

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY
3 CIVIL ACTION NO. 07-186-SRC

4 MICHAEL H. KIRSCH, D.D.S., SETTLEMENT APPROVAL
5 individually and on behalf
6 of all others similarly
7 situated,

8 Plaintiffs,

9 vs.

10 DELTA DENTAL OF NEW JERSEY,

11 Defendant.

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February 8, 2012
Newark, New Jersey

B E F O R E: HONORABLE STANLEY R. CHESLER, USDJ

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

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1 THE COURT: Be seated. Good morning.

2 THE CLERK: Kirsch v. Delta Dental of New Jersey,
3 07-186. Please note your appearances for the record.

4 MR. KATZ: Good morning, your Honor. Eric Katz of
5 the law firm of Mazie, Slater, Katz & Freeman on behalf of
6 the class.

7 MR. SELLINGER: Good morning, your Honor. Philip
8 Sellinger from Greenberg Traurig on behalf of defendant
9 Delta Dental.

10 THE COURT: Good morning to both of you. The Court
11 understands that Marc Pakrul, who represents an objector,
12 is also present in court. Is that correct?

13 MR. PAKRUL: Yes, that's correct. Marc Pakrul,
14 Tompkins McGuire on behalf of objector Dr. Gary Krugman.

15 THE COURT: Good morning to you. And I understand
16 your objection at this point is limited solely to the
17 attorneys' fee application. Is that correct?

18 MR. PAKRUL: That's correct.

19 THE COURT: All right. Fine. Now, at this point
20 let's go through the other aspects of the proceeding. I
21 gather then that the Court is now presented with a
22 situation in which Dr. Krugman's objection to the substance
23 of the settlement has been withdrawn, and there is another
24 objection filed by a Dr. Ray Galvin. Is he present in
25 court today?

1 MR. KATZ: No, Judge.

2 THE COURT: All right. And we do have his objection.
3 At this point, Mr. Katz, I'll hear you with regard to first
4 the issue of class certification.

5 MR. KATZ: Your Honor, just as a housekeeping matter,
6 so I'm clear, because I'm hearing for the first time now
7 that the objection that was filed by -- first of all, Dr.
8 Paris has withdrawn his objection entirely. He's not --

9 THE COURT: That's my understanding.

10 MR. KATZ: But the objection which Dr. Krugman had
11 joined, which was docket entry 286, which was Mr. Paris'
12 January 3, 2012 letter, that has been withdrawn in its
13 entirety as well.

14 THE COURT: That's my understanding, if I recall
15 correctly.

16 MR. PAKRUL: That's correct, Judge. Only as to the
17 amount of attorneys' fees being sought.

18 MR. KATZ: Then we'll deal with that in due course.
19 Your Honor, the class that we seek to certify here
20 certainly meets all of the requirements to be certified as
21 a settlement class under Rule 23(a), (b)(2) and (b)(3).

22 This kind of class is very similar to other classes
23 that I've certified, albeit in state court, both as
24 litigation and settlement classes on behalf of dentists and
25 physicians, because they all focus around the same common

1 and typical conduct that has been asserted by the health
2 care providers in New Jersey and nationwide, and that deals
3 with the common and typical practices as alleged by the
4 class in which computerized systems, automated systems are
5 utilized to process the claims submitted by providers in
6 the same fashion across the board, without most often any
7 individualized review of the medical records.

8 In essence, based upon a preprogrammed logic that is
9 utilized to adjudicate claims through various practices
10 which have been challenged by the class in this case,
11 including such practices as bundling, where codes are
12 processed together and only one code is paid and not the
13 other code, practices such as downcoding, where it's
14 alleged that a provider would submit a claim that he has
15 performed a particular procedure and the code would then be
16 downcoded to a code which would compensate the provider for
17 a less -- as if he had rendered a lesser procedure.

18 All these common and typical practices as alleged by
19 the class go to what we have asserted as being one common
20 theme and, that is, to save money for the carrier and pay
21 less to the class members.

22 There is another aspect to this case that deals with
23 the uniform application of the New Jersey prompt payment
24 laws, and those laws apply uniformly to all kinds of
25 providers, whether they're in network, out of network,

1 whether they're general dentists or specialists, and the
2 same computerized or automated systems that process the
3 claims that I just talked about also process the claims
4 under the prompt pay laws, and there are various
5 requirements under the prompt pay laws that are supposed to
6 be followed, so, you have the same common and typical
7 practices.

8 You have the same kinds of relief or providers are --
9 we're seeking relief under statutory and regulatory
10 violations that are uniform and across the board or, in
11 terms of network providers, seeking damages for alleged
12 breach of contracts based upon standardized agreements that
13 are not subject to negotiation that are uniformly
14 applicable to all network providers.

15 So, this is the standard case, we submit, that meets
16 the Rule 23 requirements for class certification and
17 certainly for certification of a settlement class where
18 such issues as manageability is not something that has to
19 be looked at as part of the analysis.

20 Specifically, when we look at the Rule 23
21 requirements, 23(a) requirements, beginning with
22 numerosity, we're seeking to certify a national settlement
23 class of roughly 160,000 providers. That certainly meets
24 the numerosity requirement.

25 23(a)(2), commonality, there must be questions of law

1 or fact common to the class. A finding of commonality
2 certainly does not require that all class members share
3 identical claims, and there must be at least one question
4 of fact or law that is common amongst everyone, and over
5 the last few minutes I think I've discussed several.

6 Typicality, 23(a)(3), the claims of the class
7 representative must be typical of the claims or defenses of
8 the class. Again, here Dr. Jungels, who is the class
9 representative for this settlement class, submitted claims
10 that are subject to the same prompt pay laws, the same
11 automated claims processing. He's subject to the same
12 provider agreements as the other providers in the
13 settlement class. Certainly, his claims are typical and
14 meet the typicality requirement, which is not a very
15 difficult hurdle to meet.

16 23(a)(4), adequacy of representation, Dr. Jungels is
17 obviously an adequate representative of the class. He is a
18 dental provider, an oral maxillofacial surgeon who has been
19 part of the Delta network for several years and has
20 submitted numerous claims that have been subjected to the
21 claims adjudication processes that I've been discussing.

22 As far as the component as to adequacy of counsel, I
23 do not believe that I need to extoll who I am and what my
24 firm is. We are one of the leading law firms in New
25 Jersey. We have represented numerous classes, been

1 appointed class counsel on numerous occasions.

2 I personally have been appointed class counsel in at
3 least five -- make that six other provider class actions,
4 both in New Jersey state court, as well as before the
5 American Arbitration Association in one of the first class
6 arbitration health care class actions in the country, both
7 on behalf of litigation and settlement classes.

8 We have appeared before this Court on numerous
9 occasions in this case. Your Honor has seen firsthand the
10 vigorous and often contentious litigation between Mr.
11 Sellinger and myself that always has been fought above
12 board, but it's been a tough fight.

13 We have certainly zealously, adequately represented
14 the class's interest in this case, as we do in all the
15 cases in which we represent our clients. So, I believe the
16 adequacy of representation requirement is met.

17 We then turn to the next part of the class
18 certification analysis dealing with (b) (2) and (b) (3)
19 classes.

20 Certainly here we do meet the requirements of (b) (2).
21 The settlement benefits in this case are in the form of
22 business reforms on a going-forward basis. They are
23 injunctive relief that affect the class as a whole, and
24 certainly we, therefore, meet the requirements of 23(b) (2).

