court file in the Action; and

WHEREAS, this Court has fully considered the record and the requirements of law; and good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The definitions and terms set forth in the Agreement are hereby adopted and incorporated into this Final Approval Order.
2. The Court has jurisdiction over the subject matter and parties to this proceeding pursuant to 28 U.S.C. § 1331. Venue is proper in this district.
3. The Court has personal jurisdiction over the parties before it.
4. The Court has carefully reviewed the Agreement, as well as the files, records, and proceedings to date in this matter.
5. The Settlement is hereby approved as fair, reasonable, and adequate.

6. The Plaintiffs, by and through their counsel, have investigated the facts and law related to the matters alleged in the complaints and amended complaints, including pre-trial discovery, motion practice, and an evaluation of the risks associated with continued litigation, trial, and/or appeal.

7. The settlement was reached as a result of arms-length negotiations between Plaintiffs' Counsel and Counsel for Horizon, including mediation sessions with a respected mediator, Hon. Stephen M. Orlofsky, former United States District Court Judge.

8. The Settlement confers substantial benefits to current and prior class members, particularly in light of the damages that Plaintiffs and Plaintiffs' Counsel believe are recoverable at trial, without the costs, uncertainty, delays, and other risks associated with continued litigation, trial, and/or appeal.

9. The Court finds, for settlement purposes only, that all requirements of Fed. R. Civ. P. 23(a) and (b) (3) have been satisfied and certifies the following class ("Settlement Class" or "Class"):

Any and all licensed ASCs located in New Jersey, individually and as assignees of Horizon members, that provided Out-of-Network Services to any Horizon member from October 1, 2004 through December 31, 2014 ("Class Period") and are in the Navigant Subclass or the SEHP Subclass or both.

10. The Settlement Class is comprised of the following two subclasses:

(a) "Small Employer Health Plan ("SEHP") Subclass," which is comprised of all out-of-network ASCs that Horizon and Class Counsel have determined were under-reimbursed for SEHP Claims from October 2004 through June 2008; and

(b) "Navigant Subclass," which is comprised of all out-of-network ASCs that the Class Representative contends, and Horizon disputes, could have been under-reimbursed for Navigant Claims from October 2004 through December 2014.

11. The updated list of Class Members is set forth in the papers attached to the Final Approval application and this list takes into account the two opt outs.

12. Excluded from the Settlement Class are ASCs that previously entered agreements with Horizon releasing the claims asserted in this Action, identified on Exhibit B to the Agreement.

13. The Court finds that the requirements of Rule 23(a) have been satisfied, for settlement purposes only, as follows:

- i. *Numerosity*: The members of the proposed Settlement Class are sufficiently numerous that joinder of all Class Members into one suit would be impracticable;
- ii. *Commonality*: Common questions of law and fact exist for members of the proposed Settlement Class regarding whether the Navigant methodology used by Horizon to determine UCR benefits for ONET ASCs complied with the UCR definition in the subscribers' plans and whether Horizon used the Navigant methodology to pay certain SEHP claims that should have been paid using a differently methodology

under New Jersey regulations. These issues are central to the claims Plaintiffs have asserted in this litigation and are sufficient to establish commonality.

- iii. *Typicality*: The claims of the Representative Plaintiff, who is a member of both the SEHP Subclass and Navigant Subclass, are typical of the claims of the members of both subclasses that she represents in that the ASC for which the Representative Plaintiff serves as bankruptcy trustee and the members of the two subclasses allege that they were under-reimbursed for out-of-network services for SEHP Claims and Navigant Claims respectively.
- iv. *Adequate Representation*: The Representative Plaintiff will fairly and adequately protect and represent the interests of all members of the Class, and the interests of the Representative Plaintiff are not antagonistic to those of the Class. Additionally, the Court recognizes the experience of Plaintiffs' Counsel, has observed Plaintiffs' Counsel's prosecution of the litigation, and finds that the requirement of adequate representation of the proposed Settlement Class has been fully met.

14. The Court further finds, for settlement purposes only, that the requirements of Rule 23(b)(3) are satisfied, as follows:

- i. Questions of law and fact common to the members of the Class, as described above, predominate over questions that may affect only individual members; and

- ii. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy.

