

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATALIE M. GRIDER, M.D. and	)	Civil Action
KUTZTOWN FAMILY MEDICINE, P.C.,	)	No. 2001-CV-05641
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
KEYSTONE HEALTH PLAN CENTRAL, INC.;	)	
HIGHMARK, INC.;	)	
JOHN S. BROUSE;	)	
CAPITAL BLUE CROSS;	)	
JAMES M. MEAD; and	)	
JOSEPH PFISTER,	)	
	)	
Defendants	)	

D E C R E E

NOW, this 19<sup>th</sup> day of January, 2007, upon consideration of the following motion:

Plaintiffs' Combined Emergency Motion for Preliminary Injunction and Supporting Memorandum of Law filed December 22, 2006; together with:

- (1) Opposition of Capital Blue Cross to Plaintiffs' Emergency Motion for Preliminary Injunction, which opposition was filed December 28, 2006;
- (2) Response of Highmark, Inc. in Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction, which response was filed December 28, 2006; and

(3) Plaintiffs' Corrected Reply to Defendants' Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction, which corrected reply was filed January 2, 2007;

after injunction hearing conducted January 3 and 4, 2007; and for the reasons expressed in the accompanying Adjudication, including Findings of Fact, Conclusions of Law, and Discussion,

IT IS ORDERED that plaintiffs' motion for an injunction is granted.

IT IS FURTHER ORDERED that pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the court enjoins defendants Keystone Health Plan Central, Inc.; Highmark, Inc.; John S. Brouse; Capital Blue Cross; James M. Mead; Joseph Pfister; their attorneys, including, but not limited to, Michael L. Martinez, Kimberly J. Krupka, Kathleen Taylor Sooy, Sandra A. Girifalco, Mary J. Hackett, Steven E. Siff and their respective law firms; and anyone acting in their behalf or in concert with them, from settling, or attempting to settle, the class and subclass claims in, or any part of, the within litigation, which claims the undersigned certified by Order and Opinion dated December 20, 2006, and filed December 21, 2006, and which are pending before this court, in any other forum without the express approval of this court.

IT IS FURTHER ORDERED that the aforesaid persons and firms are specifically enjoined from settling, or attempting to settle, the certified class and subclass claims in, or in any part of, the within matter in the multidistrict litigation currently pending before United States District Judge Federico A. Moreno in case number MDL No. 1334 in the United States District Court the Southern District of Florida, Miami Division, in the cases known as Love, et al. v. Blue Cross and Blue Shield Association, et al., case number 1:03-CV-21296; formerly known as Thomas, et al. v. Blue Cross and Blue Shield Association, et al., case number 1:03-CV-21296; Solomon, et al. v. Blue Cross and Blue Shield Association, et al., case number 1:03-CV-22935; and any other related case or cases.

BY THE COURT:

/s/ James Knoll Gardner  
James Knoll Gardner  
United States District Judge

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JOSEPH PFISTER,	)	
	)	
Defendants	)	

\* \* \*

APPEARANCES:

KENNETH A. JACOBSEN, ESQUIRE  
LOUIS C. BECHTLE, ESQUIRE  
FRANCIS J. FARINA, ESQUIRE  
JOSEPH A. O'KEEFE, ESQUIRE  
On behalf of Plaintiffs

MICHAEL L. MARTINEZ, ESQUIRE  
KIMBERLY J. KRUPKA, ESQUIRE  
On behalf of Defendants  
Keystone Health Plan Central, Inc. ;  
Capital Blue Cross; James M. Mead; and  
Joseph Pfister

SANDRA A. GIRIFALCO, ESQUIRE  
MARY J. HACKETT, ESQUIRE  
On behalf of Defendants  
Highmark, Inc. ; and John S. Brouse

\* \* \*

A D J U D I C A T I O N

JAMES KNOLL GARDNER,

United States District Judge

This matter is before the court on Plaintiffs' Combined Emergency Motion for Preliminary Injunction and Supporting Memorandum of Law filed December 22, 2006.<sup>1</sup> An injunction hearing was conducted by the undersigned on January 3 and 4, 2007. Plaintiffs presented the testimony of four witnesses<sup>2</sup> and 26 exhibits. Defendants presented no witnesses but presented several exhibits.<sup>3</sup>

At the conclusion of the hearing, I took the matter under advisement. Thereafter, I reviewed the hearing testimony and exhibits and researched the matter. For the following reasons I now grant plaintiffs' motion for an injunction.

Specifically, I enjoin the parties in the within Grider class action, or anyone acting on their behalf, from settling, or attempting to settle, the class and subclass claims which I

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<sup>1</sup> On December 28, 2006 the Opposition of Capital Blue Cross to Plaintiffs' Emergency Motion for Preliminary Injunction was filed. On the same date the Response of Highmark Inc. in Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction was filed. On January 2, 2007 Plaintiffs' Corrected Reply to Defendants' Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction was filed.

<sup>2</sup> Plaintiffs' witnesses were Attorney Francis J. Farina, co-counsel for plaintiffs; Attorney Mary Joan Hackett, co-counsel for defendants Highmark, Inc. and John S. Brouse; Dr. Kenneth R. Melani, the present Chief Executive Officer of defendant Highmark, Inc. and the former Medical Director of the company; and Attorney Kenneth A. Jacobsen, Lead Counsel for plaintiffs. After commencing the direct examination of Dr. Melani, plaintiffs withdrew him as a witness.

<sup>3</sup> Defendants Keystone Health Plan Central, Inc.; Capital Blue Cross; James M. Mead and Joseph Pfister presented eight exhibits. Defendants Highmark, Inc. and John S. Brouse presented three exhibits.

certified in Grider and which are pending before this court, in any other forum without my advance knowledge and approval.

I specifically enjoin the parties in Grider from settling the Grider certified class claims in the multidistrict litigation ("MDL") currently pending before United States District Judge Federico A. Moreno in the United States District Court for the Southern District of Florida, Miami Division, in the cases known as Love v. Blue Cross and Blue Shield Association, et al., Thomas v. Blue Cross and Blue Shield Association, et al., and Solomon v. Blue Cross and Blue Shield Association, et al.<sup>4</sup>

In so doing, I am not enjoining Judge Moreno from taking any action in his MDL cases in Florida. Nor am I enjoining any of the parties in the Florida litigation, including Highmark, Inc. and Capital Blue Cross, from settling any of the Florida plaintiffs' claims in the Florida litigation, which in my view are different than the class claims which I certified in this Pennsylvania litigation.

Rather I am enjoining the parties before me, including Capital and Highmark (which are also parties in the Florida litigation) and Keystone Health Plan Central, Inc. (which is not

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<sup>4</sup> The Thomas case was filed May 22, 2003 as case number 1:03-CV-21296 in the Southern District of Florida. It is now known as the Love case with the same caption number. The Love case was brought against 70 named defendants including defendants Highmark, Inc. and Capital Blue Cross, each of whom is also a defendant in the within Grider case.

The Solomon case was filed November 4, 2003 as case number 1:03-CV-22935 in the Southern District of Florida. Solomon is a managed care litigation case in which Highmark and Capital are also defendants.

a party in the Florida litigation) from settling out the claims

of the Pennsylvania litigation pending before me in another forum without my knowledge and consent.

By my Order and Opinion dated December 20, 2006 and filed December 21, 2006 I certified a class in this class action for the period from January 1, 1996 through and including October 5, 2001 on behalf of the following subclasses:

All medical service providers in connection with medical services rendered to patients insured by defendant Keystone Health Plan Central, Inc. who during the period January 1, 1996 through October 5, 2001:

(1) submitted claims for reimbursement on a fee-for-service basis for covered services which claims were denied or reduced through the application of automated edits in the claims processing software used by defendants to process those claims; and/or

(2) received less in capitation<sup>5</sup> payments than the provider was entitled through the use and application of automated systems to "shave" such payments in the manner alleged in plaintiffs' Amended Complaint filed October 6, 2003.

In that Order, I also certified ten factual issues for class treatment, including a common failure to pay clean claims within the applicable statutory time period and common proof of a conspiracy to defraud in violation of RICO.<sup>6</sup> I also certified three legal issues for class treatment, including whether

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<sup>5</sup> A "capitation" is "an annual fee paid a doctor or medical group for each patient enrolled in a health plan." Webster's Third New International Dictionary 332 (1968).