25 These business commitments and business reforms will

1 be in place for a period of at least five years from the
2 time of their implementation. A number of these reforms
3 already are in the process of being implemented because
4 they were triggered off at the preliminary approval date.
5 Others are triggered off at the final approval date. And
6 we have submitted a certification from Bruce Silverman from
7 Delta Dental that discusses some of the reforms and what's
8 going on to implement them, and how those reforms will
9 benefit the national class of providers here. I could
10 discuss more about that later if the Court wishes.

11 With regard to (b) (3), we also submit we meet the
12 requirements of 23(b) (3), that there are questions of law
13 or fact that are common to class members that predominate
14 over any questions affecting individual members, and that a
15 class action is superior to other available methods for
16 fairly and efficiently adjudicating this controversy.

17 We've already discussed those common issues and
18 certainly here, where a number of the claims that the
19 providers would seek in terms of monetary damages if this
20 case proceeded to trial, would be very small; yet, the kind
21 of discovery and efforts that would be necessary and the
22 expert discovery and analysis of -- I don't even know how
23 to describe it but other than significant megabytes of
24 electronic data and the computer programs that would have
25 to be prepared to analyze that data under the prompt pay

1 laws under an analysis of whether Delta Dental was properly
2 or improperly bundling or downcoding claims, the expert
3 costs are more than significant.

4 They would make it impossible, not even cost
5 prohibitive, make it impossible for an individual class
6 member to ever litigate a case of this magnitude on their
7 own, particularly, as I say, where the amount of damages
8 for an individual class member is likely not be that large.

9 And we know that, we know that because of the years
10 of litigation, not only in this case, but in other cases
11 that I have litigated on behalf of dental providers, given
12 that the size of the claims submitted by dentists are very
13 small compared to what, say, a neurosurgeon might submit.

14 You're dealing with a relatively small amount of
15 money per dentist, so, this is not the kind of thing, given
16 their involvement in their practices and their
17 responsibility to their patients, that an individual
18 dentist would get involved with.

19 So, I submit that we meet the requirements of (b) (3)
20 as well, and I, therefore, respectfully request that the
21 Court certify the settlement class in accordance with the
22 definition that we have provided to the Court in our
23 submissions for final approval.

24 THE COURT: Thank you. Mr. Sellinger, anything to
25 add?

1 MR. SELLINGER: No, your Honor. Delta Dental agrees
2 that settlement -- that approval of the class for
3 settlement purposes is appropriate, reserving our right to
4 disagree with factual statements and legal conclusions in
5 the event settlement is not approved.

6 THE COURT: Okay. The Court is satisfied that on the
7 record before it, that a settlement class can be certified
8 under both Rule 23(a)(2) and Rule 23(a)(3). The Court will
9 emphasize that it is satisfied that demonstration has been
10 made for purposes of a settlement class.

11 With regard to the requirements, Rule 23(a)(2)
12 requires that there be common questions of law or fact
13 common to the class, the claims or defenses of the
14 representative parties are typical of the claims or
15 defenses.

16 Rule 23(a) also requires the class is so numerous
17 that joinder of all parties is impractical and that the
18 representative parties will fairly and adequately protect
19 the interests of the class.

20 The Court is more than satisfied that the class is so
21 numerous that joinder would be impractical. I believe the
22 class is somewhere over 100,000 dentists, if I recall
23 correctly.

24 There are indeed common questions of law and fact
25 common to the class. They include issues of whether or not

1 there's been improper bundling, downcoding, violation of
2 prompt payment laws, etc.

3 The Court is further satisfied that clearly the
4 claims of the representative plaintiff, the doctor, are
5 indeed typical of the claims presented by the members of
6 the class and, again, they relate to business practices,
7 downcoding, prompt payment and so on.

8 The Court is further satisfied that this particular
9 plaintiff will fairly and adequately protect the interests
10 of the class. The Court knows perfectly well that there
11 was significant litigation as to whether or not the prior
12 class representative was adequate to represent the class.
13 I believe that was Dr. Kirsch. Is that correct?

14 MR. KATZ: That's right, you Honor.

15 THE COURT: And Dr. Jungels has been substituted for
16 Dr. Kirsch, and the Court is satisfied that Dr. Jungels is
17 indeed an adequate representative and, furthermore, it is
18 more than satisfied that counsel for the plaintiff class is
19 fully qualified professionally to represent the interests
20 of the class.

21 The Court then has to consider whether or not the
22 requirements of Rule 23(b) have been satisfied. This class
23 is being certified, sought to be certified under (b)(2) and
24 (b)(3).

25 (B)(2) is typical injunctive relief or declaratory

1 relief certification. The Court is satisfied that, as it
2 is currently structured, indeed, certification of the class
3 on that ground is warranted.

4 (B) (2) requires that the party opposing the class has
5 acted or refused to act on grounds that applied generally
6 to the class so that final injunctive relief or
7 corresponding declaratory relief is appropriate regarding
8 the class as a whole.

9 The Court need look only to the complaint to see that
10 to the extent that there would be claims relating to
11 downcoding, the practices of Delta in processing the claims
12 of doctors and similar types of activity that are alleged
13 against Delta, that indeed, the party opposing the class
14 appears to have acted or refused to act on grounds that
15 apply generally to the class, and under those
16 circumstances, the application for class certification
17 would appear to be appropriate at this time and on this
18 record.

19 The Court notes that even with regard to (b) (2)
20 classes, where the viability of the class is, in fact,
21 going to be litigated and is going to be pursued through
22 final trial, the cohesiveness of the class is invariably an
23 issue for the court to consider and the cohesiveness of the
24 class in the context of a (b) (2) class frequently involves
25 precisely the same types of issues which would be involved

1 in certifying a (b)(3) class, including whether or not
2 individual issues predominate over the common class issues.

3 So, while, as Mr. Katz has cited in his brief, there
4 is case law for the proposition that (b)(2) classes are
5 generally subject to certification, nevertheless, the Third
6 Circuit case law is that, indeed, there is nevertheless a
7 careful -- a requirement that the Court carefully review
8 (b)(2) certifications to ensure that, indeed, the class is
9 cohesive.

10 In the context of the settlement class, that is also
11 required but here in particular, with regard to the relief
12 that is being sought in connection with this current
13 application, the Court is satisfied that the cohesiveness
14 requirement has been met.

15 With regard to (b)(3), the Court is required to find
16 that common questions of law and fact common to class
17 members predominate over any questions affecting individual
18 members and that a class action is superior to other
19 available methods for fairly and efficiently adjudicating
20 the controversy.

21 And then the Court is required to consider the class
22 members' interest in individually controlling the
23 prosecution or defense in this case. While clearly, they
24 would have such an interest, as Mr. Katz has cogently
25 pointed out, the costs of litigating the particular claims

1 here would be extraordinary compared to the individual
2 class members' interests, the extent and nature of any
3 litigation concerning the controversy already begun by or
4 against class members, and the Court is not aware of any
5 particular litigation involving class members that have
6 been brought in this area. Have they, Mr. Katz?

7 MR. KATZ: I'm not aware of any such matters, your
8 Honor.

9 THE COURT: All right. The desirability or
10 undesirability of concentrating the litigation of the
11 claims in the particular forum, and the court sees no
12 particular concerns about that.

