IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GENEYNE HART, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	CIVIL ACTION NO.: 07-678-LPS
vs.	)	CLASS ACTION
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,	)	
Defendant.	)	

FINAL ORDER AND JUDGMENT APPROVING CLASS ACTION SETTLEMENT AND DISMISSING CLASS ACTION WITH PREJUDICE

WHEREAS, the Parties have entered into a Stipulation of Class Action Settlement dated October 17, 2011, together with related exhibits, to settle the class action claims asserted in *Geneyne Hart v. Nationwide Mutual Fire Insurance Company*, United States District Court, District of Delaware, Cause No. 1:07-CV-00678-LPS; and

WHEREAS, the Court entered a Order Certifying Settlement Class and Preliminarily Approving Class Action Settlement dated November 10, 2011 ("Preliminary Approval Order"), certifying a settlement class in this action; ordering notice to potential class members through mail notice; providing those persons with an opportunity either to exclude themselves from the Settlement Class or to object to the proposed settlement; and scheduling a Fairness Hearing; and

WHEREAS, the Court held a Fairness Hearing on February 28, 2012, to determine whether to finally approve the proposed settlement; and

WHEREAS, the Parties have complied with the Preliminary Approval Order and the Court finds that the Settlement Stipulation is fair, adequate, and reasonable, and that it should be finally approved.

NOW THEREFORE, based on the submissions of the Parties and Settlement Class Members, any objections, any testimony adduced at the Fairness Hearing, the pleadings on file, and the argument of counsel, the Court hereby finds, and it is hereby ORDERED, ADJUDGED AND DECREED, as follows:

1. **Incorporation of Defined Terms**. Except where otherwise indicated, all capitalized terms used in this Final Order and Judgment and in Appendices hereto shall have the meanings set forth in Appendix "A" hereto.

2. **Jurisdiction**. The Court has personal jurisdiction over all Settlement Class Members and has subject matter jurisdiction over this action, including, without limitation, jurisdiction to approve the proposed settlement, to grant final certification of the Settlement Class, to settle and release all claims arising out of the transactions alleged in the action or the Released Claims, and to dismiss this action on the merits and with prejudice. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

Final Class Certification

3. **The Settlement Class.** The Settlement Class that this Court previously certified in its Preliminary Approval Order is hereby finally certified for settlement purposes pursuant to Federal Rule of Civil Procedure 23. The "Settlement Class" consists of:

> All persons, and their medical providers or other assignees, who (a) submitted first-party medical expense claims to Nationwide pursuant to Nationwide's Delaware automobile insurance policy No-Fault coverage; (b) had their claim submitted by Nationwide to computer pricing review during the period from September 1, 2004 through December 31, 2007; (c) received or were tendered payment but in an amount less than the

> submitted medical charges based upon the pricing review of the charges; and (d) received or were tendered an amount less than the stated policy limits.
> Excluded from the Settlement Class is Nationwide, any entities in which Nationwide has a controlling interest, and all of their legal representatives, heirs and successors. Also excluded are any claims resolved and/or discharged or released prior to the date of the Preliminary Approval Order.

4. Exclusions/Opt Outs. A list of those persons or entities who have timely and validly excluded themselves from the Settlement Class (opt outs), and who are therefore not bound as Settlement Class Members by this Final Order and Judgment, is attached hereto as Appendix "C," which is incorporated herein and made a part hereof for all purposes.

5. Federal Rule of Civil Procedure 23. Under Federal Rule of Civil Procedure 23, the requirements of class certification are divided into two subsections – Rules 23(a) and 23(b). For a class to be certified, each of the four requirements of Rule 23(a), as well as one of the four requirements of Rule 23(b), must be satisfied. *Barnes v. American Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998); *In re Prudential Ins Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 308 (3d Cir. 1998); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 245, 248 (3d Cir. 1975). As established below, the Court finds for purposes of the settlement of this action (and only for such purposes, and without an adjudication of the merits or a determination of whether a class should be certified if the settlement is not approved or does not otherwise become final), that the requirements of the Federal Rules of Civil Procedure and any other applicable law have been met.

6. Numerosity. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001). "No single magic number exists satisfying the numerosity requirement," but the Third Circuit generally has approved classes of forty or more. *Stewart v. Abraham,* 275

F.3d 220, 226-27 (3d Cir. 2001); *Moskowitz v. Lopp,* 128 F.R.D. 624, 628 (E.D. Pa. 1989). Here, the Settlement Class contains thousands of members. Thus, the numerosity requirement is satisfied.

7. **Commonality.** Rule 23(a)(2) requires that the claims or defenses of the class representatives raise questions of law or fact common to the questions of law or fact raised by the claims or defenses of each member of the settlement class.

> A finding of commonality does not require that all class members share identical claims, and indeed 'factual differences among the claims of the putative class members do not defeat certification.' The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.

In re Prudential, 148 F.3d 283, 310 (3d Cir. 1998) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (internal citations omitted)); *see also In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516, 527-28 (3d Cir. 2004) ("Rule 23(a)(2)'s commonality element requires that the proposed class members share at least one question of fact or law in common with each other."). Here, the claims of the Class Representative are uniform with respect to the claims of the Settlement Class Members to the extent that they relate to Nationwide's alleged conduct. The claims of both the Class Representative and the Settlement Class Members challenge Nationwide's payment of medical expense charges, in whole or part, pursuant to audit recommendations provided to Nationwide by Mitchell Medical. Thus, the commonality requirement is satisfied.