<sup>6</sup> The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968.

defendants committed mail or wire fraud, and whether they violated the Pennsylvania prompt payment statute.<sup>7</sup>

Finally, I certified eight common defenses for class treatment, including whether the class claims are barred by disclosures in defendants' standard forms, manuals and newsletters; by the applicable statute of limitations; or because of the absence of any material misrepresentations, misleading disclosures or omissions by defendants in their standard form contracts and consulting agreements.

In my class certification Order, I approved plaintiff Natalie M. Grider, M.D., both in her individual capacity and as President of plaintiff Kutztown Family Medicine, P.C., as the sole class representative. I also appointed plaintiffs' counsel, Kenneth A. Jacobsen, Esquire, Louis C. Bechtle, Esquire, Francis J. Farina, Esquire and Joseph A. O'Keefe, Esquire, each as class counsel.

#### FACTS

By Order and Opinion dated September 18, 2003 I granted in part, and denied in part, Defendants' Motion to Dismiss plaintiffs' Complaint. As noted above, by Order and Opinion dated December 20, 2006, I certified a class and two subclasses. In those two Opinions, I thoroughly discussed the facts,

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<sup>7</sup> Pennsylvania's Quality Health Care Accountability and Protection Act, Act of May 17, 1921, P.L. 682, No. 284, §§ 2101-2193, as amended, 40 P.S. §§ 991.2101 to 991.2193.

procedural history and contentions of the parties in this matter. I incorporate those Opinions, findings and discussions here.

Briefly, plaintiff Natalie M. Grider, M.D. is a family practitioner and President of plaintiff Kutztown Family Medicine, P.C. ("Kutztown"). Plaintiffs and their affiliates provide medical services to about 4,000 patients who are insured by defendant Keystone Health Plan Central, Inc. ("Keystone").

Keystone is a Health Maintenance Organization ("HMO"). Defendant Joseph Pfister is the former Chief Executive Officer ("CEO") of Keystone.

Defendant Highmark, Inc., formerly known as Pennsylvania Blue Shield and defendant Capital Blue Cross are insurance companies. Defendant John S. Brouse is the former CEO of Highmark, and defendant James M. Mead is the former CEO of Capital.

During the entire class period Highmark and Capital were each 50% owners of Keystone. In November 2003 Capital purchased Highmark's ownership interest in Keystone. Keystone is now a subsidiary of Capital.

Plaintiffs contend that during the proposed class period, defendants Capital and Highmark directed and controlled the operations of Keystone and received all of its profits. Plaintiffs allege that defendants and various non-parties together form what is styled as the "Managed Care Enterprise", an

entity which allegedly operates to defraud plaintiffs and the class through a variety of illegal methods. Defendants deny those allegations.

Plaintiffs' central assertion is that when contracting with plaintiffs, defendants intentionally misrepresented, and failed to disclose, internal HMO policies and practices that were designed to systematically reduce, deny, and delay reimbursement payments to plaintiffs and their business.

Plaintiffs entered into an HMO-physician agreement with defendant Keystone in December 1998 to provide medical services to the HMO members. In addition to a complex bonus system, the agreement provides for two basic methods by which plaintiffs are paid for rendering medical services: (1) capitation and (2) fee-for-service.

Specifically, plaintiffs allege that defendants (1) "shave" capitation payments by purposefully under-reporting the number of patients enrolled in plaintiffs' practice group; and (2) defraud plaintiffs of fees for medical services rendered by wrongfully manipulating CPT codes<sup>8</sup> to decrease the amount of reimbursements.

I certified for class treatment plaintiffs' claims of conspiracy to commit RICO violations and violations based upon

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<sup>8</sup> CPT codes refer to the standardized American Medical Association Current Procedural Terminology code set. The CPT codes were developed by the association to describe the medical services and procedures performed for the insured patient.

the RICO predicate acts of mail and wire fraud. I also certified for class treatment plaintiffs' claims of violations of the prompt-payment provision of Pennsylvania's Quality Health Care Accountability and Protection Act. I denied plaintiffs' request for class treatment of plaintiffs' breach of contract claims against defendant Keystone.

Based upon the testimony elicited at the injunction hearing, the exhibits introduced, the injunction motion and responses, the pleadings and record papers, and my credibility determinations, I make the following additional findings.

#### Findings of Fact

##### **Procedural History- Grider**

1. On October 5, 2001 plaintiffs Natalie M. Grider, M.D. and Kutztown Family Medicine, P.C. filed their class action Complaint in the Court of Common Pleas of Philadelphia County, Pennsylvania.

2. Defendants removed the Grider action from state court to the United States District Court for the Eastern District of Pennsylvania on November 7, 2001.

3. By Order and Opinion dated September 18, 2003 the undersigned granted in part and denied in part Defendants' Motion to Dismiss the Grider Complaint.

4. On October 6, 2003 plaintiffs filed an Amended Complaint in this court.

5. On April 26, 2005 the undersigned entered an Order granting in part and denying in part Defendants' Motion to Dismiss and/or Strike Certain Portions of the Amended Complaint.

6. On September 12, 2005 all Grider defendants answered plaintiffs' Amended Complaint and asserted affirmative defenses to plaintiffs' claims. Defendant Keystone Health Plan Central, Inc. also asserted a Counterclaim for recoupment or setoff.

7. The pleadings in the Grider case are closed.

8. On March 6-10, 2006 the undersigned conducted a class certification hearing in Grider.

9. By Order and Opinion dated December 20, 2006 the undersigned granted in part and denied in part Plaintiffs' Amended Motion for Class Certification and certified two class action subclasses concerning the processing of claims for reimbursement for medical services provided on a fee-for-service and on a capitation basis.

#### **Procedural History - Love and Solomon**

10. On May 22, 2003 the Thomas case, now known as Love, was filed in the United States District Court for the Southern District of Florida, Miami Division, and assigned to United States District Judge Federico A. Moreno. Love is a managed care litigation case brought by three individual otolaryngologists, one anesthesiologist and several medical

associations and medical societies in which Highmark, Inc. and Capital Blue Cross are defendants.

11. On November 4, 2003 the Solomon case was filed in the Southern District of Florida. Solomon is a managed care litigation case, in which Highmark and Capital are defendants, brought on behalf of a proposed class of health care providers and medical associations representing providers in the fields of orthotics, podiatry, chiropractic services and prosthetics.

12. The class proposed for class certification in Love includes a proposed class of medical providers, including Dr. Grider, who rendered medical services to patients insured with 70 Blue Cross/Blue Shield medical insurance affiliated companies, each of which is a defendant in the Florida litigation. Two of the seventy Florida defendant medical insurance companies are Highmark and Capital, who are also defendants in the Pennsylvania Grider class action.

13. The Blue Cross/Blue Shield Association with its member "Blues" is a party in the Florida MDL. The association is not named as a party in the Grider class action.

14. The most recent complaint filed in Love is Plaintiffs' Fifth Amended Class Action Complaint filed August 1, 2006.

15. Defendants' Joint Motion to Dismiss Plaintiffs' Corrected Fifth Amended Complaint and Supporting Memorandum of

Law was filed in Love on October 18, 2006.<sup>9</sup> The motion to dismiss has not been decided in the Florida litigation.

16. No answer has been filed to Plaintiffs' Fifth Amended Class Action Complaint in Love.

17. No class certification hearing has been scheduled or held in Love or Solomon.

18. No class has been certified in Love or Solomon.

19. Defendant Keystone in Grider is not a named defendant in the Florida litigation, nor has it been served with a summons or complaint pursuant to Federal Rule of Civil Procedure 4. However, in paragraph 186 of the Fifth Amended Complaint in Love, plaintiffs define Capital Blue Cross as including "its subsidiaries and health care plans".<sup>10</sup> In paragraph 189, plaintiffs define Highmark, Inc. as including "its subsidiaries and health care plans".

20. In paragraph 143 of the Solomon Second Amended Complaint, plaintiffs aver that "Capital Blue Cross, its subsidiaries and health care plans are collectively referred to as 'Capital Blue Cross of Pennsylvania' in this Complaint."<sup>11</sup> In

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<sup>9</sup> See Plaintiffs' Exhibit 3, admitted in the within preliminary injunction hearing.

<sup>10</sup> The Love Fifth Amended Class Action Complaint is Exhibit 1 to the Opposition of Capital Blue Cross to Plaintiffs' Emergency Motion for Preliminary Injunction.