13 And finally, the likely difficulties in managing a
14 class action, and the Court will highlight that issue
15 because, as controlling Third Circuit law has indicated,
16 that particular concern does not arise and is not a subject
17 of consideration by the Court in the context of a
18 settlement class and, therefore, the Court need not
19 consider whether or not there would be substantial
20 difficulties in managing this class if it were a litigation
21 class and not a settlement class.

22 And the Court does note and will be discussing in
23 connection with its determination of whether or not to
24 approve the settlement the issues which, indeed, the
25 defense has raised with regard to manageability and such

1 issues with regard to certifying a (b) (3) class for
2 litigation purposes as opposed to settlement.

3 But based upon this record, the Court is satisfied
4 that, indeed, the class is appropriately certified under
5 both (b) (2) and (b) (3), and will approve the certification
6 of the settlement class.

7 At this point, Mr. Katz, I will hear you on behalf of
8 the parties concerning approval of the settlement. And, of
9 course, that requires the Court to consider the Girsh v.
10 Jepson factors.

11 MR. KATZ: Thank you, your Honor. As an initial
12 matter, I would like to note for the record, and as the
13 Court is certainly aware, this settlement which provides
14 significant benefits to class members, to a very large
15 national class, in terms of business reforms that would be
16 in place for five years, was only achieved after intense
17 negotiations and a very lengthy mediation with the
18 assistance, the valuable assistance of former Magistrate
19 Judge Ronald Hedges.

20 There was no collusion amongst the parties. We
21 engaged in mediation for several months, exchanged numerous
22 drafts of proposed reforms. I had consulted with not only
23 my clients but with other dentists to develop a set of
24 business practice changes that we believed would be most
25 beneficial to the class and, more importantly, address or

1 most importantly address the issues that were raised by
2 this litigation that had to do with claims that the class
3 has alleged are not being processed in a timely fashion or
4 that the dental providers have been subjected to what they
5 term as the hassle factor, and having to incur significant
6 administrative expenses and hiring people to track down
7 stuff or to wait on the phone or to be on the provider or
8 the Delta Dental's web site, claims processing web site to
9 process claims, all of which detracted from these
10 providers' ability, they allege, to render care to their
11 patients because the time spent in dealing with all the
12 business of claims processing and follow-up was taking time
13 away from the time that they would be spending with their
14 patients.

15 So, we looked at a set of reforms that would make the
16 dentists' life and their administrative staffs' lives
17 easier and save money or be designed to save money in the
18 administrative area.

19 And various reforms were discussed. They went back
20 and forth, back and forth over the course of months. We
21 had several sit-downs at my office. We had a number of
22 conference calls, all of which Judge Hedges oversaw, and a
23 lot of head banging went on, and ultimately we --

24 THE COURT: Judge Hedges wouldn't do that.

25 MR. KATZ: Am I on the record?

1 THE COURT: Yes.

2 MR. KATZ: Judge Hedges was very effective in this
3 case, and ultimately we achieved a settlement. And I mean,
4 the case law is very clear that private mediation conducted
5 by a mediator, in fact, I think there's a case that
6 specifically talks about a retired federal mediator,
7 retired federal judge, certainly supports the inference of
8 an arm's-length negotiation and that there's no collusion.
9 And that's what we had here.

10 Looking specifically at the Girsh factors, and there
11 are nine of them and some of them are more important than
12 others and, if I recall my fundamental law correctly, that
13 not, you know, not every one weighs as heavily as the
14 other, and you look at it as sort of a totality of the
15 facts and circumstances as they're presented in the
16 particular case. But let me go through these, your Honor.
17 If the Court has any specific questions, I will certainly
18 discuss and respond.

19 The first one, the complexity and duration of the
20 litigation, this case was heavily fought for five years.
21 It started in state court. It was removed to federal court
22 and, in fact, your Honor may recall because your Honor
23 heard the motion for remand, there was a chance that this
24 case would have been remanded but for the fact that the
25 prompt pay laws could have applied to the national class in

1 terms of outside providers from out of states who were
2 submitting claims to Delta Dental of New Jersey, and that
3 was a significant factor in keeping this case in federal
4 court.

5 Over the five years of the litigation, the parties
6 had vigorously litigated both class issues and, to a
7 certain extent, the merits issues because under the
8 Hydrogen Peroxide standard, unlike in New Jersey state
9 court, there is significant overlap between the class and
10 merits issues because the court would have to make a
11 determination at the time of class certification for
12 litigation class as to certain merits matters and, so,
13 there was significant overlap in the discovery that we
14 took.

15 So, certainly, given the length of time and the
16 complexity of the case and where we stand based upon all
17 the information obtained, I submit, weighs heavily in favor
18 of the settlement being approved.

19 As far as the reaction of the class to the
20 settlement, out of a class of 160,000 or so providers,
21 there are now two objections, and one of those objections
22 is solely to the fees, leaving only Dr. Galvin's objection
23 as the only one that arguably goes to the approval of the
24 settlement.

25 Now, we pointed out in terms of Dr. Galvin's

1 objection, first of all, it didn't actually conform to the
2 requirements of your Honor's preliminary approval order in
3 terms of how it was filed and when it was filed, but
4 putting that aside for a minute, because it was filed by a
5 pro se and not an attorney, the basis of Dr. Galvin's
6 objection essentially went to the hassle factor, that he
7 had to be on the phone too long, and his concerns, we
8 submit, through a variety of the business reforms that have
9 been made part of this settlement should be addressed, so,
10 in that regard, his concerns that he raised had been
11 addressed.

12 I believe his other issue that he raised was that
13 Delta Dental should pay claims, I think within 15 days or
14 so of when they're submitted. That is a requirement that
15 greatly exceeds that which is required under New Jersey law
16 which says claims that are submitted electronically have to
17 be processed and paid in 30 days and claims submitted on
18 paper, processed and paid in 40 days, so, I do not believe
19 that is a credible objection to the settlement, to require
20 Delta to do something not only greater but significantly
21 greater than what the law actually requires it to do.

22 So, all that said, then the reaction to the
23 settlement is overwhelmingly positive. There is only a
24 minuscule number of objectors, and I don't remember the
25 number off the top of my head, but I think it's less than

1 30 or 40.

2 THE COURT: There are only two objectors and there
3 are approximately 70 opt-outs.

4 MR. KATZ: Excuse me. The number of opt-outs is
5 approximately 70 opt-outs in a class of 160,000 or
6 thereabouts, obviously, a minuscule number, certainly
7 supports a finding that the reaction to the class has been
8 overwhelmingly positive to this settlement.

9 The next Girsh factor is the stage of the
10 proceedings. As I noted earlier, this case has been
11 actively and aggressively litigated by both sides for more
12 than five years.

13 Over that period of time we engaged in extensive
14 document discovery involving the production of tens of
15 thousands of pages of documents, responses to significant
16 sets of interrogatories and multiple supplemental sets of
17 interrogatories.

18 There has been substantial motion practice of both
19 discovery motion practice before Judge Shipp, and before
20 that former Magistrate Judge Cecchi -- shows you the
21 duration of this case.

22 There has been dispositive motion practice before
23 your Honor, and at the time the case was settled, there was
24 also a pending motion to dismiss what could have arguably
25 have been the most significant aspect of the prompt pay

1 claim for the class.

2 THE COURT: Let me stop you right there for just one
3 second. Mr. Katz, please broad.

4 MR. KATZ: Certainly the information exchanged by
5 both parties during the course of discovery, as well as the
6 overall experience of both counsel in these kinds of
7 matters, allowed us to have a full appreciation of what the
8 case was about, what its strengths and weaknesses were, and
9 ultimately leading to the conclusion that it would be in
10 our mutual best interest to resolve this matter and to
11 resolve it for what really is a significant set of business
12 commitments going forward.