8. **Typicality.** Rule 23(a)(3) requires that the claims or defenses of the class representative are typical of the claims or defenses of each member of the settlement class. The Third Circuit recently identified three interrelated considerations relevant to this inquiry:

> (1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory

> advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests and incentives of the representative must be sufficiently aligned with those of the class.

In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 599 (3d Cir. 2009). This component of Rule 23 is designed to ensure that "the [class representatives] will work to benefit the entire class through the pursuit of their own goals." *In re Prudential,* 148 F.3d at 311 (citing *Baby Neal,* 43 F.3d at 57), *cert. denied,* 525 U.S. 1114 (1999). "'[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *Id.* (quoting *Baby Neal*, 43 F.3d at 58); *see also In re Warfarin*, 391 F.3d at 532. Here, the claims of the Class Representative arise from the same course of alleged conduct with respect to Delaware insureds and their assigns under the same governing Delaware law, which gives rise to the claims of all the Settlement Class Members. Thus, the typicality requirement is satisfied.

9. Adequacy of Representation. Rule 23(a)(4) requires that the class representative and class counsel can fairly and adequately protect and represent the interests of each member of the settlement class.

> [T]he adequacy inquiry under Rule 23 "has two components designed to ensure that absentees' interests are fully pursued." First, the adequacy inquiry "tests the qualifications of the counsel to represent the class." Second, it seeks "to uncover conflicts of interest between named parties and the class they seek to represent."

In re Warfarin, 391 F.3d at 532 (internal citations omitted); *see also In re Prudential*, 148 F.3d at 312. Here, the Class Representative has the same interest in attempting to establish her claims against Nationwide. Additionally, the Class Representative and the Settlement Class Members are represented by experienced, able counsel. Thus, adequacy of representation is satisfied.

10. Predominance. Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). These dual requirements are commonly referred to as "predominance" and "superiority," respectively. *See, e.g.*, *In re Constar Int'l, Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009).

Predominance probes whether the proposed class is sufficiently cohesive to warrant adjudication by representation. *See Amchem,* 521 U.S. at 623 (citing 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1777, at 518–19 (2d ed. 1986)). Although it tends to merge with the concept of commonality, it imposes a more exacting standard. *See Newton,* 259 F.3d at 186. To establish predominance, issues common to the class must predominate over individual issues. *In re Prudential,* 148 F.3d at 313–14. Common issues do not "predominate," and the case is inappropriate for certification, if "proof of the essential elements of a cause of action require individual treatment." *Newton,* 259 F.3d at 172 (citing *Binder v. Gillespie,* 184 F.3d 1059, 1063–66 (9th Cir. 1999), *cert. denied,* 528 U.S. 1154 (2000)).

Whether an element requires individual or common treatment depends on the nature of the evidence that will suffice to resolve it. *See In re Hydrogen Peroxide,* 552 F.3d at 311 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)). When an issue requires both individual and common proofs, the Court must determine which proof is key to its outcome. *See In re Lineboard,* 305 F.3d at 162–163. Indeed, the presence of some individual issues "does not *per se* rule out a finding of predominance." *In re Prudential,* 148 F.3d at 315.

Here, the common issues of the Settlement Class predominate over individual issues. The core issues commonly concern Nationwide's payment of medical expense charges:

(1) arising from No-Fault coverage issued under and subject to Delaware law; (2) calculated based on the same bill review audit database, criteria, and process that recommended for the charges at issue in this lawsuit payments less than the amount billed; and (3) implemented and applied by the same regional claims office with responsibility to comply with Delaware law and regulations. Any individualized issues that may exist if the claims were fully litigated have been mooted by the settlement terms. *See Sullivan v. DB Investments*, 2011 WL 6367740, *16-17 (3d Cir. 2011) (en banc). Thus, the predominance of common questions is satisfied.

11. Superiority. Rule 23(b)(3) also requires that class representation is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these issues include: (1) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

Here, a class action is superior because, given the relatively small individual amounts in controversy, the economic interests of the Settlement Class Members are better served through a class action. Additionally, the Parties have represented to the Court that they find it desirable to concentrate the existing litigation – and conclude their settlement – in this forum. Finally, because superiority is assessed in the context of a proposed class settlement, the Court need not consider manageability issues that might be presented in this case. *See Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248 (1997). Specifically, the Parties have agreed to a negotiated formula for determining a reasonable reimbursement under the proposed settlement, which

negotiated amount removes the potentially individualized issues that were contested in the litigation. *See Sullivan*, 2011 WL 6367740 at *16-17.

Final Settlement Approval

12. Fair, Reasonable and Adequate. In order to approve a class settlement, a court must find that the settlement is fair, reasonable and adequate and in the best interests of the class under Rule 23(e). *In re General Motors Corp. Pick–Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 785 (3d Cir. 1995). When considering a class settlement, the "court plays the important role of protector of the [absent class members'] interests, in a sort of fiduciary capacity." *Id.*

The Court of Appeals for the Third Circuit has enumerated nine factors that a district court should consider in determining whether a settlement is fair, reasonable and adequate: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir. 1975).

The Court may also consider other factors it deems useful for a thorough analysis, such as

> the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, . . . the extent of discovery on the merits, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved – or likely to be achieved – for

> other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

In re Prudential, 148 F.3d at 323.

Here, the *Girsh* factors and relevant *Prudential* considerations support final approval of the settlement.