<sup>11</sup> The Solomon Second Amended Complaint is Exhibit 2 to the Opposition of Capital Blue Cross to Plaintiffs' Emergency Motion for Preliminary Injunction.

paragraph 145 of the Solomon Second Amended Complaint, plaintiffs state that "Highmark, Inc., its subsidiaries and health care plans are collectively referred to as 'Highmark' in this Complaint."

### **Multidistrict Litigation**

21. The Love and Solomon cases are part of the coordinated and consolidated pretrial proceedings being conducted in Florida in these matters pursuant to 28 U.S.C. § 1407 concerning multidistrict litigation and pursuant to the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

22. On March 12, 2004, pursuant to 28 U.S.C. § 1407(c)(ii), defendants Highmark and Capital filed notice with the Judicial Panel on Multidistrict Litigation that the Grider action would be appropriate for transfer to the Florida MDL proceedings as a "tag-along action" to In re Managed Care Litigation, MDL No. 1334, pending before Judge Moreno, under Rule 7.5 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. Keystone did not join in Highmark and Capital's motion to transfer.

23. On March 17, 2004 the Motion of Defendants Capital Blue Cross and Highmark, Inc. for a Stay of All Proceedings in this Action was filed. On May 5, 2004 the undersigned entered an

Order, filed May 7, 2004, denying the motion for stay.<sup>12</sup> As noted in our Order, we concluded "that the fair and efficient adjudication of this matter is better served by continuing to proceed with this matter on its current schedule until such time as the MDL Panel makes its determination on defendants' request for transfer." We also concluded that "further delay of these proceedings may prejudice plaintiffs' rights to expeditious adjudication of their claims in the event that the matter is not transferred."

24. On August 10, 2004 Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation, entered an Order Denying Transfer of the Grider case to the Florida MDL.<sup>13</sup> Therefore, the Pennsylvania Grider action involving Keystone was not transferred to Florida.

25. Chairman Hodges' Order Denying Transfer states, in part, that

while *Grider* shares some questions of fact with actions in this litigation previously centralized in the Southern District of Florida, inclusion of *Grider* in MDL-1334 proceedings in the Southern District of Florida will not necessarily serve the convenience of the parties and witnesses and promote the just and efficient conduct of this

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<sup>12</sup> My Order denying the stay of these Grider proceedings is Plaintiffs' Exhibit P-H, attached as Exhibit H to Plaintiffs' Combined Emergency Motion for Preliminary Injunction and Supporting Memorandum of Law.

<sup>13</sup> Chairman Hodges' Order Denying Transfer is Plaintiffs' Exhibit P-J, attached as Exhibit J to Plaintiffs' Combined Emergency Motion for Preliminary Injunction and Supporting Memorandum of Law. It is also Exhibit 3 to the Opposition of Capital Blue Cross to Plaintiffs' Emergency Motion for Preliminary Injunction.

litigation. We point out that *Grider* is nearly three years old with a discovery cutoff date of less than five months away. Moreover, alternatives to Section 1407 transfer exist that can minimize whatever possibilities there might be of duplicative discovery, inconsistent pretrial rulings, or both.

(Citations omitted.) (Emphasis in original.)

26. There are some similarities in the types of general allegations advanced in each jurisdiction. Both the Florida and Pennsylvania plaintiffs aver that their respective medical insurer defendants are guilty of improper bundling and downcoding of claims, conspiracy to commit RICO violations, and intentionally delaying payment of claims.

27. Pursuant to the multidistrict litigation statute, 28 U.S.C. § 1407(e), no proceeding for review of any order of the MDL panel is permitted except by extraordinary writ pursuant to the provisions of 28 U.S.C. § 1651. Petitions for an extraordinary writ to review an order of the panel denying transfer shall be filed only in the Court of Appeals having jurisdiction over the district in which a transfer hearing has been held.

### **Comparison of Grider and Love**

#### Parties

28. Although Dr. Grider is a potential class member in the Florida multidistrict litigation, she is such as a Highmark

Blue Cross/Blue Shield affiliated provider, not because she is a Keystone HMO provider.

29. Dr. Grider is the sole class representative in the Pennsylvania litigation. She is a class member as a Keystone HMO provider, not because she is a Highmark Blue Cross/Blue Shield indemnity provider.

30. Therefore, Dr. Grider's standing as a potential class member in the Florida case is independent of her standing as the class representative in the Pennsylvania case, and vice versa.

31. The Pennsylvania Grider case is entirely about Keystone (and its corporate owners) processing HMO claims. The Grider case concerns an alleged conspiracy with Highmark and Capital through their jointly-owned HMO (Keystone), and only their jointly-owned HMO, to deny proper payments to doctors.

32. The Florida MDL case is about 70 Blue Cross/Blue Shield affiliated companies processing their indemnity claims.

33. Both Highmark and Capital are named as defendants in Grider by virtue of their co-ownership of Keystone during the Grider class period (1996-2001). However, the Grider plaintiffs do not allege any direct claims against either Highmark or Capital involving Highmark's or Capital's own respective claims-processing systems or operations, as alleged by plaintiffs in the Florida MDL litigation. Rather, the Grider class claims are

solely for Keystone's claims-processing activities, and the Grider class is limited to Keystone providers in Pennsylvania.

#### Class Action Claims

34. The Pennsylvania class action has two certified subclasses of medical providers: those who are reimbursed on a fee-for-service basis, and those who are reimbursed on a capitation basis.

35. The Florida MDL case has only fee-for-service reimbursement claims. There are no capitation claims in the Florida litigation. The Love plaintiffs have dropped all capitation claims.

#### Claims Processing Systems

36. The claims processing systems in the two cases are different. In Grider, defendant Keystone uses Tingley System software operated by a company known as Synertech<sup>14</sup> to process claims. Neither the Tingley System, nor Synertech, are mentioned in Love. In Love, the MDL defendants use the McKesson and other systems. McKesson is a company that provides some health insurance companies with software for processing health insurance claims. Keystone did not use McKesson software.

37. Highmark uses a system known as OSCAR, but not in respect to Keystone. OSCAR is a component of those systems in

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<sup>14</sup> During the class period, Synertech, Inc. was owned by Highmark.

central Pennsylvania which process claims for Highmark Network and Highmark Blue Shield submitted by Highmark Blue Shield providers.

38. A company known as the National Account Service Company, LLC ("NASCO") was engaged as a claim processing entity exclusively for Blue Cross/Blue Shield member plans in the Florida Love and Solomon cases.<sup>15</sup> NASCO is not named in any capacity in the Pennsylvania Grider Complaint.

39. There is an allegation in Love that the Blue Cross/Blue Shield Association facilitates claims processing among co-conspirators through the Blue Card Program System. There is no such allegation in Grider.

40. There is an allegation in Love that the Blue Cross/Blue Shield Association acts as the "hub" of defendants' conspiracies. There is no such claim in Grider.

#### Class Periods

41. Although there is some overlap, the dates included in the class periods are different. The Pennsylvania Grider class action is certified for the class period from January 1, 1996 through October 5, 2001. The Florida Love potential class seeks certification for a class period from May 22, 1999 until the date of certification. Therefore, there are class claims for

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<sup>15</sup> See paragraphs 42-44 of Plaintiffs' Fifth Amended Class Action Complaint in Love and paragraph 40 of the Second Amended Complaint-Class Action in Solomon.

a more-than-three-year period from January 1, 1996 to May 21, 1999 in Pennsylvania, but not in Florida. And there are class claims in Florida for the more-than-five-year period from October 6, 2001 until some future date of potential class certification, but not in Pennsylvania.

#### Scope of Claims

42. The claims in the two cases are different in scope. The Florida MDL case is concerned with a large national conspiracy. The Pennsylvania case is concerned with a smaller more local conspiracy confined to the central Pennsylvania region.

#### Highmark

43. Highmark, Inc. is the largest health care company in Pennsylvania by membership. Keystone Healthcare Plan West is a subsidiary of Highmark Blue Cross/Blue Shield. It serves 21 counties in central Pennsylvania. Highmark has 42,000 providers. It also contracts with hospitals, medical companies and home care companies. Approximately 40,000 doctors have contracts with Highmark in all the networks.

44. Highmark is a parent company with a number of subsidiaries. Each does business differently. Highmark Blue Cross/Blue Shield of Western Pennsylvania uses six or seven

systems to process claims. However, Highmark does not use Tingley or Synertech systems.