13 So, the stage of proceedings certainly satisfies or
14 that requirement is certainly satisfied, I would submit,
15 your Honor.

16 As far as the risks of establishing liability,
17 obviously, Delta Dental denies and continues to deny any
18 wrongdoing and, obviously, the class believes that we have
19 a case that we could establish liability, but there are a
20 number of factors that go into play. It's not that black
21 and white.

22 There were certainly, and I have to acknowledge this,
23 significant risks of establishing liability in this
24 particular case that I did not face in any of the other
25 health care or dental care class actions that I have been

1 involved with. And specifically, they can be looked at in
2 two areas.

3 Number one is, unlike other insurance companies and
4 related payors that I've been involved with in other
5 litigation, here, through the course of extensive
6 discovery, we determined that Delta Dental does, in fact,
7 disclose a number of the bundling policies and claims
8 adjudication practices that it engages in.

9 We didn't see that in other cases. In other cases,
10 in other carriers, it was behind the eight ball. It was
11 the proverbial black box.

12 Therefore, in this particular case, the focus for us
13 to establish liability for breach-of-contract claim would
14 have been that the costs of the adhesive nature of the
15 contracts, take it or leave it basis on limited negotiation
16 or no negotiation offering, the contracts would have to be
17 unconscionable. That's a high -- a much tougher burden,
18 row to hoe than simply you breached the contract because
19 you didn't tell us anything about what you were doing with
20 the claims and we expected to get paid a certain way, so,
21 we had to acknowledge that fact.

22 More importantly, the significant claim -- the most
23 significant claim to the class here was under the prompt
24 pay statutes and regulations. Two things that we would
25 have had to establish there. One is that, although there

1 may have been an ancillary breach-of-contract cause of
2 action for violating the prompt pay laws, but the most
3 significant claim would have been implied private right of
4 action. Okay.

5 I have been successful in litigating that, the first
6 attorney in New Jersey litigating that, but all that was in
7 state court. We were here in federal court. Frankly, I
8 had no idea how the court may come out on implied private
9 rights of action involving state statutes. That was a
10 significant concern.

11 The other concern regarding the prompt pay issues
12 that were certainly the most significant issue was that in
13 the course of the litigation, the New Jersey Department of
14 Banking and Insurance repealed what we label, what I label
15 as the waiver regulation.

16 The waiver regulation allowed for providers, because
17 I also litigated this issue and prevailed in state court,
18 it allowed providers to seek the full payment on the claim
19 if the insurance company was late in denying the claim.
20 So, if you had 30 days to pay or deny the claim and on day
21 31 they sent a denial, even if that denial was a legitimate
22 denial on legitimate grounds, they would have waived the
23 right to contest the claim and would have had to pay it.

24 That waiver provision was repealed and, moreover,
25 based upon the manner in which it was repealed and the

1 statements put out by the Department of Banking and
2 Insurance, there was a very serious concern that it would
3 have been retroactive back to the enactment of the H Cap
4 statute in New Jersey, which predates the filing of this
5 lawsuit.

6 So, we were looking at a potential that not only was
7 the waiver claim repealed on a going-forward basis, but it
8 would have been repealed for the entire class period, which
9 would have significantly undermined the amount of damages
10 that we could have sought if we had been successful, and
11 assuming we could have established a private right of
12 action and assuming your Honor bought into my
13 interpretation of the waiver provision.

14 So, the risks of establishing liability were great,
15 and even though I feel that we presented a good case, a
16 strong case, we have to acknowledge those risks in
17 determining whether we're going to settle.

18 And on Delta Dental's perspective, from their
19 standpoint, they also have to weigh those factors and weigh
20 the fact that they know that I have been successful in
21 litigating these issues before and, you know, there's a lot
22 of Russian roulette going on here.

23 Ultimately, we all decided it was in the best
24 interest of everyone and, most significantly the class
25 members, the providers who are rendering significant

1 services to Delta Dental's members, to achieve a settlement
2 that provides significant benefits in terms of business
3 commitments that are a part of this agreement.

4 So, just moving ahead, the risks of establishing
5 damages, I think I've also addressed that in the context of
6 what I just discussed, so, both those factors support
7 settling the case.

8 The next factor, the risks of maintaining a class
9 action, once again, I think I've touched upon that here
10 because the kind of class we would be seeking to certify
11 would have to be under a private right of action under the
12 prompt pay laws and/or a class of dental providers who can
13 support that they entered into unconscionable agreements,
14 unconscionable being a tough doctrine to substantiate, so,
15 again, we would have to acknowledge that certifying the
16 class was more difficult here or to maintain a class action
17 more difficult here than in other cases.

18 Throwing in issues of manageability, which come into
19 play also in a case of this type, have to be factored in
20 here. Most of the case, had it been litigated, would have
21 been litigated based upon the electronic data that would
22 have -- presumably would have been produced by Delta Dental
23 in the course of litigation. Delta Dental would have
24 argued that no, no, no, you can't just rely upon our data.
25 We've got to look at the individual records of the

1 dentists, so, a big fight would have been going on as to,
2 well, you were going to have 160,000 dentists who have to
3 produce their own records. Obviously, that would have been
4 a manageability nightmare, to say the least.

5 So, all that supports settling the case according of
6 the lines of the significant benefits provided by this --

7 THE COURT: Let me ask you something, wouldn't there
8 also have been issues concerning the fact that some of your
9 class were participating or, in fact, had contracts and
10 some of your class were submitting claims as
11 nonparticipating doctors and had no contract?

12 MR. KATZ: Well, there would have -- what we were
13 seeking to certify would have been a class and a subclass.
14 The subclass would have been a contract claim subclass
15 which only would have been network providers, and that
16 would have been the unconscionability claim.

17 The prompt pay class, the prompt pay laws do apply to
18 network and non-network providers, so, that would have been
19 a larger class if we would have been successful, if we
20 gotten that far and we were successful.

21 The next factor, the ability of the defendant to
22 withstand a greater judgment is not a factor that plays any
23 meaningful role in this case.

24 In terms of the range of reasonableness of the
25 settlement in light of the best recovery and litigation

1 risks, we submit that the settlement is eminently
2 reasonable and certainly compared to the plaintiffs' best
3 possibly recovery, as I just discussed a few minutes ago,
4 the most significant claim of the class involving the
5 waiver damages, was, we must acknowledge, potentially
6 gutted by virtue of the repeal of the waiver provision and
7 the fact that that repeal may have been extended
8 retroactively to prior to the institution of this
9 litigation.

10 Needless to say, that would have greatly impacted the
11 amount of damages that we could have sought because then
12 we'd be looking at an interest-only damages and the
13 interests that are paid on late pay claims, according to
14 statute and regulation, is 12 percent annual interest,
15 which is not a lot of money compared to getting paid the
16 entire amount of your claim if they had waived the right to
17 contest the claim. So, the amount of damages would have
18 been significantly less than what we hoped for and
19 anticipated when we instituted this litigation.

20 So, in total, I think in looking at the individual
21 factors and the factors as a whole, I do believe the Girsh
22 factors are satisfied. This particular settlement provides
23 some 15 business commitments going forward for a period of
24 five years. They are laid out in Section 7 of the
25 agreement. Some of them are discussed in Bruce Silverman's

1 certification that was submitted in support of preliminary
2 approval in October, and these reforms are geared, as I
3 said, to address the issues raised in the complaint dealing
4 with paying claims more timely and reducing the hassle
5 factor and the administrative burden on practices so that
6 they can tend to their patients.