The Complexity, Expense, and Likely Duration of the Litigation

"The first *Girsh* factor 'captures the probable costs, in both time and money, of continued litigation.'" *Sullivan*, 2011 WL 6367740 at *29 (quoting *In re Warfarin*, 391 F.3d at 536).

Continued litigation in this case would involve further discovery, including depositions, and substantial motion practice. *See Carroll v. Stettler, III*, No. 10-2262, 2011 WL 5008361, *5 (E.D. Pa. 2011). Considerable time and expense would also be devoted to trial preparation and the trial itself. Finally, "[i]n light of the highly contested nature of this action, it is likely that a judgment for either party would be appealed, which would further delay any potential payment to class members." *In re Residential Doors Antitrust Litigation*, No. 94-3744, 1998 WL 151804, *6 (E.D. Pa. 1998).

The first *Girsh* factor therefore weighs in favor of settlement.

The Reaction of the Class to the Settlement

"The second *Girsh* factor 'attempts to gauge whether members of the class support the settlement' by considering the number of objectors and opt-outs and the substance of any objections." *Sullivan*, 2011 WL 6367740 at *30 (quoting *In re Prudential*, 148 F.3d at 318).

As explained above, the Notice was mailed to 4,187 insured Settlement Class Members and 307 provider Settlement Class Members. The Notice established February 21, 2012 as the

deadline for Settlement Class Members to submit requests for exclusion or to file objections. As of that date, only four written requests for exclusion had been submitted by Settlement Class Members, and no objections had been filed with the Court.

In sum, the Settlement Class Members' reaction to the settlement has been positive. The second *Girsh* factor therefore further supports final approval. *See, e.g.*, *Serrano*, 711 F. Supp. 2d at 415; *McDonough v. Toys "R" US, Inc.*, Nos. 2:06-cv-0242-AB, 2:09-cv-06151-AB, 2011 WL 6425116, *4 (E.D. Pa. 2011); *Sullivan*, 2011 WL 6367740 at *30.

The Stage of the Proceedings and the Amount of Discovery Completed

"The third *Girsh* factor 'captures the degree of case development that class counsel had accomplished prior to settlement,' and allows the court to 'determine whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Sullivan*, 2011 WL 6367740 at *30 (quoting *In re Warfarin*, 391 F.3d at 537).

As explained above, this case has already been litigated for over four years. Extensive written discovery and document production have taken place. The Parties have fully briefed, and the Court has ruled upon, two motions for protective order filed by Defendant. Nationwide's claims director during the relevant time period has been deposed as a corporate representative.

Moreover, prior to entering into the Stipulation under consideration, the Parties engaged in extensive arms-length settlement negotiations spanning a period of years. The settlement negotiations culminated in a mediation in Philadelphia with The Honorable Diane M. Welsh on September 8, 2010.

The Parties were therefore able to gain an "adequate appreciation of the merits of the case before negotiating" the Stipulation under consideration. *Id. See also Toys "R" US, Inc.*, 2011

WL 6425116 at *5; *Serrano*, 711 F. Supp. 2d at 415; *Carroll* 2011 WL 5008361 at*5. Thus, the third *Girsh* factor favors final approval of the settlement.

The Risks of Establishing Liability and Damages

"The fourth and fifth *Girsh* factors require the Court to examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *Carroll*, 2011 WL 5008361 at *4 (citing *In re General Motors Corp.*, 55 F.3d at 814).

While Class Counsel is willing to pursue the claims in the Lawsuit through trial and appeal, if necessary, and believes in the merits of the claims, Class Counsel also recognizes the risk and delay that continued litigation poses to the Settlement Class Members. Indeed, Defendants have vigorously denied liability from the outset of the Lawsuit, and would continue to deny liability if the Lawsuit were to go to trial. *See In re Residential Doors Antitrust Litigation*, 1998 WL 151804 at *7.

Moreover, the determination of damages at trial would be a complicated process. On the other hand, under the settlement, Settlement Class Members who submit qualifying Claim Forms will receive over one hundred percent of their actual damages without any risk. In particular, the settlement provides for two forms of cash payments ("Settlement Payments") to Settlement Class Member insureds and/or their assignee medical providers for medical services where the amount allowed or paid by Nationwide was in an amount less than the submitted medical charges based upon a UCR review of the charges. Both forms of Settlement Payments are based on a set percentage. The legal holder of the right to receive medical expense benefits under a subject No-Fault coverage will be eligible to receive an "Unpaid Benefits Settlement Payment" calculated as

125% of the difference between the amount of the charges submitted and the amount previously paid by Nationwide for medical expense claims covered by the settlement.

Insureds who, prior to distribution of the Class Notice, paid to their medical providers the difference between the amount of the charges submitted and the amount previously paid by Nationwide for medical expense claims covered by the settlement, will be eligible to receive a "Reimbursement Settlement Payment" equal to 200% of the amount paid by the insured for the subject charges.

Settlement Payments are limited only by the amount of the insured's remaining coverage limits and the ability to validate the amount due. There is no limited fund and no aggregate cap on Settlement Payments. Also, the award of attorneys' fees and expenses, in the amount of $333.333.33, is being paid separately by Nationwide, and will not be offset against payments available to Settlement Class Members. Moreover, the proposed enhancement award for Plaintiff, in the amount of $15,000.00, is modest and reasonable.

Although there is no limited fund and no aggregate cap on Settlement Payments, through the discovery process and settlement negotiations, the Parties found that the amount of the charges submitted and the amount previously paid by Nationwide for medical expense claims covered by the settlement are approximately $733,475.60. Thus, the Parties estimate that the Stipulation under consideration makes available no less than approximately $916,844.50 (as Unpaid Benefits Settlement Payments) and up to approximately $1,466,951.20 (as Reimbursement Settlement Payments) for Settlement Class Members.