45. Since November 2003 Highmark has had no relationship with Keystone.

#### Pleadings

46. In paragraph 6B of Plaintiffs' Proposed Conclusions of Law in Support of their Amended Motion for Class Certification filed in Grider on February 28, 2006 (Docket item 475) plaintiffs averred: "A class action is the 'superior' method of adjudicating substantially similar claims on behalf of thousands of class members concerning the same controversy which would provide relief to the Class...." In proposed Finding of Fact 61, plaintiffs asserted that "without a class action the doors to the courthouse would be effectively closed to these [Pennsylvania] plaintiffs". The Grider defendants never disputed these assertions.

47. In discovery request 59 of Plaintiffs' Second Request for Production of Documents the Grider plaintiffs requested "[a]ll documents within your possession...regarding the MDL currently underway in Florida...including all memoranda...." In their unfiled response dated March 3, 2004, defendants Capital Blue Cross and James M. Mead argued that "the MDL currently underway in Florida is a separate legal action". Therefore, they asserted that plaintiffs' request for Florida MDL documents

"seeks documents that are not relevant to the claims or defenses of any party" to the Pennsylvania litigation and "is not reasonably calculated to lead to the discovery of admissible evidence".<sup>16</sup> In their unfiled response dated March 3, 2004, defendants Highmark, Inc. and James M. Mead similarly asserted that plaintiffs' request for documents from the Florida MDL "seeks irrelevant information not reasonably likely to lead to the discovery of admissible information...."<sup>17</sup>

#### **Grider Settlement**

48. From time to time there have been settlement discussions between the parties, or some of the parties, in Grider. The Grider plaintiffs have communicated to defendant Highmark a number of monetary settlement demands.

49. Several times the Grider plaintiffs have bid against themselves without responses from Highmark. On at least one occasion Highmark responded to a monetary demand from the Grider plaintiffs. Recently, Highmark has received a monetary settlement demand from the Grider plaintiffs to which Highmark has not responded.

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<sup>16</sup> See Plaintiffs' Exhibit 9, Excerpts from the Defendant Capital Blue Cross and James M. Mead Response to Plaintiffs Second Request for Production of Documents Directed to All Defendants dated March 3, 2004.

<sup>17</sup> See Plaintiffs' Exhibit 10, Excerpt from Defendant Highmark, Inc. and John S. Brouse Response to Plaintiffs' Second Request for Production of Documents dated March 3, 2004.

50. Previously, there were some settlement discussions between counsel for the Grider plaintiffs and counsel for defendants Keystone, Capital, Pfister and Mead. However, plaintiffs have not had any settlement discussions with those defendants for months.

51. In September 2006 there were personal settlement discussions between Lead Counsel for the Grider plaintiffs, Kenneth A. Jacobsen, Esquire, and Co-counsel for defendants Highmark and Brouse, Mary J. Hackett, Esquire. Referring to the litigation in both states, Attorney Hackett, who is also Co-counsel for Highmark in the Florida MDL litigation, said, "We only want to pay once."

#### **Global Settlement**

52. In the September 2006 discussions between Attorneys Jacobsen and Hackett, they discussed whether all of the claims against Highmark in both the Pennsylvania and Florida cases could be settled. Attorney Jacobsen expressed optimism that plaintiffs' counsel in Love would accept a settlement that Attorney Jacobsen might negotiate in Grider.

53. Attorney Jacobsen tried to be creative to see if a deal could be structured to settle the claims against the Keystone-Grider providers, the Highmark providers, and the Capital providers, in a package deal covering both jurisdictions.

54. In Attorney Jacobsen's letters to the Pennsylvania defense counsel concerning a global settlement, he said that everything is going to be above board, with full knowledge and agreement of plaintiffs' counsel in Love and Judge Moreno.

55. Attorney Jacobsen's view was that Capital and Highmark were only two of seventy defendants in Florida. He felt that because counsel for Highmark was intrigued by the idea that Highmark would only need to pay once by settling globally, that it might be possible to settle the Love claims against Capital and Highmark in Florida together with the Grider claims against Keystone, Capital and Highmark in Pennsylvania.

56. After their September 2006 discussions, Attorney Hackett sent an e-mail to Attorney Jacobsen advising him that the person at Highmark to whom she needed to speak about settlement was out of the country and that she would get back to Attorney Jacobsen.

57. Attorney Jacobsen approached Attorney Hackett's law partner on November 15, 2006 and inquired whether the partner had provided a response to Attorney Jacobsen's settlement proposal. In response Attorney Hackett attempted to reach Attorney Jacobsen by telephone right before Thanksgiving and again on Monday, November 27, 2006.

### Love Settlement

58. Highmark's Co-counsel in the Pennsylvania Grider litigation, Mary J. Hackett, Esquire, is also Co-counsel for Highmark in the Florida litigation.

59. Oral argument on class certification in Florida was scheduled for December 2005. The case was stayed because the parties were undertaking settlement discussions.

60. Settlement discussions have been going on for years in Love. They have been stalled at various times.

61. On August 8, 2006 Judge Moreno entered an Order of Referral to Mediation in Thomas (Love)<sup>18</sup> and an identical Order in Solomon<sup>19</sup>. Both Orders were filed August 19, 2006. Each Order appointed William Charles Hearon, Esquire, of Miami, Florida as Mediator.

62. Each mediation referral Order contained a confidentiality provision (paragraph (5)) which directed: "All discussions, representations and statements made at the mediation conference shall be confidential and privileged."

63. On August 24, 2006 Judge Moreno entered and filed an Order Extending Mediation Deadline in Thomas (Love)<sup>20</sup> and an

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<sup>18</sup> See Defendant Keystone's Exhibit 6.

<sup>19</sup> See Defendant Keystone's Exhibit 7.

<sup>20</sup> See Defendant Keystone's Exhibit 4.

identical Order in Solomon<sup>21</sup>. Each Order extended the parties' deadline to complete mediation from September 15, 2006 to November 17, 2006.

64. Each Order Extending Mediation Deadline incorporated a separate Order Vacating Mediator's Appointment and Appointing Edward B. Davis as Mediator (also entered by Judge Moreno on August 24, 2006). Settlement Mediator Davis of Miami, Florida, is the former Chief Judge of the United States District Court for the Southern District of Florida.

65. Each Order Extending Mediation Deadline contained the identical confidentiality provision contained in the original August 8, 2006 Orders of Referral to Mediation.

66. On November 21, 2006 Mediator Davis filed a Mediation Status Report in Thomas (Love)<sup>22</sup>. The report stated in its entirety:

After numerous prior mediation sessions, the negotiating teams for the parties met on November 17, 2006 and advised the Mediator that a substantial majority of all Plaintiffs and Defendants reached an agreement on all terms of the proposed settlement, except for some individual items and attorneys' fees, which will be negotiated separately.

Over the next several weeks, the various Boards of Directors of the Defendants are expected to approve the settlement, along with the various Plaintiff groups. The parties anticipate filing a Motion for Preliminary Approval of Settlement no

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<sup>21</sup> See Defendant Keystone's Exhibit 5.

<sup>22</sup> See Plaintiffs' Exhibit A.

later than December 29, 2006. It is anticipated that non-settling parties will continue the mediation process up to December 29, 2006 if the Court so approves.

67. On January 9, 2007 Mediator Davis filed a Supplemental Mediation Status Report in Thomas (Love)<sup>23</sup>. The supplemental report stated in its entirety:

By Mediation Status Report dated November 21, 2006, the Mediator informed this Court that the parties anticipated filing a motion for preliminary approval of settlement by December 29, 2006 and would continue mediation until that time. Due to the necessity of obtaining approval from the various settling Defendants' boards of directors, the Plaintiffs, and numerous state medical societies, and the fact that the intervening holidays made many of these people or entities unavailable for meeting, the parties have agreed to extend the mediation until January 31, 2007.

#### **Settlement Conference**

68. On November 29, 2006 Highmark's Co-counsel, Attorney Hackett, approached Grider plaintiffs' Lead Counsel, Attorney Jacobsen, in a courtroom in the Edward N. Cahn United States Courthouse in Allentown, Pennsylvania, where Special Discovery Master Blume was conducting a discovery conference with Grider counsel. Attorney Hackett asked Attorney Jacobsen if it would be possible to continue their settlement discussions that afternoon. Attorney Jacobsen agreed.

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<sup>23</sup> See Exhibit 1 to Highmark Inc.'s Response to Plaintiffs' Post-Hearing Notice of New Developments filed in Grider January 9, 2007.