15. The Court hereby appoints as Class Representative Barbara Edwards, in her capacity as Trustee in Bankruptcy of Roxbury Surgical Center, LLC, f/d/b/a Roxbury Open MRI and Surgery Center.

16. The Court appoints Bruce H. Nagel and Robert H. Solomon of Nagel Rice, LLP and Neil Prupis, Esq. formerly of the law firm Lampf, Lipkind, Prupis & Petigrow as Class Counsel pursuant to Rule 23(g). In making this appointment, the Court finds that Mr. Nagel, Mr. Solomon and Mr. Prupis can, have and will fairly and adequately represent the interests of the Class.

17. The Court has assessed the settlement under the nine factors identified in Third Circuit precedent. *See Girsh v. Jepson*, 521 F.2d 1 53, 157 (3d Cir. 1975); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 257-58 (3d Cir. 2009). It has also examined the additional factors identified in *In re Prudential Insurance Co. of America Sales Practices Litigation*, 148 F.3d 283, 323 (3d Cir. 1998). The Court finds that each *Girsh* factor, and each applicable *Prudential* factor, supports approval of the Settlement.

- (a) The complexity, expense, and likely duration of the litigation.

This case presents complex factual and legal questions - including complex

damages calculations - that, absent settlement, would have to be resolved through extensive proceedings for which the outcome is uncertain, including contested class certification proceedings involving experts and an extensive factual record, *Daubert* challenges, summary judgment briefing, and a complicated, lengthy trial of any claims that survive summary judgment. An appeal would almost certainly follow any ruling on class certification, summary judgment, and/or trial, whatever its outcome, thereby further delaying this case's final resolution for a period of months or even years.

(b) The reaction of the class to the settlement. The reaction of the class to the Settlement has been highly favorable. Of the 183 Class Members only 2 have decided to opt out and not a single objection has been filed. The two opt outs were to receive a total of \$4,545.61 out of the \$4 million which represents approximately .1%.

(c) The stage of the proceedings and the amount of discovery completed. In the 13 plus years of this litigation, there has been extensive discovery. Discovery has included numerous depositions of fact witnesses, working with experts, and production of numerous documents and large amounts of data. These proceedings represent years of sustained advocacy

by counsel, which gave them a proper understanding of the case's merits before they negotiated the settlement.

(d) The risks of establishing liability and the risks of establishing damages. Although Plaintiffs have sought damages, Horizon vigorously disputes damages as well as Plaintiffs' ability to make those determinations on a class-wide basis. Plaintiffs' ability to establish both liability and damages hinges in part on expert testimony, which is admissible only if it meets the requirements of the Federal Rules of Evidence and *Daubert*. Accordingly, without a settlement, the Court likely would have to resolve a "battle of the experts" that could result in exclusion of the principal evidence supporting Plaintiffs' claims. Plaintiffs also face other challenges in establishing liability or proving damages. These factors make Plaintiffs' likelihood of success far from certain and favor settlement.

(e) The risks of maintaining class action status through trial. The Agreement provides that the Court's decision to certify a class action for settlement purposes shall be vacated if the proposed Settlement is terminated or if the Effective Date does not occur for any reason. While Horizon consents to the certification of a class for settlement purposes, it has indicated its opposition to any attempt to certify a litigation class for trial.

“There are different standards for approving a settlement class than for certifying a litigation class.” *Carrera v. Bayer Corp.*, 727 F.3d 300, 311 (3d Cir. 2013); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 304 & n.29 (3d Cir. 2011) (discussing differences). While the parties obviously disagree concerning whether this Class could be certified outside the settlement context, the plaintiffs do acknowledge, and the Court finds, that there is at least a risk that a class action cannot be maintained through a trial. This factor therefore weighs in favor of approving the settlement.

(f) The ability of the Defendant to withstand a greater judgment.

The Third Circuit has explained that the mere fact that a Defendant “could afford to pay more” in a judgment than it agrees to pay in a settlement “does not mean that [Defendant is] obligated to pay any more than what [the] class members are entitled to under the theory of liability that existed at the time the settlement was reached.” *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004). This settlement represents a fair, reasonable, and adequate payment under the Class Members’ theories of liability.