7 Some of these reforms involve significant changes to
8 Delta Dental's, what's called the benefit connection web
9 site, which allows participating and nonparticipating
10 providers to get information about patient eligibility, the
11 benefits, claim receipt, claim payment status.

12 There are changes that will enable practices --
13 changes that have been made as a result of the settlement
14 that will enable dental providers to log in and look at, in
15 greater bulk, what's going on with all of the claims that
16 they have submitted to Delta Dental, you know, where they
17 stand in terms of processing, without having to enter
18 individual patients, which is always a big administrative
19 hassle. You have to enter each individual patient, it
20 takes time, it takes effort, it takes staffing to do that.
21 That's been eliminated.

22 In addition, Delta Dental is agreeing to supply more
23 specific information about its claims processing policies
24 that have been applied to a particular claim adjudication
25 for which Delta Dental requires more information or

1 additional information in which to process the claim, and
2 through this procedure, the practices -- through this
3 improvement or enhancement in the benefit web site -- I'm
4 sorry -- the benefits connection web site, providers will
5 know up to as much as ten days earlier what additional
6 documentation they need by logging in and looking at the
7 status of the claim, what's going on and how it was
8 processed and why it couldn't be fully processed.

9 They'll know as much as ten days earlier than they
10 would have known the old way through getting things in the
11 mail, what additional documentation or information has to
12 be provided to Delta Dental so that the claim could be
13 fully processed and, in turn, the dentist getting paid much
14 more quickly than the dentist would have been paid under
15 the old way.

16 In addition, Delta Dental has committed to allowing
17 dentists to continue, unlike most clearing houses,
18 electronic clearing houses, to allowing dentists to
19 continue to submit claims electronically free of charge,
20 and this is significant because under the prompt pay laws,
21 claims submitted electronically get paid 25 percent or have
22 to get paid 25 percent more quickly than claims submitted
23 on paper but, at the same time, most electronic clearing
24 houses, and those are the entities through which dentists
25 submit their claims electronically that then, in turn, send

1 them to the specific insurance company, charge money, 35
2 cents, 45 cents, 50 cents a claim.

3 Delta Dental will not do that. It's committed to not
4 charging, at least for another five years, so, not only
5 will dentists -- not only is that an incentive to submit
6 electronically and get paid faster, but dentists will be
7 saving money.

8 Another significant benefit of this settlement is
9 what's called electronic explanation of benefits. An
10 explanation of benefits, we've all seen them a million
11 times when we go to our providers, are the written
12 communications that you get from the insurance company
13 which explains how the services were processed and what's
14 being paid and your responsibility and so forth and so on.

15 Under this settlement, Delta Dental will be providing
16 providers electronic explanation of benefits to all
17 dentists and that will expedite the information going back
18 to dentists that will -- and eliminate all the time and the
19 delays that used to be employed through mailing, through,
20 you know, snail mail and this, in turn, will allow
21 dentists, once they see how the claims were processed, what
22 the various responsibilities are, co-payments and so forth,
23 will allow the dentists more expeditiously to collect money
24 that is due and owing to them from their patients than it
25 would have been under the old way in which these things

1 were handled.

2 And also, in this paperless system, any documentation
3 that could be sent electronically is a great benefit to
4 professional offices because the electronically EOBs can be
5 downloaded directly into the practice management software
6 systems of the various dental providers, allowing the
7 dental providers to more quickly post payments and
8 reconcile their payments, know what was paid, what wasn't
9 paid, what additional documents they may have to submit. If
10 they need to appeal, if they believe a claim was not
11 rightfully adjudicated, they can get on that more quickly.

12 All of this is designed to get the process speeding
13 along so in the end, the dentists are getting paid more
14 quickly. So, that is also a significant benefit of this
15 settlement.

16 Another significant benefit of this settlement is
17 that -- and this was a major complaint with dentists --
18 there's often a coordination of benefits issues between --
19 in the dental world between medical and dental services
20 and who's paying first or, you know, the dental company is
21 not going to pay until they get the explanation of benefits
22 from the medical company to see how it's been processed.

23 As part of this settlement and subject to certain
24 conditions which are set forth in the agreement, Delta
25 Dental has agreed not to require the submission of medical

1 explanation of benefits for a variety of procedures and
2 that is also a great benefit because, again, it will
3 facilitate the prompt processing and payment of claims and,
4 at the end, get the money in the dentists' hands faster,
5 which was what this litigation was all about.

6 Another significant benefit is the individualized
7 review of certain claims by professional dental consultants
8 that are employed by Delta Dental. One of the issues
9 raised in this complaint that I alluded to or discussed
10 earlier was the automated processing of claims independent
11 of looking at any records, clinical documents, to see what
12 services were actually rendered and whether the services
13 billed for are supported by the clinical records.

14 In essence, the complaint was you have a pre-program
15 logic that's going to process a claim no matter what, come
16 hell or high water, no matter what the dentist actually did
17 and is documented in his records.

18 Under this settlement, Delta Dental, for a variety of
19 dental services, will have a consultant which will be
20 reviewing, manually reviewing the claim to ensure that
21 whether the services were accurately described and the
22 correct codes were submitted. It's a labor intensive
23 effort that requires the consultants to review the x-rays
24 and the treatment records, and Delta Dental is committed to
25 continuing this for the next five years.

1 I mean, this is the kind of thing that dentists want.
2 They do not want their claims just simply going through a
3 computer system and something being spit out on the other
4 side without the consideration of the services they
5 actually rendered. So, that is also a significant benefit
6 of this settlement.

7 Another significant benefit of this settlement is
8 where Delta Dental will be sending the payment. In this
9 day and age, you have practices that have multiple
10 locations or dentists practicing in multiple offices.
11 Often what you have are centralized locations where all the
12 administrative work is done, where all the staff is, you
13 know, the billing of staff is located, and as part of this
14 settlement, Delta Dental has agreed to send the payment to
15 the location that is designated by the dentist, so, it's
16 the dentist who now is controlling the administrative
17 aspect of its practice, where does he want a centralized
18 location where all the checks are going, so that that would
19 enure to the ability of the practice to make deposits more
20 quickly as opposed to checks going here and there to
21 different locations and having to collect them and whatnot.
22 Again, money get to the dentists or getting to their bank
23 accounts more quickly, a benefit to the class.

24 Your Honor, I've only touched on some of the reforms.
25 There are other reforms that are addressed in Mr.

1 Silverman's certification. All of them are in Section 7 of
2 the agreement but all in all, I believe these are very
3 significant benefits that are designed to achieve what the
4 goal of this litigation was, get dentists paid more
5 quickly; significantly reduce the administrative hassle,
6 the administrative overhead; and to ensure that claims are
7 being processed not based solely on some preprogrammed
8 logic, but based upon the services that are actually
9 rendered, based upon what the dentist documents in his or
10 her records.

11 I think the settlement reforms here, benefits are
12 significant, and I think they overwhelmingly support final
13 approval of this settlement.

14 THE COURT: Thank you. Mr. Sellinger.

15 MR. SELLINGER: As before, your Honor, Delta Dental
16 agrees that the settlement should be approved, reserving
17 our right to disagree with any factual statements or legal
18 conclusions.