The settlement provides for a liberal claims process. Unpaid Benefits Settlement Payments are payable to insured Settlement Class Members upon submission of an executed Claim Form, without any supporting documentation. Unpaid Benefits Settlement Payments are

payable to medical provider Settlement Class Members upon submission of an executed Claim Form, along with proof of an assignment of benefits or legal transfer of rights. Reimbursement Settlement Payments are payable upon submission of an executed Claim Form, together with reasonably available documentation which verifies the amounts paid by insureds to their medical providers from which the Settlement Payment may be calculated.

Settlement Class Members have a substantial amount of time – 120 days – to submit claims. Moreover, they will be provided notice of any defects precluding or limiting their Settlement Payment, and will have 30 days to cure any such defects.

In sum, the proposed settlement "obviates the litigation risk to the [Settlement Class Members] and secures an economic benefit to the [Settlement Class Members] that is reasonable and fair relative to [the potential damages] that might be obtainable after protracted discovery and a trial." *Serrano*, 711 F. Supp. 2d at 416. The fourth and fifth *Girsh* factors therefore weigh in favor of settlement.

The Risks of Maintaining the Class Action Through Trial

"The sixth *Girsh* factor 'measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial' in light of the fact that 'the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from a class action.'" *Sullivan*, 2011 WL 6367740 at *31 (quoting *In re Warfarin*, 391 F.3d at 537).

Here, the Court has only addressed certification of a settlement class. The Parties agree that a settlement class is properly certifiable as to the claims at issue in the Lawsuit. *Cf. Sullivan*, 2011 WL 6367740 at *16 ("But we need not rely merely on certifications involving actual litigation of the class issues for the proposition that differing state laws do not defeat commonality or predominance. The correct outcome is even clearer for certification of a

settlement class because the concern for manageability that is a central tenet in the certification of a litigation class is removed from the equation").

However, while Plaintiffs believe that a litigation class would be properly certified, Defendants would vigorously oppose the certification of such a class should the Lawsuit continue to trial. Moreover, as the Third Circuit has recognized, "[c]lass certification is tenuous, as a district court retains the authority to decertify or modify a class at any time during the litigation if it proves to be unmanageable." *Id.* at 31. The sixth *Girsh* factor therefore weighs in favor of settlement.

The Ability of the Defendants to Withstand a Greater Judgment

"The seventh *Girsh* factor considers 'whether the defendants could withstand a judgment for an amount significantly greater than the settlement.'" *Sullivan*, 2011 WL 6367740 at *31 (quoting *In re Warfarin*, 391 F.3d at 537-38). This factor "generally only comes into play when 'a settlement in a given case is less than would ordinarily be awarded but the defendant's financial circumstances do not permit a greater settlement.'" *Toys "R" US, Inc.*, 2011 WL 6425116 at *6 (quoting *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011)).

The Third Circuit has recognized that "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of [a] settlement." *Sullivan*, 2011 WL 6367740 at *32 (quoting *Weber v. Gov't Empl. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009)).

Similarly, in this case, Defendants' potential ability to withstand a greater judgment does not undermine the fairness of the settlement under consideration.

The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

"The final two *Girsh* factors consider 'whether the settlement represents a good value for a weak case or a poor value for a strong case.'" *Sullivan*, 2011 WL 6367740 at *32 (quoting *In re Warfarin*, 391 F.3d at 538). As explained by the Third Circuit,

> the reasonableness of a proposed settlement is assessed by comparing the present value of the damages plaintiffs would likely recover if successful [at trial], appropriately discounted for the risk of not prevailing . . . with the amount of the proposed settlement. Notably, in conducting this analysis, the court must guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.

Id. (internal quotations omitted).

As discussed above, the settlement provides recovery to each Settlement Class Member that submits a qualifying Claim Form in an amount well exceeding one hundred percent of their actual damages. *Cf. In re Pet Food Products Liability Litigation*, 629 F.3d at 352 (finding that "the range of reasonableness under the eighth and ninth *Girsh* factors weigh[ed] in favor of settlement" even though "some Class Members may not be reimbursed fully for their economic damages depending upon whether the fund can support the number of claims ultimately submitted"). Moreover, "there is always an inherent risk in proceeding with litigation – not the least of which is the inevitable delay associated with it." *Toys "R" US, Inc.*, 2011 WL 6425116 at *7. The eighth and ninth *Girsh* factors therefore weigh in favor of settlement.

Prudential Considerations

The relevant *Prudential* considerations similarly support approval of the settlement. In brief, "the underlying substantive issues are mature in light of the experience of the attorneys,

extent of discovery, posture of the case, and mediation efforts undertaken." *Id.* at 7. Moreover, Settlement Class Members have the right to "opt out" of the settlement, thereby preserving the right to sue Nationwide at a later time regarding the claims at issue in the Lawsuit. *See id.* Finally, for the reasons set forth herein, the award of attorneys' fees and expenses, in the amount of $333.333.33, is reasonable.

In sum, the terms of the proposed settlement are fair, reasonable, and adequate. Final approval of the settlement by the Court is therefore appropriate.