69. The settlement discussions were held in Courtroom 4A of the Allentown federal courthouse after conclusion of the discovery conference. Present for the discussions were Sandra A. Girifalco, Esquire, Lead Counsel for defendants Highmark, Inc. and John S. Brouse in the Pennsylvania litigation; Mary J. Hackett, Esquire, Co-counsel for defendants Highmark and Brouse in Pennsylvania and Co-counsel for Highmark in Florida; Kenneth A. Jacobsen, Esquire, Lead Counsel for the Grider plaintiffs in Pennsylvania; and Francis J. Farina, Esquire, Co-counsel for the Pennsylvania Grider plaintiffs. No counsel for defendants Keystone Health Plan Central, Inc.; Joseph Pfister; Capital Blue Cross; or James M. Mead was present. Special Discovery Master Karolyn Vreeland Blume was not present for these settlement discussions either.

70. At the beginning of the November 29, 2006 settlement talks, Attorney Hackett indicated that she had an offer to make conditioned on certain events and approvals by Highmark. She asked Attorney Jacobsen if he were still continuing to monitor the docket in the Florida litigation, and if he had seen the report of the Florida Mediator. Attorney Jacobsen responded that he was not continuing to monitor the docket and had not seen the Mediator's report.

71. At the November 29, 2006 settlement meeting, Attorney Hackett said that Mediator Davis had filed a report in

which he indicated that a majority of the defendants in Love were close to settlement. She said that Highmark had determined that it was going to settle in the Florida case and had agreed to join in on the settlement in the Florida multidistrict litigation. Attorney Hackett said that, not only was she entering into settlement in Florida, but also that the Florida settlement would dispose of and eliminate all of the Grider plaintiffs' claims in Pennsylvania as well.

72. Attorney Hackett said that the Florida settlement would settle the claims of all subsidiaries of the Florida defendants, including Keystone. When Attorney Jacobsen asked Attorney Hackett what were the terms of the Love settlement and what, if anything, the Keystone class would receive, she said that she did not know what the terms of the Love settlement were, and that she had no information what, if anything, the Keystone class would receive.

73. During the November 29, 2006 settlement discussions, Grider plaintiffs' Lead Counsel, Attorney Jacobsen, and Co-counsel, Attorney Farina, said that they would object to settlement of the Pennsylvania Keystone claims through a settlement of the Florida litigation. They asserted that the Keystone class claims are not in the Florida litigation. They stated that the Grider plaintiffs are not at the table at the

multidistrict litigation in Florida because their claims are not there.

74. Attorneys Jacobsen and Farina also maintained that the Grider plaintiffs' formal claims in the Pennsylvania litigation against defendants and defense counsel for sanctions for discovery violations are not before the Florida court.

75. At the November 29, 2006 settlement meeting, Attorney Jacobsen said that he was going to ask Judge Moreno to stop settlement of the Pennsylvania claims in the Florida litigation and appeal to the United States Court of Appeals for the Eleventh Circuit, if necessary. Attorney Hackett responded that she "would buy a ticket to watch the proceedings in Florida if plaintiffs asked to block the Florida settlement." She said that she "would like to watch the show."

76. Attorney Jacobsen indicated to Attorney Hackett in the November 29, 2006 meeting that defendant Highmark's settlement offer was not meaningful and was not worth his talking further.

#### **Status of Florida Settlement**

77. Because of the confidentiality Order in the Florida mediation, and because of Attorney Hackett's assertions that she lacks information, the Grider plaintiffs do not know the details of the settlement terms being discussed in the Love litigation between the Love plaintiffs and Highmark.

78. Joe R. Whatley, Jr., Esquire, is one plaintiffs' Lead Counsel in the Love litigation in Florida. After the November 29, 2006 Grider settlement discussions, Attorney Whatley told Attorney Jacobsen that he was surprised that there had been a breach of the confidentiality of the Florida MDL settlement negotiations. Attorney Whatley stated that "now that the cat is out of the bag," Attorney Whatley felt comfortable advising Attorney Jacobsen procedurally where the Florida settlement stands. However, Attorney Whatley never told Attorney Jacobsen any of the substance of the Florida negotiations.

79. Attorney Whatley told Attorney Jacobsen that Highmark agreed to join in the settlement in Florida. He said that in the Florida negotiations Highmark was insisting on a release that would release the subsidiaries of the Florida defendants. Highmark asserted in the Florida negotiations that Keystone would be released by a Florida settlement because Keystone had been a Highmark subsidiary years ago. Attorney Whatley further advised Attorney Jacobsen that Capital Blue Cross was now negotiating in Florida with the Florida plaintiffs regarding settlement of the Love case.

80. At no time prior to the January 3, 2007 injunction hearing in the within matter did counsel for Highmark advise the undersigned Grider trial judge that Highmark was negotiating a settlement of the Love and Solomon class claims in Florida, or

that in Highmark's view such a Florida settlement would have the effect of terminating the Grider litigation in Pennsylvania.

81. In the within injunction hearing, Co-counsel for Highmark, Mary J. Hackett, Esquire, both testified and argued that Highmark has not reached a settlement agreement in Love; that the Highmark settlement reached an impasse in Florida in November 2006; that Highmark was in talks in Florida but have not reached an agreement; that there is no imminent agreement by Highmark to settle Love; that Highmark has not moved for preliminary approval of any settlement in Florida; that she told Attorney Jacobsen on November 29, 2006 that she did not know what the terms of the settlement were in Love; and that there is no basis for a threat to the Grider litigation here in Pennsylvania.

82. On January 3, 2007, Steven E. Siff, Esquire (who describes himself as "Liaison Counsel" for Highmark in the Florida litigation) filed in the United States District Court for the Southern District of Florida, Miami Division, in Love, a Notice by Highmark Inc. of Motion Affecting Mediation.<sup>24</sup> In that Notice, Liaison Counsel for Highmark stated that "Highmark is part of the 'substantial majority' of Defendants identified by

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<sup>24</sup> The Love Notice has been made part of the within record as Court Exhibit A.

Judge Edward Davis in his report to this Court [the Southern District of Florida] submitted on November 21, 2006.”<sup>25</sup>

83. As noted in Finding of Fact 66, above, on November 21, 2006, Mediator Davis filed a Mediation Status Report in Love stating, in part, that “the negotiating teams for the parties met on November 17, 2006 and advised the Mediator that a *substantial majority* of all Plaintiffs and Defendants reached an agreement on all terms of the proposed settlement, except for some individual items and attorneys’ fees, which will be negotiated separately.” (Emphasis added.)

84. In Defendants’ Brief in Support of Claims of Attorney-Client Privilege and Work Product Protection for Testimony from the Chief Executive Officer of Highmark Inc. filed January 9, 2007, co-counsel for Highmark stated four times that there are ongoing settlement mediation discussions in Florida.

85. On December 9, 2006 Attorney Jacobsen sent an e-mail to Edward Davis, the Settlement Mediator in the Florida MDL.<sup>26</sup> The communication notified the Mediator about the Grider

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<sup>25</sup> On January 3, 2007, Attorney Siff also filed in the Southern District of Florida, Miami Division, in Solomon, a second Notice by Highmark Inc. of Motion Affecting Mediation. The Solomon Notice is identical to the Love Notice, except that the sentence in the Love Notice, quoted above, about Highmark being part of the “substantial majority”, does not appear in the Solomon Notice. The Solomon Notice has been made part of the within record as Court Exhibit B.

<sup>26</sup> See Plaintiffs’ Exhibit 19, admitted in the within preliminary injunction hearing.

case and outlined some of the differences between the Grider litigation and the Florida MDL litigation. The e-mail also stated:

On November 29, 2006, after one of our regular meetings with the Special [Discovery] Master, counsel for Highmark in our case informed me privately that Highmark had reached an agreement in principle to settle the Florida MDL litigation which, by virtue of an expansion of the class definition and/or scope of release, would purport to settle the claims against KHPC [Keystone Health Plan Central, Inc.] on behalf of KHPC providers in our *Grider* action which have never [been] part of the Florida MDL proceedings.

86. The December 9, 2006 e-mail from Attorney Jacobsen to Mediator Davis also included the views of the Grider plaintiffs on the appropriateness of settlement in each forum as follows:

*Grider* does not involve any claims processing activities, practices or operations of either Highmark or Capital. Rather...the *Grider* class consists *only of KHPC providers* and the case involves *only KHPC's claims processing activities*. In light of this, we obviously would have no objection to any settlement in the Florida MDL litigation which would resolve claims on behalf of Highmark and Capital providers for the claims processing activities of those companies—which were and are the only claims alleged and litigated there. We would, however, have significant problems and concerns with any settlement which purports to sweep up claims against KHPC which were never part of the *Love/Thomas* case, which the MDL Panel itself refused to transfer there, and which have been separately and independently

litigated before Judge Gardner in the Eastern District of Pennsylvania for more than five years.<sup>27</sup>

(Emphasis in original.)