19 THE COURT: All right. Thank you. As the parties
20 have indicated, the Court is required to review the
21 settlement of the class action to determine whether or not
22 it's fair, reasonable and adequate as required by Rule
23 23(e).

24 In *Girsh v. Jepson*, 521 F.2d, 153, Third Circuit
25 1975, the Third Circuit indicated a number of factors which

1 are nonexclusive which the court should consider in
2 determining whether or not the settlement is indeed fair
3 and appropriate.

4 The Third Circuit has indeed indicated that those
5 factors are not exclusive and, indeed, if I recall
6 correctly, the Prudential Insurance litigation indicated
7 that the court may, in its discretion, consider a number of
8 additional factors in order to determine whether or not the
9 settlement is fair and reasonable and adequate.

10 The Court is satisfied on the record before it that
11 it need only consider the Girsh v. Jepson factors and that,
12 indeed, those factors overwhelmingly demonstrate that the
13 settlement is fair, reasonable and adequate as required by
14 Rule 23(e).

15 The Court's required to consider, among other things,
16 the complexity and duration of litigation. This litigation
17 has been going on, at least to me, interminably. It has
18 been extraordinarily complex. The parties have, indeed,
19 vigorously and aggressively litigated every single aspect
20 of this case. And as the parties have indicated, to a
21 certain degree, even at this point with all that
22 litigation, we've only started the main event, which would
23 be dealing with the added motion to dismiss, coupled with
24 class certification procedures.

25 The Court is satisfied that, indeed, this is an

1 appropriate point in the litigation, given all the
2 discovery and litigation that has occurred, for the case to
3 be settled.

4 The Court is satisfied furthermore that the reaction
5 of the class to the settlement appears to be overwhelmingly
6 in favor of it. As the Court indicated, there appear to be
7 two objections. One is to attorneys' fees, the other
8 essentially, and interestingly, does not really suggest
9 that a monetary component should have been included in
10 here. Dr. Galvin would like additional procedural remedies
11 put in place and, as Mr. Katz indicated, at least one of
12 them is simply not authorized by any statute. That would
13 be payment within, if I recall correctly, he wanted two
14 weeks.

15 He would also like, and this Court can certainly
16 understand that, that Delta Dental not keep him on the
17 phone for interminable periods of time when he inquires.
18 Hopefully, that objective will be met in part by the
19 automated procedures that have been adopted by the parties
20 in the settlement, including accessing EOBs electronically
21 and so on.

22 But in short, the record indicates that the class
23 appears to be overwhelmingly in favor of the settlement.

24 The stage of the proceedings, I actually discussed
25 while I was discussing the complexity and duration of the

1 litigation and, that is, that this case is far along but
2 would have much further to go still before it could reach a
3 resolution, depending on how things were determined in
4 motion practice and otherwise.

5 With regard to the risks of establishing litigation,
6 Mr. Katz has clearly and articulately indicated that the
7 risks, indeed, would be substantial. There would be two
8 classes, assuming they were approved. One would be a group
9 that had a contractual relationship with Delta Dental. The
10 other would be nonparticipating doctors. Presumably, the
11 nonparticipating doctors would have to base their claims
12 virtually exclusively on the prompt pay statutes, while the
13 participating doctors could base claims both upon
14 contractual relations and upon the prompt pay statute.

15 The risks with regard to the prompt pay statute being
16 available to all of the potential class members has been
17 clearly outlined by Mr. Katz and, indeed, presented a
18 substantial risk.

19 Likewise, the extent that claims would be brought
20 based upon the contractual relationships between the
21 parties, as Mr. Katz indicated, the viability of those
22 claims would depend substantially upon the determination as
23 to whether or not the provisions were determined to be
24 unconscionable under state law and, as Mr. Katz has
25 indicated, that is an extremely substantial burden and

1 would be particularly so in the context of a case which was
2 not involving consumers.

3 Under those circumstances, the Court concludes that
4 the risks of establishing liability would indeed be
5 extremely substantial and that that argues strongly in
6 favor of settling the case.

7 Mr. Katz has likewise indicated the risks of
8 establishing damages and the Court need not go over them,
9 but it is apparent to the Court that, indeed, the risks of
10 establishing liability are commensurate with the risks of
11 establishing damages in this case, coupled with, of course,
12 an extraordinarily complex and difficult issue with regard
13 to, in fact, calculating damages and, indeed, potentially a
14 further complication of calculating damages in the context
15 of whether or not the providers had, in fact, balance
16 billed or not balance billed patients, and I gather that is
17 an issue which, in fact, you did discuss in the class
18 certification issue, Mr. Katz, if I recall correctly.

19 MR. KATZ: Well, that's correct, because certainly a
20 dentist -- damages would be reduced if they had collected
21 amounts from patients and that would have to be factored
22 in.

23 THE COURT: And of course, that would again require
24 an item-by-item calculation in effect. So that, among
25 other things, when one gets to the risks of maintaining a

1 class action, indeed, for various reasons pointed out by
2 counsel, the risks of maintaining the class could
3 potentially be very substantial, among other things, as the
4 Court and Mr. Katz just indicated, the manageability issues
5 might potentially become paramount, among other things,
6 because, of course, one might have to indeed calculate
7 damages on a patient-by-patient basis and factor in on an
8 accounting basis whether or not patients had been balance
9 billed for particular claims or had not been balance
10 billed, had paid, had not paid and so on, or whether or not
11 they had been paid up front, if I recall correctly.

12 Indeed, presumably, nonparticipating doctors would be
13 permitted to, in fact, bill patients if they wished to for
14 the total fee up front and then, in fact, collect as an
15 assignee in some manner from Delta Dental and forward those
16 payments or have those payments forwarded to the patient.
17 Correct, Mr. Katz?

18 MR. KATZ: That is also an issue that would have had
19 to have been dealt with.

20 THE COURT: All of those suggest that, indeed, there
21 could be very substantial risks and issues in maintaining a
22 class action in this case.

23 As Mr. Katz indicated, there is no doubt that
24 defendants could maintain a greater judgment in this case
25 and that, of course, the Court does factor into its

1 consideration.

2 And finally, the range of reasonableness of
3 settlement in light of the best recovery and the range of
4 reasonableness of the settlement in light of all the
5 attendant risk factors, the Court will deal with both of
6 those issues together and the Court, quite frankly,
7 concludes that on the record before it, ultimately, the
8 risks of obtaining a substantial monetary judgment in this
9 case on behalf of the class were extremely problematic and
10 that, therefore, obtaining substantial business reforms in
11 the form of injunctive relief, indeed, is not only a
12 reasonable settlement in this particular case, but the
13 nature of the business reforms that were obtained by
14 counsel for plaintiff in this negotiation appear to this
15 Court to, indeed, be very substantial, and while there is
16 not a monetary component for the doctors, it is apparent to
17 the Court that a major concern of providers, both in the
18 dental area and other medical providers, has and continues
19 to be the difficulty, inconvenience and expense involved in
20 submitting, processing and dealing with the insurance
21 companies who reimburse them for the services which they
22 have provided.

23 The Court can certainly take judicial notice of the
24 fact that providers seem to have more and more staff which
25 they have to devote to this particular process and that,

1 indeed, that kind of staff, time and money is
2 extraordinarily expensive.

3 The business reforms that the parties have presented
4 to this Court for approval seem to this Court to go a
5 substantial way to ameliorating some of those issues.