Other Provisions

13. Notice Plan. The Court finds that the Notice Plan, including distribution of the Mail Notice and CAFA Notice in accordance with the terms of the Settlement Stipulation and this Court's Preliminary Approval Order, and as explained in the declarations filed at or before the Fairness Hearing:

a) constituted the best practicable notice;

b) constituted notice that was reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the Lawsuit, their right to object or to exclude themselves from the proposed settlement and to appear at the Fairness Hearing held by this Court, and their right to seek monetary relief as provided in the Settlement Stipulation;

c) was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice; and

d) met all applicable requirements of due process and applicable law.

14. Binding Effect. The terms of the Settlement Stipulation and of this Final Order and Judgment shall be forever binding on the Class Representatives and all other Settlement

Class Members, as well as their heirs, representatives, executors and administrators, successors and assigns, and those terms shall have res judicata and full preclusive effect in all pending and future claims, lawsuits or other proceedings maintained by or on behalf of any such persons or entities, to the extent those claims, lawsuits or other proceedings involve matters that were or could have been raised in this action or are otherwise encompassed by the Release described in the next paragraph of, and attached as Appendix "B" to, this Final Order and Judgment.

15. Release. Upon the Effective Date, the Release attached hereto as Appendix "B" ("Release") shall be valid and binding against the Class Representative and all Settlement Class Members who have not been recognized as excluded from the Settlement Class in Appendix "C" of this Final Order and Judgment.

16. Bar to Asserting Released Claims. Upon the Effective Date, the Class Representative and all Settlement Class Members who have not been excluded from the Settlement Class, whether or not they return a Claim Form within the time and in the manner provided for, shall be barred from asserting any Released Claims against the Released Parties, and such Class Representative and Settlement Class Members shall have released any and all Released Claims against the Released Parties.

17. Permanent Injunction. All Settlement Class Members who have not timely excluded themselves from the Settlement Class (and are therefore not listed on Appendix "C" hereto) are hereby permanently barred and enjoined: (1) from filing, commencing, prosecuting, intervening in, or participating as a plaintiff, claimant, or class member in any other lawsuit or administrative, regulatory, arbitration, or other proceeding against Nationwide in any jurisdiction based on, relating to, or arising out of the claims and causes of action, or the facts and circumstances relating thereto, in the Lawsuit and/or the Released Claims; (2) from filing,

commencing, or prosecuting a lawsuit or administrative, regulatory, arbitration, or other proceeding against Nationwide as a class action on behalf of any Settlement Class Members who have not timely excluded themselves (including by seeking to amend a pending complaint to include class allegations or seeking class certification in a pending action), based on, relating to, or arising out of the claims and causes of action, or the facts and circumstances relating thereto, in the Lawsuit and/or the Released Claims; (3) from attempting to effect an opt-out of a class of individuals in any lawsuit or administrative, regulatory, arbitration, or other proceeding against Nationwide based on, relating to, or arising out of the claims and causes of action, or the facts and circumstances relating thereto, in the Lawsuit and/or the Released Claims; and (4) taking any action inconsistent with the Release attached as Appendix "B."

18. Enforcement of Settlement. Nothing in this Final Order and Judgment or any order entered in connection herewith shall preclude any action to enforce the terms of this Final Order and Judgment or the Settlement Stipulation.

19. Attorneys' Fees and Expenses. Pursuant to the terms of the Preliminary Approval Order, any petition by Class Counsel for attorneys' fees, costs and expenses was to be filed prior to the Fairness Hearing. On February 14, 2012, Class Counsel submitted a motion and brief to approve attorneys' fees, costs and expenses.

An agreed-upon award of attorneys' fees and expenses is appropriate in a class action settlement, subject to a finding of reasonableness. Fed. R. Civ. P. 23(h). The negotiation of fee awards is generally encouraged. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

In this case, several factors support a finding of reasonableness of the requested award of Class Counsel's Fees and Expenses. First, the requested award will not be awarded from a "common fund" created for the Class as a whole. Where "money paid to the attorneys is entirely

independent of money awarded to the class" (as is the case here), "the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006). "[C]ourts are authorized to award attorneys' fees and expenses where all parties have agreed to the amount, subject to court approval, particularly where the amount is in addition and separate from the defendant's settlement with the class." *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322 (W.D Tex. 2007) (citing *Local 56, United Food & Comm. Workers Union v. Campbell Soup Co.*, 954 F.Supp. 1000, 1005 (D.N.J. 1997)). This factor weighs in favor of a finding of reasonableness.

Second, the Parties reached an agreement as to Class Counsel's fees and costs only after they had reached an agreement-in-principle with regard to relief to the class. This factor, "indicate[s] a presumption of reasonableness in the request for an award." *DeHoyos*, 240 F.R.D. at 323. Specifically, the Parties negotiated and reached agreement regarding the essential terms for the Class Action Settlement. Only subsequently, under the direction of The Honorable Diane M. Welsh, did the Parties negotiate and agree upon the amount Defendant would pay for Class Counsel's fees and costs. Thus, the fact that the Parties waited to negotiate over Class Counsel's fees and costs until after reaching an agreement-in-principle on the terms for the Class Action Settlement further supports a finding of reasonableness.

Third, the positive response to the settlement itself from Class Members and the lack of any objections to the fee application disclosed in the Notices are further grounds for finding that the requested award is reasonable and appropriate. *See In re Veritas Software Corp. Securities Litigation*, 396 Fed. Appx. 815, n.2 (3d Cir. 2010) (finding fee request reasonable and noting that

other than the objection at issue, "not a single other member out of the hundreds of thousands of known class members in this litigation objected to the award of attorneys' fee").