87. In the December 9, 2006 e-mail, Attorney Jacobsen offered to discuss the e-mail or any of the issues raised in it with Mediator Davis, either by telephone or in person in Florida. Judge Davis did not respond to the e-mail.<sup>28</sup>

### Summary

88. In the Notice by Highmark, Inc. of Motion Affecting Mediation filed by Attorney Siff on January 3, 2007 in the Southern District of Florida in both Love and Solomon, Highmark makes the following statements:

(A) The Grider case "asserts claims overlapping with those asserted against Highmark in the Love litigation.";

(B) "On Thursday, December 21, 2006, Judge Gardner certified a class of Keystone Central providers. These providers are within the class as to which Plaintiffs in Love and Solomon

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<sup>27</sup> As noted above, this action was removed from the Court of Common Pleas of Philadelphia County to the United States District Court for the Eastern District of Pennsylvania on November 7, 2001. The case was originally assigned to my colleague United States District Judge Anita B. Brody. The case was transferred from the docket of District Judge Brody to the docket of Senior District Judge Thomas N. O'Neill, Jr. on November 16, 2001 and from the docket of Senior Judge O'Neill to my docket on December 19, 2002.

<sup>28</sup> At the within injunction hearing, no one offered any evidence, or otherwise made part of the record, the monetary amounts, or other details, of any settlement demands made by plaintiffs, or offers made by defendants, in either the Pennsylvania or Florida settlement negotiations.

have asserted claims and which have been the subject of negotiations with Plaintiffs in Love.”; and

(C) “This injunction, if granted, would likely have the effect of preventing a settlement of the claims asserted against Highmark in the Love and Solomon cases.”

89. Concerning Highmark’s statement in the Notice quoted in Finding of Fact 88(A), there is “overlapping” between the Grider and Love claims only in the broadest sense that both cases are based upon class action Complaints brought by medical service providers against their patients’ medical insurance companies involving claims processing on a fee-for-service basis and alleging improper bundling and downcoding of claims, conspiracy to commit RICO violations, and intentionally delaying payment of claims. In the broadest sense, the cases also each involve the computerized automated processing of claims by physicians and other medical service providers for payment.

90. Concerning Highmark’s statement in the Notice quoted in Finding of Fact 88(B), for the reasons expressed in the above Findings of Fact, Highmark’s representation to the Florida court that the undersigned certified a class of Keystone providers who are “within the class as to which Plaintiffs in Love and Solomon have asserted claims” is overly simplistic and untrue.

91. Concerning Highmark's statement in the Notice quoted in Finding of Fact 88(C), based upon the foregoing Findings of Fact and for the reasons expressed above, it is incorrect that "This injunction, if granted, would likely have the effect of preventing a settlement of the claims asserted against Highmark in the Love and Solomon cases." On the contrary, enjoining the Grider defendants from attempting to settle the Keystone claims in Florida, where they are not pending, will have no effect upon the Florida court's ability to settle the Love and Solomon claims which are properly there and which do not involve the Pennsylvania Grider claims against Keystone.

92. For the foregoing reasons, the statements, assertions and conclusions in Attorney Jacobsen's December 9, 2006 e-mail to Settlement Mediator Davis in the Florida multidistrict litigation on behalf of the Grider plaintiffs are more accurate and persuasive than are the statements, assertions and conclusions quoted in Finding of Fact 88, above, as contained in the Notice by Highmark, Inc. of Motion Affecting Mediation filed by Attorney Siff on January 3, 2007 in the Southern District of Florida.

## CONCLUSIONS OF LAW

1. Under the circumstances of this case, this court has the power and authority under the All Writs Act to enjoin the Grider defendants from settling the Grider class action claims in any other jurisdiction, including Florida, without the approval of this court.

2. Under the circumstances of this case, to deny the Grider plaintiffs' request for an injunction would be an abuse of discretion.

3. Settlement of the Grider class action in another forum without the approval of the Grider Class Representative, the Grider Class Counsel and this court would violate due process and fundamental concepts of fairness.

4. Federal district courts have the power, both under common law and the All Writs Act, to enjoin parties before it from proceeding in another federal court in a controversy involving the same issues.

5. In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it.

6. No other trial court has jurisdiction to settle, or otherwise dispose of, any claim in the Grider class action without the approval of this court.

7. Settlement of any aspect of the Florida managed care multidistrict litigation cases, including Love, Thomas and

Solomon will not operate as a matter of law to settle the Grider class action claims.

8. The Florida managed care multidistrict litigation court has the power to decide whether it has jurisdiction over, and to determine the nature and extent of, any claims before it.

9. This court does not have jurisdiction over the parties to the Florida multidistrict litigation.

10. This court has jurisdiction over the parties before it in the Grider class action litigation.

11. An injunction enjoining the Grider class action defendants from attempting to settle the Grider class claims against Keystone Health Plan Central, Inc. in the Florida multidistrict litigation court, will have no effect upon the Florida court's ability to settle the Love and Solomon prospective class action claims.

12. Plaintiff Natalie M. Grider, M.D., is a member of a different class in Florida than the class for which she is the sole class representative in Pennsylvania.

13. The Grider class is not a subset of any proposed class in the Florida litigation.

14. The Grider class does not encompass the prospective Florida class in any significant fashion.

15. The class of medical providers with patients insured by Keystone Health Plan Central, Inc. which this court

certified, are not within the class of plaintiffs who have asserted claims in the Love, Thomas and Solomon managed care cases in Florida.

16. Under the circumstances of this case, it is appropriate to grant a final injunction, rather than a preliminary injunction or a temporary restraining order.

17. Under the circumstances of this case, the Grider plaintiffs are not required to satisfy the requirements of Federal Rule of Civil Procedure 65 concerning the granting of injunctions.

18. Nevertheless, the Grider plaintiffs satisfy all of the requirements for the issuance of a Rule 65 injunction, including establishing a likelihood of success on the merits, irreparable harm, absence of greater harm to the nonmoving party, and that granting the relief will be in the public interest.

## DISCUSSION

### **Summary of Decision**

Based upon the foregoing Findings of Fact and Conclusions of Law, and for the reasons articulated below, I grant plaintiffs' emergency motion for an injunction. Under the powers conferred on me by the All Writs Act, I enjoin the parties in the within Grider class action from settling or attempting to settle the class claims which I certified in Grider and which are

pending in this court, in any other forum without my knowledge and consent.

Because the Judicial Panel on Multidistrict Litigation entered an Order Denying Transfer of the Grider case to the Florida Multidistrict Litigation, the Grider class claims are not before the Florida court. Therefore, the Florida district court does not have jurisdiction to settle or otherwise dispose of any claims in Grider at this time.

Because Grider is factually, procedurally and substantively different from the Florida MDL, a settlement of any aspect of the Florida case will not result in the automatic settlement of Grider. The Grider class is not a subset of any proposed class in the Florida litigation. The Grider class does not encompass the projected Florida class in any significant fashion.

Plaintiff Natalie M. Grider, M.D., is a member of a different class in Florida than the class for which she is the sole Class Representative in Pennsylvania. Not only is this Pennsylvania district court the first forum in which the Grider class claims have been filed, it is the only forum in which those claims have been filed.

There is nothing per se inappropriate for the parties in two different lawsuits in two different jurisdictions to attempt to achieve a global settlement of both cases in one of

the courts. Indeed that is what Grider Lead Counsel Kenneth A. Jacobsen was proposing to do in the Pennsylvania forum.

However, all of that presupposes that all parties to both suits are present and represented at the negotiating table and fully participating in the settlement discussions and mediation proceedings, and fully informed. That also presupposes that all parties approve the settlement before it becomes effective. And that presupposes that the judge presiding over the case being settled in another forum has advance notice of, and has consented to, the settlement. None of those prerequisites have occurred in this case.

On the contrary, if matters proceed along the path desired by defendant Highmark, Inc., Highmark will shortly settle all claims against it in the Love and Solomon cases in Florida (which it has every right to do). However, Highmark has maintained in negotiations both in this jurisdiction and in Florida that a Florida settlement of Love and Solomon will automatically settle and terminate the Grider class action as well.