6 The Court finally notes that the settlement in this
7 case was, indeed, negotiated at arm's length with a
8 mediator, Judge Hedges, a former magistrate judge of this
9 court, and that argues also strongly in favor of concluding
10 that the settlement is a fair and reasonable one.

11 The Court, therefore, is satisfied that, indeed,
12 settlement should be approved as being fair, reasonable and
13 adequate and sufficient to protect the interests of the
14 class in this matter and the settlement will be approved.

15 Now, the final issue then is attorneys' fees. The
16 Court has received an objection to the fee application in
17 this case and Mr. Pakrul, on behalf of Dr. Krugman, do you
18 wish to be heard further with regard?

19 MR. PAKRUL: I'll be very brief, Judge. Obviously,
20 our position is set forth in the papers your Honor just
21 referred to. I would just state three things; that class
22 counsel litigated many, many claims and they were largely
23 unsuccessful and a lot of the claims were dismissed.

24 The lodestar and hourly rate that was being sought
25 has already been rejected by this very Court in the Dewey

1 matter and we ask that it be rejected here or at least
2 certainly modified, and I guess just very plainly saying
3 that the lawyers shouldn't get a lot of money when the
4 class members didn't get anything, so, the fee should just
5 be modest.

6 THE COURT: Okay. Mr. Katz, I'll hear you.

7 MR. KATZ: Your Honor, class counsel submits that our
8 fee application which seeks \$575,000 in fees and expenses,
9 from which 2500 will be deducted as an incentive award to
10 Dr. Jungels should be approved in its entirety.

11 We have certainly submitted a complete and
12 comprehensive fee application with all detailed billing and
13 expense records which certainly gives this Court and gives
14 the objectors, if they chose to do so, which they did not,
15 the opportunity to go through and determine whether, in
16 fact, the hours were reasonably expended and to attack the
17 certification and fee application in the ways that one
18 could attack such an application.

19 Here, let me point out a few things from the get-go.
20 First of all, the fee application or the amount of fees was
21 only negotiated and agreed upon after all the class
22 benefits were fully negotiated and agreed upon. It's
23 separate and apart from the class benefits and does not
24 diminish the class benefits or their value in any way.

25 With regard to counsel's, Mr. Pakrul's remark, sort

1 of colloquial remark that class counsel shouldn't get paid
2 or paid, quote, you quote "a lot of money" if the class is
3 not getting a monetary component, that is certainly not a
4 criteria in analyzing a fee application where there are, in
5 fact, numerous class action settlements providing
6 injunctive relief where there's no money exchanged. The
7 test is to look at, are the benefits significant as such to
8 warrant a fee and here -- and I'm not going to belabor the
9 point that we've addressed at length already -- we have
10 five years of significant business commitments going
11 forward that address the issues that were raised in the
12 lawsuit or the significant concerns raised in the lawsuit,
13 so, and those reforms ultimately will lead to a greater
14 bottom line for the dentists and savings in administrative
15 costs to a class, a national class of 160,000. So, I think
16 that last, what I consider almost off-the-cuff remark
17 should be summarily rejected.

18 I think what's significant to recognize here, also,
19 your Honor, is that this fee was the subject or the product
20 of a recommendation before your Honor at a court-ordered
21 mediation on the fee. Mr. Pakrul, in his letter which was
22 filed last night, docket entry 296, acknowledges that this
23 Court mediated the fee award but, he goes on to say it is
24 unclear whether there was any analysis of the basis of the
25 lodestar.

1 Well, your Honor, when we were before the Court, we
2 specifically -- I specifically addressed, Mr. Sellinger was
3 there, the amount of hours that we had been expending on
4 this case, the hourly rates that we are accustomed to
5 getting, and the amount of hours that would have to
6 actually be cut off of the lodestar because they dealt with
7 issues that weren't directly beneficial to the class.

8 As it is, I deducted 500 hours off of this lodestar
9 before it was ever submitted and, as this Court knows
10 because there was some intense conversations, this was a
11 significantly compromised fee from our perspective that,
12 for the benefit of the class, to get this deal done, that
13 we were willing to take a significant cut in both hours and
14 the amount of money that we'd be looking for under normal
15 circumstances. We forfeited -- I mean, not only did we
16 take half of our lodestar, I mean, we obviously, in the
17 same vein, forfeited any right for any type of an
18 enhancement, even a nominal enhancement which is not
19 uncommon in this district for enhancement of one to four.

20 So, I certainly think that under these circumstances,
21 even if we were to be, quote, unquote "penalized" for not
22 achieving the ultimate resolution, I don't know how much
23 more we could be, quote, unquote, "penalized" than what we
24 already have. And I think the proof in the pudding is in
25 the next paragraph of Mr. Pakrul's letter, which really

1 shows that he doesn't understand the facts of this matter
2 and, more specifically, our fee application.

3 He cites the various cases. He cites to a case that
4 I was involved in in 2006 in the Appellate Division where I
5 was awarded \$375 an hour and he also cites to the Dewey
6 matter, which my firm was involved in, where there were
7 rates of -- for the senior partners that went to 00 well,
8 the rates were between 260 and 560.

9 First of all, the West Morris Pediatrics matter is
10 2006, which is six years ago. The Dewey matter was 2010,
11 which is two years ago. It's axiomatic in this district
12 that in calculating the lodestar, all of the work is based
13 upon not historical rates but the rates that are in effect
14 at the time that the fee application is made, so, it's
15 irrelevant what I may have been awarded in 2006 or we were
16 awarded in 2010, in terms of work that was done in 2006 and
17 2010, because it would be based only on the current hourly
18 rate.

19 But more significantly, far more significantly, Mr.
20 Pakrul's logic is flawed because we aren't even getting
21 paid anything remotely like the 375 that I got paid in
22 2006. If you look at our hours, our hour are 1900. We
23 have 75,000 in disbursements. We're getting paid
24 essentially a \$500,000 fee. Do the math. 500,000 divided
25 by 1900 gives me a rate of \$259 an hour, and if you throw

1 in the 500 hours that I deducted because I concluded they
2 were not reasonably expended, then my hourly rate is \$208
3 an hour.

4 I submit to the Court, I mean, clearly Mr. Pakrul's
5 analysis is completely flawed and has to be rejected out of
6 hand. But I would submit, aside from that, I would submit
7 that getting compensated, given the experience and
8 expertise and success of myself and my law firm, as this
9 Court is fully familiar with, getting paid an hourly rate
10 of \$259 an hour on a case of this magnitude, with all the
11 risks involved that we take on on a contingency basis in
12 essence, is certainly justified. And under the
13 circumstances, I believe that the \$500,000 fee is eminently
14 reasonable and should be awarded in this case.

15 Similarly, the disbursements in this case of \$75,000,
16 all of them were reasonably incurred in litigating this
17 matter. Mr. Pakrul didn't say anything today when he got
18 up, but he raises one issue about the \$30,000 in expert
19 fees.

20 I'm assuming he got that, he gleaned that by looking
21 at the chart where I totaled up \$30,000 in expert fees, but
22 what these expert fees really were, were both -- would have
23 been testifying and consulting, primarily consulting
24 experts.

25 We've already discussed the complex issues involved

1 in this case. The issues involved include an analysis of
2 determining -- reviewing, for example, the discovery of a
3 technical nature involving the computer and claims
4 adjudication systems of Delta Dental. It required
5 expertise in that area, expertise from people with
6 knowledge of understanding these computer systems and how
7 they adjudicate claims; expertise in provider relations
8 issues, contracts, terms, what they mean, what documents,
9 what should we be asking for, what kind of deposition
10 questions should we be inquiring.