Finally, a second look at the fee award with knowledge of both the hours worked and benefit to the Class, supports its reasonableness. Analogous case law indicates that a review of (1) the hours worked multiplied against a lodestar, and (2) a percentage of the fee against the potential benefit to the class, are appropriate as a cross-check. *See Hall*, 274 F.R.D. 154, 172 (E.D. Pa. 2011) (where unpaid benefits were returned from common fund to the Defendant, court cross-checked the requested fee against (1) a lodestar and (2) a "percentage of recovery" based on the "possible amount that could be paid out by Defendants").

Comparing the "possible amount that could be paid out by Defendants" under the Class Action Settlement, the requested fees, expenses and costs of $333,333.33 are reasonable. As discussed previously, the amounts available to class members ranges from $916,844.50 and $1,466,951.20 depending on the form of claim submitted. Therefore, the requested fees, costs and expenses of $333,333.33 represent between 22% and 36% of the benefits available. The requested fees are reasonable on this basis. *See Hall*, 274 F.R.D. at 173 (granting fees representing 33% of amount that could be paid out to class members); *In re General Motors*, 55 F.3d at 822 (discussing percentage of recovery fee awards ranging between 19% and 45%).

When reviewed on a lodestar basis, the fee is reasonable. Class Counsel's firm has performed over 440 hours of work on behalf of the class. Using standard hourly rates for the firm, the fees would be $178,993.75 and expenses would be $6,644.20 for a total of $185,637.95.

Courts typically apply a multiplier when testing a fee request with a lodestar analysis. *See In re Cendant Corporation Prides Litigation*, 243 F.3d 722, 742 (3d Cir. 2001) (discussing multipliers of between 1 and 4); *Hall*, 274 F.R.D. at 171, n. 106 (discussing multipliers approved

in other cases of 1.52 and 3). This case involved a significant amount of work, discovery, discovery disputes, complex legal questions and negotiations. In this case, the requested fee of $333,333.33 represents a lodestar of 1.79 of the hourly rates and expenses.

The requested fees, expenses and costs are reasonable and fair under the circumstances and Class Counsel is hereby awarded the amount of $333,333.33, in attorneys' fees and reimbursement of their costs and expenses, to be paid by Nationwide within thirty (30) days after the Effective Date.

20. Enhancement Award. With respect to enhancement awards for class plaintiffs, the Court has "broad discretion to award payment to class representatives for their efforts to benefit the class." *Hall*, 274 F.R.D. at 173. "Factors courts use to evaluate the appropriateness of awards include the financial, reputational and personal risks to the plaintiff; the degree to which the Plaintiff was involved in discovery and other litigation responsibilities; the length of the litigation; and the degree to which the named plaintiff benefitted (or not) as a class member." *Id.*

Hart was involved throughout the case. She attended the mediation in Philadelphia, consulted with Class Counsel and provided her opinion on the settlement before an agreement was reached. Furthermore, as part of the class action settlement, Hart agreed that her class representative award would be in full satisfaction of her claims and that she would not be entitled to receive anything further from the class action settlement. The agreed upon award to Hart does not come from amounts that are available for class members so that reducing the enhancement award to Hart only benefits the Defendant.

Given the amount of work that Hart performed in the case, and her agreement to waive any other award in the case, an enhancement award of $15,000 is appropriate. *See Hall*, 274

F.R.D. at 173-174 (providing $5,000 enhancement awards to each of the three class plaintiffs , totaling $15,000); *Crowhorn v. Nationwide Mut. Ins. Co.*, 836 A.2d 558, 563 (Del. Super. 2003) (approving award to class plaintiff in the amount of $24,000).

The Class Representative, Geneyne Hart, is hereby awarded $15,000 as compensation for her time and effort in connection with the litigation of this matter to be paid by Nationwide within thirty (30) days after the Effective Date and which payment will be separate from and will not diminish any Settlement Payments or other relief provided to Settlement Class Members.

21. No Other Payments. Paragraphs 19 and 20 of this Final Order and Judgment cover, without limitation, any and all claims for attorneys' fees and expenses, costs or disbursements incurred by Class Counsel or any other counsel representing the Class Representative and/or Settlement Class Members, or incurred by the Class Representative and/or the Settlement Class Members, in connection with or related in any manner to this action, the settlement of this action, the administration of such settlement, and/or the Released Claims except to the extent otherwise specified in this Final Order and Judgment and the Settlement Stipulation. Nationwide shall not be liable to the Class Representative, Class Counsel or the Settlement Class Members for any additional attorneys' fees or expenses.

22. Modification of Settlement Stipulation. The parties are hereby authorized, without needing further approval from the Court, to agree to and adopt such amendments, modifications and expansions of the Settlement Stipulation and all Exhibits thereto as: (1) shall be consistent in all material respects with the Final Order and Judgment; and (2) do not limit the rights of the Settlement Class Members.

23. No Admissions. Neither this Final Order and Judgment, nor the Settlement Stipulation (nor any other document referred to herein, nor any action taken to negotiate,

effectuate and implement the Settlement Stipulation) is, may be construed as, or may be used as an admission or concession by or against the Released Parties as to the validity of any claim or any actual or potential fault or liability. Additionally, neither the Settlement Stipulation nor any negotiations, actions, or proceedings related to it, shall be offered or received in evidence in any action or proceeding against any party hereto or any of the Released Parties in any court, administrative agency or other tribunal for any purpose whatsoever, except to enforce the provisions of this Final Order and Judgment and the Settlement Stipulation; provided, however, that this Final Order and Judgment and the Settlement Stipulation may be filed and used in any action, arbitration or other proceeding against or by the Released Parties to support a defense of res judicata, collateral estoppel, release, waiver, good-faith settlement, judgment bar or reduction, full faith and credit, or any other theory of claim preclusion, issue preclusion or similar defense or counterclaim.