Highmark has advanced this position despite the fact that neither the Grider Class Representative nor Grider Class Counsel participated in the Florida settlement negotiations or even knew that such discussions were occurring. In fact, because of the confidentiality provisions in the Florida mediation

referral Order, the Grider Class Representative and Class Counsel are unaware of the contemplated Florida settlement terms.

The Florida court certainly has the power to decide whether it has jurisdiction and to determine the nature and extent of the claims before it. However, for the reasons expressed in this Adjudication, my conclusion is that the Florida court does not have jurisdiction to settle the Grider case without the approval of the Grider plaintiffs or me.

Of course I do not have jurisdiction over the parties to the Florida litigation. Nor would I presume to enjoin Judge Moreno from doing anything in his case. I do, however, have jurisdiction over the parties before me in Grider. And I can, and do, enjoin the Grider defendants from settling the Grider case in Florida without my approval.

To do otherwise would enable the Grider defendants to strip me of the jurisdiction and power to shepherd, manage, administer, try and decide or settle the case assigned to me. It would also deprive me of the ability to decide discrete issues in Grider which no one is suggesting are pending in Florida—for example, the various motions for sanctions brought by the Grider plaintiffs against the Grider defendants and former and present defense counsel for alleged violations of the discovery rules and abuse of the discovery process.

In addition, settlement of the Grider claims in another forum without approval of the Grider Class Representative, Class Counsel or judge would violate both due process and fundamental concepts of fairness.

Accordingly, this court has the power and authority under the All Writs Act to enjoin the Grider defendants from settling the Grider class action in Florida without my approval. Indeed, to deny plaintiffs' request for an injunction would itself be an abuse of discretion.

I am not employing the All Writs Act to divest the Florida court of jurisdiction to do or decide anything. I am employing the All Writs Act in a much more limited way—that is, to enjoin the Grider defendants from improperly divesting me of jurisdiction over the case assigned to me.

At the injunction hearing, plaintiffs were able to establish a more imminent threat that the Highmark defendants would settle the Grider class action in Florida than that the Capital or Keystone defendants would do so. Because of the restrictions imposed by the Florida confidentiality Order, the failure of Highmark's counsel to notify plaintiffs of their intention to settle the Grider claims in Florida until after expiration of two Florida mediation deadlines, the inconsistent information provided by Highmark's attorneys concerning the status of their Florida settlement, and the immediacy of the

January 31, 2007 extended Florida mediation deadline, there is a continuing threat that either Highmark, Capital or Keystone could rather quickly effectuate settlement of the Grider claims in Florida without anyone else involved in the Pennsylvania litigation knowing about it, if they have not already done so.<sup>29</sup> This provides the urgency and immediacy necessary to compel the granting of an injunction prohibiting anyone, not just Highmark, from settling the Grider case in another jurisdiction without my knowledge and approval.

For the reasons expressed in this Adjudication, I have the power and duty to grant plaintiffs' motion for injunction pursuant to the All Writs Act, and plaintiffs do not have to satisfy the requirements of Federal Rule of Civil Procedure 65 concerning the granting of injunctions. Nevertheless, as discussed below, plaintiffs have satisfied all of the requirements for issuance of a Rule 65 injunction, as well.

Because I am granting the injunction pursuant to the All Writs Act, and because plaintiffs' motion for emergency preliminary injunction was fully answered, briefed, litigated and argued at a comprehensive hearing before me, it is appropriate to grant a final injunction rather than a preliminary injunction or temporary restraining Order, and I do so.

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<sup>29</sup> As noted in Finding of Fact 79, above, Grider defendant Capital Blue Cross is also currently negotiating in Florida with the Florida plaintiffs regarding settlement of the Love case.

Additional reasons and analysis in support of my decision follow.

### **Analysis**

Although plaintiff Natalie M. Grider, M.D., may be a small member of a large national class in the Florida litigation (because she serves some patients who have medical insurance with Blue Cross and Blue Shield through Highmark), the smaller more local Pennsylvania class for which she is the sole class representative (that is, all medical service providers who render medical services in Pennsylvania to patients insured by defendant Keystone Health Plan Central, Inc. through an HMO) is not part of the potential class action litigation in Florida.

Keystone is not a defendant in the Florida multidistrict litigation. It has not been served with a summons or complaint. It's name does not appear in the Florida caption. It is not a Blue Cross/Blue Shield provider. It is not at the table in the Florida litigation. Neither are the Grider plaintiffs' class counsel at the negotiating table in Florida.

Because defendants did not advise me that they were negotiating a settlement in Florida which they contend will settle the Pennsylvania class action assigned to me, I did not formally learn of the potential settlement until plaintiffs filed their emergency motion for a preliminary injunction on December 22, 2006. Because defendant Highmark did not advise

plaintiffs that it was entering into a settlement in Florida which would dispose of and eliminate the Grider plaintiffs' claims in Pennsylvania as well, until the settlement meeting of November 29, 2006 (more than two months after the September 15, 2006 deadline to complete the Florida mediation, and twelve days after the November 17, 2006 extended mediation deadline, imposed by Judge Moreno), the settlement of plaintiffs' class claims almost became a reality without plaintiffs or me knowing about it.

Because Highmark's lawyer, Attorney Hackett, told plaintiffs' counsel at the November 29, 2006 settlement meeting that she did not know what the terms of the Love settlement were, and that she had no information what, if anything, the Keystone class would receive as part of the global settlement being negotiated in Florida; and because of the confidentiality Order imposed by Judge Moreno prohibiting disclosure of any discussions, representations and statements made at the Florida mediation conference; neither plaintiffs nor I know, or have the ability to learn, whether the Florida case has settled in whole or in part, which Florida defendants have settled with which Florida plaintiffs, whether Highmark and Capital have settled and for what amount, whether Keystone is paying any money towards the Florida settlement and what amount, whether Dr. Grider or her medical group is receiving any money and what amount, and whether

the Grider class which she represents is receiving any money and in what amount.

Neither plaintiffs nor I know whether settlement is imminent, happening in a little while, or not at all. Neither plaintiffs nor I know if Dr. Grider and/or the Grider class would receive \$5.00, \$500.00, \$50,000.00 or \$500,000.00 from a global settlement negotiated in Florida. (Although I express no opinion on the value of the Grider class action for settlement purposes, plaintiffs' counsel has stated that the damages expert in Grider has calculated "hard" damages in the case "in the nine figures".<sup>30</sup>

On the one hand, Highmark's Co-counsel (Attorney Hackett) states that Highmark has not reached a settlement agreement in Love, nor moved for preliminary approval of any settlement in Florida, and that the Highmark settlement discussions reached an impasse in November 2006. On the other hand, Highmark's Liaison Counsel (Attorney Siff) states that Highmark is part of the "substantial majority" of defendants identified by Mediator Davis in his November 21, 2006 report to the Southern District of Florida who have reached agreement on all terms of the proposed settlement, except for some individual items and attorneys' fees. Because of the facts outlined in the

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<sup>30</sup> See the e-mail sent by plaintiffs' Lead Counsel Kenneth A. Jacobsen, Esquire, to Settlement Mediator Edward Davis on December 9, 2006. Plaintiffs' Exhibit 19, admitted in the within preliminary injunction hearing.

Findings of Fact, above, I am more inclined to accept Attorney Siff's version.

Grider Not Part of Florida Litigation

For a number of reasons I reject defendants' argument that the Grider class is part of the Florida litigation and therefore would be bound by any settlement of the Florida class. First, on August 10, 2004 the Judicial Panel on Multidistrict Litigation entered an Order denying Highmark and Capital's March 12, 2004 motion for transfer of the Grider class action to the Florida MDL proceedings as a "tag-along action".<sup>31</sup>

Denial of the transfer is non-appealable except by petition for an extraordinary writ filed in the Court of Appeals having jurisdiction over the district in which a transfer hearing has been held.<sup>32</sup> No such petition has been filed or granted.

Defendants are now trying to do an end run around that prohibition by negotiating a global settlement in Florida without the participation of either the Grider class representative or the Grider class counsel, cloaked in the secrecy required by the Florida confidentiality Order, and without my advance knowledge or consent.

Defendants base their contention that Grider is part of the Florida litigation on the thin thread of an argument that in

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<sup>31</sup> Findings of Fact 21-26, above.