11 This is all part of the expert costs that were
12 incurred in this case. And also, assisting us once we
13 start engaging in negotiations; how should we formulate the
14 business reforms. Okay. What is the best way? How do we
15 know that Delta Dental, who obviously has better working
16 knowledge of its operations than I do, it's not my
17 business, how do we know, based upon what we know what
18 Delta Dental does, if in fact the reforms we're requesting
19 are providing the kind of benefits that we are seeking and
20 whether we're, you know, we're getting our money's worth,
21 to sort of analogize, and consultants and experts we dealt
22 with helped us in that, in formulating the settlement
23 proposals and the reforms, and the ideas that we needed to
24 get this case done.

25 Also, this case involved issues of understanding

1 whether, in fact, just because Delta Dental may bundle
2 codes together doesn't mean that it's breaking any laws,
3 because bundling is permissible under various industry
4 standards. So, it required consulting with people
5 knowledgeable on those standards and whether or not, under
6 accepted industry standards, the CDT, which is the codes
7 that dentists use, and also here we had CPT codes because
8 there's dentists who render medical procedures.

9 There was considerations of whether Medicare coding
10 guidelines which, you know, could be followed to the extent
11 there were any applicable code lines, or Medicaid code
12 lines were applicable. We needed to consult with people on
13 that.

14 So, the big ticket item of the \$30,000 is certainly
15 substantiated and certainly substantiated given the results
16 we got in this case.

17 It doesn't seem to me that any of the other expenses
18 are being challenged, so, I will not address that.
19 Moreover, I don't believe I need to address, unless the
20 Court has specific questions about hours expended. I think
21 we've deducted, again, deducted 500 hours out of 2500, so,
22 you know, five over 20, what is that, one-fifth of our
23 hours, 20 percent of our hours for work that was not
24 reasonably expended, I. Think we did our only policing, if
25 you will, and I don't think any further reductions are

1 necessary there, either, and none have been challenged by
2 the objector.

3 So, all in all, I think the fee application should be
4 approved in its entirety. We should be awarded the
5 \$575,000 in fees and costs, from which 2500 of that we are
6 paying out of our money to Dr. Jungels as the incentive
7 award and, thus, it should be granted in its entirety.
8 Thank you.

9 THE COURT: Thank you. Mr. Sellinger, do you wish to
10 be heard on this at all?

11 MR. SELLINGER: No, your Honor. Thank you.

12 THE COURT: All right. Anything further?

13 MR. PAKRUL: No, Judge.

14 THE COURT: All right. As Mr. Katz indicated, the
15 parties have already agreed upon a tentative settlement of
16 the claims with Judge Hedges. They reached an impasse over
17 the attorneys' fees and this Court did indeed mediate the
18 attorneys' fee application.

19 It would be an understatement to say that the
20 parties' perception of the appropriate attorneys' fee award
21 was vastly different and the Court did carefully consider,
22 in making a recommendation to the parties, the extent to
23 which plaintiff's counsel had spent time and effort on this
24 and made a recommendation to the parties which they
25 ultimately advised the Court they agreed to of this figure

1 based upon the Court's evaluation that, indeed, the nature
2 of the case and the nature of the relief warranted a
3 substantial reduction from the potential lodestar that
4 plaintiffs' counsel would have been able to use in seeking
5 a fee application.

6 Now, in cases in which the relief which is awarded to
7 the plaintiff class is non-monetary, one typical way of
8 calculating the fee award which has been approved by the
9 Third Circuit and numerous other circuits is a percentage
10 of the recovery based upon the court's calculation of what
11 the reasonable value of the non-monetary relief would be to
12 the class.

13 The Court did not engage in any explicit calculation
14 of that figure in mediating the claim, nor had the parties,
15 indeed, engaged in such an explicit calculation. But this
16 Court is fully aware that in class actions in which the
17 overall value of the recovery is relatively small, a fairly
18 typical percentage of the recovery award is in the vicinity
19 of 30 to 33 percent.

20 It is fairly common for that percentage to decline as
21 the amount of money in the common fund increases, although
22 that is not invariably and necessarily so. But if the
23 Court were to use approximately a one-third percentage of
24 the recovery calculation in this case in determining what
25 would be an appropriate fee award, that would mean that

1 this settlement would have to be valued at approximately
2 1.6 or 1.6 and change in benefit to the class in order for
3 such a fee award to be justified.

4 This Court has no problem concluding that the
5 recovery and the benefits which this class action
6 settlement confers upon class members is well above \$1.6
7 million and, indeed, that would be, by any stretch of the
8 imagination, the most modest valuation of the benefits that
9 were achieved to the class members.

10 In common fund cases, what is typically done by the
11 court then is to use the lodestar calculation as a cross
12 check to see whether or not the fee award is appropriate.

13 As Mr. Katz has indicated, after he discounted 500
14 hours of time spent on the case, he came up with a lodestar
15 calculation which was roughly \$1.1 million, slightly less
16 than that, if I recall correctly, one million 95 dollars or
17 something like that. So, as a ballpark, the application
18 which is sought here is approximately half of that
19 lodestar.

20 The Court is satisfied that under the facts of this
21 case, that is a more than reasonable attorneys' fee. It is
22 not uncommon for percentage of the fund recovered fee
23 awards to be multiples of the lodestar, and one of the
24 reasons for that is because class action litigation is,
25 indeed, contingent fee litigation. If you are not

1 successful on behalf of the class, you don't get any fees.

2 The Court is satisfied that this was a difficult,
3 vigorously contested case which resulted in substantial
4 benefits for the class in connection with the settlement
5 and that while the plaintiffs did not get all they wanted
6 or wished for, they did get substantial benefits as a
7 result of the industry and efforts of the plaintiffs'
8 counsel and counsel then is, therefore, entitled to an
9 appropriate fee award.

10 In the context of this case the \$575,000 fee
11 application and the expert fees is indeed a modest one.
12 This Court will note for the record that if the Court had
13 not concluded that this indeed was a settlement which was
14 fair and appropriate and reasonable with regard to the
15 class members, this Court would not have approved it and
16 would not have awarded any fee whatsoever.

17 This Court is fully aware of the economics of class
18 action litigation, the difficulties and, indeed, the
19 substantial abuses that occur sometimes in class action
20 litigation, including so-called coupon settlements.

21 This is not a coupon settlement. This is not a
22 settlement in which the only people who benefit are
23 plaintiffs' lawyers. And the Court is satisfied that based
24 upon all the information that's been presented to it, that
25 the fee application and the application for expert fees is,

1 indeed, warranted and supported by all the documentation.

2 As Mr. Katz notes, the fee which is, in fact, being
3 awarded, would appear to be somewhere around half of his
4 fees. Correct.

5 MR. KATZ: The hourly rate, yes, your Honor.

6 THE COURT: The hourly rate and the lodestar.

7 MR. KATZ: Well, correct.

8 THE COURT: All right. There is no way that this
9 Court could conclude that that fee is not an appropriate
10 and fair one which is warranted. The application will be
11 granted. Anything further?

12 MR. KATZ: Nothing from the class, your Honor.

13 MR. SELLINGER: No. Thank you, your Honor, for all
14 your diligent attention to this case over many years. It's
15 much appreciated.

16 THE COURT: Thank you to both of you.
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