24. No Representations Regarding Taxes. The Court finds that the Parties and their counsel have expressed no opinions concerning the tax consequences of the settlement to Settlement Class Members and have made no representations, warranties or other assurances regarding any such tax consequences. No opinions, representations, warranties, or other assurances shall be deemed to have been made by the Parties or their counsel with respect to any such tax consequences by virtue of the Settlement Stipulation or by effectuating the settlement, and the Parties and their counsel shall not be responsible or liable for any such tax consequences that may occur.

25. Dismissal of Lawsuit. This Lawsuit is hereby dismissed on the merits and with prejudice against the Class Representative and all other Settlement Class Members, without fees or costs to any party except as specifically provided in this Final Order and Judgment.

26. Discovery. No discovery with regard to the Settlement Stipulation or the settlement and its administration shall be permitted by any Settlement Class Members or other persons, other than as may be directed by this Court upon a proper showing seeking such discovery by motion properly filed with this Court and noticed and served in accordance with the governing rules of procedure.

27. Retention of Jurisdiction. The Court, without affecting the finality of this Final Order and Judgment, reserves exclusive and continuing jurisdiction over all matters relating to the administration, implementation, effectuation, enforcement, interpretation and execution of the Settlement Stipulation and this Final Order and Judgment and/or of the conduct or the policies and procedures described herein, with respect to all parties hereto and all beneficiaries hereof, including all Settlement Class Members.

Signed this 28th day of February, 2012, at the courthouse for the United States District Court for the District of Delaware.

United States District Judge

APPENDIX "A":

DEFINITIONS

Except where otherwise indicated, all capitalized terms used in the foregoing Final Order and Judgment and its Appendices shall have the meanings set forth below.

A. **"Class"** or **"Settlement Class"** has the meaning defined in paragraph 3 of this Final Order and Judgment.

B. **"Class Counsel"** means, the law firm Cross & Simon, LLC.

C. **"Class Member"** or **"Settlement Class Member"** means plaintiff Geneyne Hart and any member of the Settlement Class, and each of their respective heirs, trustees, executors, administrators, principals, beneficiaries, representatives, agents, and present and former officers, directors, employees, insureds, attorneys, contractors, predecessors, successors, parent companies, subsidiaries, divisions, affiliates, and assigns, and/or anyone claiming through them or acting or purporting to act for them or on their behalf.

D. **"Class Period"** means the period from September 1, 2004 through the Effective Date.

E. **"Class Representative"** means plaintiff Geneyne Hart, individually, and as representative of the Settlement Class; together with any other representative of the Settlement Class who is approved by the Parties and the Court.

F. **"Court"** means the United States District Court for the District of Delaware.

G. **"Covered Claims"** has the meaning defined in the Release attached as Appendix "B" to this Final Order and Judgment.

H. **"Effective Date"** shall be the date when each and all of the following conditions have occurred: (1) the Settlement Stipulation has been fully executed by the Class Representative, Class Counsel and counsel for Defendant; (2) the Preliminary Approval Order

has been entered by the Court certifying the Settlement Class, granting preliminary approval of the Settlement Stipulation, and approving the forms of the Mail Notice and Claim Forms, all as provided in the Settlement Stipulation; (3) the approved notice plan has been duly promulgated as ordered by the Court; (4) the Court has entered Final Order and Judgment finally approving the Settlement Stipulation; and (5) the Final Order and Judgment has become Final.

I. **"Final,"** means that: (1) the Final Order and Judgment is a final, appealable judgment; and (2) either (a) no appeal(s) have been taken as of the date on which all times to appeal therefrom have expired, or (b) if an appeal(s) or other review proceeding(s) have been commenced, such appeal(s) or other review(s) are finally concluded and no longer are subject to review by any court, whether by appeal, petitions for rehearing or reargument, petitions for rehearing en banc, petitions for writ of certiorari, or otherwise, and such appeal(s) or other review(s) have been finally resolved in such manner that affirms the Final Order and Judgment appealed from in all material respects.

J. **"Lawsuit"** means the above-captioned class action pending in the Court styled *Geneyne Hart v. Nationwide Mutual Fire Insurance Company*, United States District Court, District of Delaware, Cause No. 1:07-CV-00678-LPS.

K. **"Nationwide,"** for the purposes of this settlement, means and includes Nationwide Mutual Fire Insurance Company, Nationwide Assurance Company, Nationwide Mutual Insurance Company, Nationwide Property and Casualty Insurance Company, Nationwide Insurance Company of America, Nationwide Affinity Insurance Company of America, and Nationwide General Insurance Company, and each of their respective present and former officers, directors, employees, agents, contractors, attorneys, insurers, trustees, representatives,

predecessors, successors, parent companies, divisions, subsidiaries, affiliates, and assigns, and/or anyone acting or purporting to act for them or on their behalf.

L. **"No-Fault"** means no-fault personal injury protection coverage issued as provided in the Delaware Motorist Protection Act, including without limitation basic and additional personal injury protection coverage.

M. **"Plaintiff"** refers to Geneyne Hart, individually and on behalf of the Class of persons defined in this Stipulation.