(g) The reasonableness of the settlement in light of the best possible recovery and in light of all the attendant risks of litigation. Current

class members are receiving \$4 million as part of this Settlement. In addition, significant monetary relief has already been recovered by prior and current class members as a result of Class Counsel's filing of this Action and the Prior Actions. In addition, the non-monetary business reforms and other settlement terms have added substantial value and benefit to the Class. Overall this is a substantial recovery in light of Horizon's likely challenges to Plaintiffs' claims and damage calculations.

(h) Applicable Prudential factors. The Third Circuit has also instructed district courts to consider, "when appropriate," other factors. *See Prudential*, 148 F.3d at 323. The *Prudential* factors applicable here also support finally approving the Agreement. The settlement represents an appropriate "assessment of the probable outcome of a trial on the merits of liability and individual damages." *Id.* The Agreement also gave members of the Class "the right to opt out of the settlement." *Id.* The Agreement's "provisions for attorneys' fees are reasonable." *Id.*

18. In light of its analysis of the *Girsh* and *Prudential* factors, the Court finds that the settlement is fair, reasonable, and adequate, and in the best interests of the Class.

19. The Court finds that the dissemination of the Class Notice by the Administrator complied with this Court's Order Granting Preliminary Approval to Proposed Class Action Settlement and other relief (D.E. 315) and satisfied the requirements of Federal Rule of Civil Procedure 23(e) and due process. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) (due process satisfied where individual notice is mailed to "all members who can be identified through reasonable effort"). The Court also finds that the Class Notice complies with Rule 23(c)(2) as it is also the best practicable notice under the circumstances, provides individual notice to all Class Members who can be identified through a reasonable effort, and is reasonably calculated, under all the circumstances, to apprise the members of the Settlement Class of the pendency of this action, the terms of the Settlement, and the right to object to the Settlement or opt out.

20. As set forth in the Declaration of Joseph Mahan of Heffler Claims Group, the claims administrator in this case, Heffler served the Court-approved Class Notice via certified mail on all class members. Additional notice was provided through the website established by Heffler -- www.njascclasssettlement.com.

21. In addition, class counsel mailed the Court-approved Class Notice to all Class Members.

22. The members of the Settlement Class identified on Exhibit A attached hereto have filed timely requests to be excluded from the Settlement ("Excluded Class Members").

23. Except for the Excluded Class Members, the terms of the Agreement and this Final Approval Order and Judgment are binding on the Plaintiffs and all Class Members, as well as their heirs, executors and administrators, successors, assigns, and all other persons to the fullest extent provided for in the Agreement.

24. The release and covenant not to sue provisions set forth in Sections 10.1 and 10.2 of the Agreement (and all related definitions and other provisions of the Agreement) are incorporated herein by reference, and the Representative Plaintiff, Class Members, and Releasing Parties shall be fully subject to all of these provisions.

25. The Releasing Parties (including the Representative Plaintiff and all Class Members) are hereby permanently enjoined from: (i) filing, commencing, prosecuting, intervening in, participating in or receiving any benefits from any lawsuit, arbitration, administrative or regulatory proceeding or order in any jurisdiction based on 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 based on, involving, or incorporating, directly or indirectly, any or all Released Claims; and (iii) filing, commencing, prosecuting, intervening in, participating in 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 the Released Parties, which is in compliance with the provisions of the Agreement, violates any right of any Class Member. All Persons who are, have been, could be, or could have been alleged to be joint tortfeasors, co-tortfeasors, co-conspirators, or co-obligors with any or all of the Released Parties respecting any or all of the Released Claims, are hereby, to the maximum extent permitted by law, barred and permanently enjoined from making, instituting, commencing, prosecuting, participating in or continuing any claim, cross-claim, action, or proceeding, however denominated, regardless of the allegations, facts, law, theories or principles on which they are based, in this Court or in any other court or tribunal, against any or all of the Released Parties with respect to any or all of the Released Claims, including without limitation equitable, partial, comparative, or complete contribution, set-off, indemnity, or otherwise, whether by contract, common law or statute, arising out of or relating in any way to the Released Claims. All such claims are hereby fully and finally

barred, released, extinguished, discharged, satisfied and made unenforceable to the maximum extent permitted by law, and no such claim may be commenced, maintained, or prosecuted against any Released Party. Any judgment or award obtained by a Class Member against any such Person shall be reduced by the amount or percentage, if any, necessary under applicable law to relieve any Released Party of all liability to such Person on such barred claims. Such judgment reduction, partial or complete release, settlement credit, relief, or setoff, if any, shall be in an amount or percentage sufficient under applicable law as determined by the Court to compensate such Person for the loss of any such barred claims against any Released Party. Where the claims of a Person who is, has been, could be, or could have been alleged to be a joint tortfeasor, co-tortfeasor, co-conspirator or co-obligor with a Released Party respecting the Released Claims have been barred and permanently enjoined by this section, the claims of Released Parties against that Person respecting those Released Claims are similarly fully and finally barred, released, extinguished, discharged, satisfied and made unenforceable to the maximum extent permitted by law.

26. The terms of the Agreement and this Final Approval Order and Judgment shall have *res judicata*, collateral estoppel and all other preclusive effect in any and all claims for relief, causes of action, suits, petitions, demands in law or

equity, or any allegations of liability, damages, debts, contracts, agreements, obligations, promises, attorneys' fees, costs, interests, or expenses which are based on or in any way related to any and all claims for relief, causes of action, suits, petitions, demands in law or equity, or any allegations of liability, damages, debts, contracts, agreements, obligations, promises, attorneys' fees, costs, interest, or expenses which were asserted in the Action.

27. Class Counsel and Horizon are ordered to implement and consummate the Agreement according to its terms and provisions.

28. Without further order of the Court, the Parties may agree to reasonable extensions of the time to carry out any provisions of the Agreement.

29. The Court finds that defendant Horizon fully complied with the notice provisions set forth under the Class Action Fairness Act, 28 U.S.C. § 1715. See Declaration of Bruce Nagel dated June 12, 2018 at ¶4. (D.E. No. 317-2).

30. The Court hereby approves the Agreement, all terms of which are incorporated herein by reference, as being fair, adequate, and reasonable and in the best interests of the Settlement Class, satisfying Federal Rule of Civil Procedure 23(e). The Settlement of this case on the terms and conditions set forth in the Agreement is approved and confirmed in all respects as fair, reasonable, and adequate under Federal Rule of Civil Procedure 23, and in the best interest of the

Settlement Class and Class Members, especially in light of the benefits to the Settlement Class and the costs and risks associated with the complex proceedings necessary to maintain class certification and achieve a favorable result through trial and any post-judgment appeals.

31. The Court approves the payment of attorneys' fees, expenses, and costs to Class Counsel in the total amount of \$_____ [\$9,000,000]. The attorneys' fees and expenses shall be paid in accordance with ¶6 of the Agreement.

32. Defendant Horizon Blue Cross Blue Shield of New Jersey shall make an additional payment of five thousand dollars (\$5,000.00) to the Class Representative Barbara Edwards, in her capacity as Trustee in Bankruptcy of Roxbury Surgical Center, LLC, f/d/b/a Roxbury Open MRI and Surgery Center in accordance with ¶4 of the Agreement.

33. Nothing in this Final Approval Order and Judgment, the Agreement, or any documents or statements related thereto, is or shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by Horizon. Each of the Parties to the Settlement entered into the Agreement with the intention to avoid further disputes and litigations with the attendant inconvenience and expenses.

34. In the event that the settlement does not become effective according to the terms of the Agreement, this Final Approval Order and Judgment shall be rendered null and void as provided by the Agreement, shall be vacated and, all orders entered in connection herewith shall be null and void to the extent provided by and in accordance with the Agreement.

35. Without affecting the finality of this Order, or the judgment to be entered pursuant hereto, in any way, this Court shall retain jurisdiction over the Parties to the Agreement to administer, supervise, construe, and enforce the Settlement in accordance with its terms for the mutual benefit of the parties.

36. Pursuant to Federal Rules of Civil Procedure 54 and 58 and the Orders referenced above, and under the terms of the Agreement approved by the Court, the Court hereby enters JUDGMENT dismissing with prejudice this Action and all claims in the operative complaint therein.

IT IS SO ORDERED AND ADJUDGED this _____ day of _____, 2018.

HON. KEVIN MCNULTY
UNITED STATES DISTRICT JUDGE

EXHIBIT
"A"

Opt -Outs

1. McBride Surgical Center, LLC
2. Gastroenterology Diagnostics of Northern New Jersey, P.A.