N. **"Preliminary Approval Order"** means the Order Certifying Settlement Class and Preliminarily Approving Class Action Settlement dated November 10, 2011.

O. **"Provider Settlement Class Member"** means any Settlement Class Member that is a medical provider or other assignee as set forth in the Settlement Class definition.

P. **"Released Claims"** means Released Claims as defined in the Release attached as Appendix "B" to this Final Order and Judgment.

Q. **"Released Parties"** means Released Parties as defined in the Release attached as Appendix "B" to this Final Order and Judgment.

R. **"Settlement Stipulation"** means the Stipulation of Class Action Settlement, together with related exhibits, entered into by, between, and among Geneyne Hart, and Nationwide.

S. To the extent not defined above, any terms used herein shall have the meanings as set forth in the Settlement Stipulation.

APPENDIX B

RELEASE

Except where otherwise indicated, all capitalized terms in this Release shall have the meaning set forth in Appendix "A" to the Final Order and Judgment.

The Class Representative, and all other Settlement Class Members who have not been recognized as excluded from the Settlement Class, hereby expressly acknowledge and agree, on their own behalf and on behalf of each of their respective heirs, trustees, executors, administrators, principals, beneficiaries, representatives, agents, and present and former officers, directors, employees, insureds, attorneys, contractors, predecessors, successors, parent companies, subsidiaries, divisions, affiliates, and assigns, and/or anyone claiming through them or acting or purporting to act for them or on their behalf, that they release and discharge the Released Parties of and from all Released Claims and shall not now or hereafter initiate, maintain, or assert against any of the Released Parties, either directly or indirectly, derivatively, on their own behalf, on behalf of the Settlement Class, or on behalf of any other person or entity any right, liability, claim, or cause of action arising out of or relating to the Released Claims.

"Released Parties" means Nationwide, any person or entity covered or insured by Nationwide, and any third party that provided medical bill review or audit services to Nationwide.

"Released Claims" means and includes any and all rights, claims for relief or causes of action pursuant to any theory of recovery, including but not limited to claims based in contract or tort, common law or equity, and federal, state, or local law, statute, ordinance, rule or regulation, whether known or unknown, alleged or not alleged in the Lawsuit, suspected or unsuspected, contingent or matured, which Hart or any Settlement Class Member had, now has, or may in the future have with respect to any conduct, act, omissions, facts, matters, transactions, or oral or written statements or occurrences during the Class Period involving, based on, arising out of, related to, or in any way connected with, directly or indirectly, the reduction or denial of medical charges or expenses for Covered Claims reasons.

"Covered Claims" means and includes medical expense charges: (a) submitted under first-party medical expense coverage to Nationwide pursuant to Nationwide's Delaware automobile insurance policy No-Fault coverage (inclusive of such coverage purchased above statutory minimums); (b) that Nationwide submitted to computer pricing review during the period from September 1, 2004 through December 31, 2007; (c) where payment for such medical expense charges was received or tendered but in an amount less than the submitted medical charges based upon the pricing review of the charges; and (d) where the limits of the subject No-Fault coverage did not exhaust. Potential "Covered Claims" are generally identified on an explanation of benefits by reason code 41, although such potential reductions may not have been applied for a variety of reasons. **Expressly excluded** from Covered Claims are charges reduced or denied based upon: coverage denials, exhaustion of policy limits, application of a government

sanctioned fee schedule, independent medical examination, peer review, and insured co-pay, deductible or other contribution requirements under the law or policy terms.

Included as Released Claims, by example and without limitation, are claims for breach of contract, breach of the duty of good faith and fair dealing, negligence, bad faith, willful and wanton conduct, breach of statutory duties, actual or constructive fraud, intentional or negligent misrepresentations, fraudulent inducement, outrageous conduct, statutory and consumer fraud, breach of fiduciary duty or quasi-fiduciary duty, unfair or deceptive business or trade or insurance acts or practices, insurance premium overcharges or a refund or rebate of premiums, anticipatory repudiation, restitution, rescission, reformation, injunctive or declaratory relief, claims for compensatory, consequential, and punitive or exemplary damages, damages based on statutory violations, remedies, or penalties, damages in excess of actual damages, interest, attorneys' fees, damages for physical or bodily injury, or other injuries to person, property, or psyche, damages for emotional distress or mental anguish, lost wages, loss of income, attorneys' fees, interest, costs, penalties, and any other damages.

Provider Settlement Class Members, on their own behalf and on behalf of each of their respective heirs, trustees, executors, administrators, principals, beneficiaries, representatives, agents, and present and former officers, directors, employees, insureds, attorneys, contractors, predecessors, successors, parent companies, subsidiaries, divisions, affiliates, and assigns, and/or anyone claiming through them or acting or purporting to act for them or on their behalf, release and discharge each insured Settlement Class Member from whom the Provider Settlement Class Member received valid written assignments of the claims that fall within the scope of Released Claims pursuant to this Release, and agree not to initiate or to discharge or dismiss with prejudice, as appropriate, any balance billing, credit reporting, collection activities, liens, actions or other proceedings arising out of or relating to such Released Claims, whether or not the medical provider Settlement Class Member has been paid in full for its charges.

Nothing in this Release shall preclude any action to enforce the terms of the Settlement Agreement, including participation in any of the processes detailed herein.

APPENDIX "C":

OPT OUT LIST

Name (Last, First)	**Claim Number (truncated)**
Atkinson, Vernard	44219
Leo, Raymond	35736
Everett, Ronda	37303, 37310
Baines-Whaley, Tanja	41423