<sup>32</sup> Finding of Fact 27. 28 U.S.C. §§ 1407(e) and 1651.

paragraphs 186 and 189 of Plaintiffs' Fifth Amended Class Action Complaint filed August 1, 2006 in Love, the Florida plaintiffs define Capital Blue Cross and Highmark, Inc. each as including "its subsidiaries and health care plans". Defendants contend that Keystone is a subsidiary of Capital which has owned Keystone since 2003 and that during the class period Keystone was a subsidiary of both Highmark and Capital.

The fifth amended complaint of the Love plaintiffs was filed only five months ago as opposed to the Grider Complaint which was filed five years ago. Although these same defendants filed a motion to dismiss the Florida fifth amended complaint on October 18, 2006<sup>33</sup>, they now argue that an allegation made by the Florida plaintiffs (that the Florida defendants include their unnamed subsidiaries) two-and-one-half months before defendants moved to dismiss the Florida amended complaint and five years after the initial Complaint in Grider, would divest me of jurisdiction to hear a case over a class that I have certified.

On March 10, 2006 during closing arguments at the class certification hearing, Sandra A. Girifalco, Esquire, Lead Counsel for defendants Highmark, Inc. and John S. Brouse, argued that Highmark did not process Keystone claims.<sup>34</sup> Also during those

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<sup>33</sup> Defendants' Joint Motion to Dismiss Plaintiffs' Corrected Fifth Amended Complaint and Supporting Memorandum of Law filed on October 18, 2006 in Love v. Blue Cross and Blue Shield Association is Plaintiffs' Exhibit 3.

<sup>34</sup> Notes of Testimony of the class certification hearing, March 10, 2006, pages 83 to 85.

closing arguments, Daniel B. Huyett, Esquire, Counsel for defendants Capital Blue Cross and James M. Mead, argued that the evidence is clear that Capital and Highmark had nothing to do with Keystone or these Keystone claims.<sup>35</sup> But now because the Love plaintiffs allege that the Florida cases involve the subsidiaries of the Florida defendants, Highmark and Capital say that they should be able to settle the Grider claims in Florida. The argument is unpersuasive.

Highmark and Capital have been insistent in the Grider discovery proceedings that they are not going to produce anything that does not specifically relate to, or mention, Keystone because it is irrelevant. But now they say that the Grider case is relevant to this Florida case which does not mention Keystone. Now they argue that because the Florida plaintiffs think it is all relevant, that therefore Grider and Love are the same case.

Additional reasons why the Grider class should not be considered part of the Florida litigation are as follows.

Procedurally, the Grider case is much further advanced than either Love or Solomon. The Grider pleadings are closed. I have decided both a motion to dismiss the complaint and a motion to dismiss the amended complaint. I have completed a class certification hearing and certified a class and two subclasses. Approximately three and one-half years of discovery has been

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<sup>35</sup> Notes of Testimony of the class certification hearing, March 10, 2006, pages 79 to 81.

completed resulting in the production and review by counsel and the court of more than 118,000 pages of documents and exhibits.

On the other hand, no answer has been filed to Plaintiffs' Fifth Class Action Complaint in Love, and the pleadings are not closed. No class certification hearing has been held in Love, and the pleadings are not closed. No class certification hearing has been held in Love or Solomon and no class has been certified in either case.

For the reasons detailed in the Findings of Fact, above, the parties are different in Grider and Love<sup>36</sup>, the nature of the class action claims are different<sup>37</sup>, the claims processing systems in the two cases are different<sup>38</sup>, the class periods are different<sup>39</sup>, the scope of the claims are different<sup>40</sup>, and the Grider defendants have previously pled that documents and exhibits in the Florida multidistrict litigation are not relevant to, or discoverable in, Grider<sup>41</sup>.

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<sup>36</sup> Findings of Fact 28-33.

<sup>37</sup> Findings of Fact 34-35.

<sup>38</sup> Findings of Fact 36-40.

<sup>39</sup> Finding of Fact 41.

<sup>40</sup> Finding of Fact 42.

<sup>41</sup> Finding of Fact 47.

### Common Law

The power of the federal district courts to enjoin parties before it from proceeding in another court in a controversy involving the same issues is well established. In Crosley Corporation v. Hazeltine Corporation, 122 F.2d 925 (3<sup>rd</sup> Cir. 1941), the United States Court of Appeals for the Third Circuit was called upon to determine whether a United States district court which first obtains jurisdiction of the parties and issues may, and under certain circumstances should, enjoin proceedings involving the same issues and parties begun thereafter in another United States district court.

The Court concluded that a federal district court, sitting in equity, did have the power to enjoin parties from proceeding in equity in another district court. 122 F.2d at 928. Moreover, under the circumstances of the Crosley Corporation case, the Third Circuit concluded that the district court abused its discretion in refusing to grant the injunction. 122 F.2d at 929.

The facts of the Crosley Corporation case are as follows. Hazeltine Corporation is a Delaware Corporation which holds title to some 400 patents in the radio and television fields. The Crosley Corporation is an Ohio corporation which terminated a twelve years' license agreement with Hazeltine. In

response, Hazeltine formally notified Crosley that the latter was infringing 22 patents owned by Hazeltine.

Thereafter, Hazeltine sued Crosley in the United States District Court for the Southern District of Ohio, alleging infringement of two of its twenty-two patents. While that suit was awaiting decision, Crosley commenced an action in the District Court for the District of Delaware, seeking a declaratory judgment as to the validity and infringement of the remaining 20 patents. Seventeen days later Hazeltine filed nine suits in the District Court for the Southern District of Ohio in which it sought decrees that Crosley had infringed fifteen of the patents involved in the declaratory judgment suit.

After that, Crosley moved for a preliminary injunction in the District of Delaware to restrain Hazeltine from proceeding with the nine suits in Ohio until the District Court in Delaware had adjudicated the declaratory judgment suit. The motion for injunction was denied, and Crosley appealed to the Third Circuit.

The Appeal Court reasoned that determination of the question of the power of the district court to issue such an injunction involved a consideration of the powers of the Court of Chancery of England. 122 F.2d at 927. It concluded that the English Court of Chancery had the power at the time our government was established to enjoin parties before it from proceeding in another court in a controversy involving the same

issues, and that the federal district courts, as courts of equity, have similar power. 122 F.2d at 928.

Next the Third Circuit addressed the question whether, under the circumstances of this case, the Delaware District Court abused its discretion in refusing to grant the injunction. The Appeal Court held that the trial court did abuse its discretion. The Third Circuit cited Chief Justice John Marshall who long ago laid down as a salutary rule that "In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it." Smith v. McIver, 9 Wheat. 532, 535, 22 U.S. 532, 535, 6 L.Ed. 152, 154 (1824). 122 F.2d at 929-930.

The Third Circuit stated that

The party who first brings a controversy into a court of competent jurisdiction for adjudication should, so far as our dual system permits, be free from the vexation of subsequent litigation over the same subject matter.... Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties.

122 F.2d at 930.

Because the Grider plaintiffs are the party who first brought the Grider class claims into a court of competent jurisdiction, it would be an abuse of my discretion to refuse to grant their injunction request.

### **All Writs Act**

Six years after the decision in Crosley Corporation v. Hazeltine Corporation, in 1948, Congress enacted the All Writs Act, 28 U.S.C. § 1651(a). The All Writs Act confers "extraordinary powers" upon federal courts. See ITT Community Development Corporation v. Barton, 569 F.2d 1351 (5<sup>th</sup> Cir. 1978).

The Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

With respect to this Act, the United States Supreme Court has emphasized that "a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." Adams v. United States ex rel. McCann, 317 U.S. 269, 273, 63 S.Ct. 236, 238, 87 L.Ed. 268, 272 (1942).

In the Florida multidistrict litigation, Judge Moreno was confronted with the almost identical situation which I face in connection with the within motion for a preliminary injunction to restrain a settlement of a managed care class action suit. See In re: Managed Care Litigation, 236 F.Supp.2d 1336 (S.D.Fla. 2002).

Although there are a few differences, the Managed Care Litigation case has numerous similarities to the Grider injunction request. The similarities include the following.

Both cases are class actions brought by numerous medical providers against several managed care insurance company defendants where defendants—either singly or as part of a conspiracy—allegedly implemented certain policies and practices which unlawfully interfered with either health care providers delivery of care to their patients, or with appropriate reimbursement to the providers for the provision of medical care. Both cases state claims for RICO violations, conspiracy to commit RICO violations, and prompt pay violations.

Both cases involve one forum where the claims have been coordinated and consolidated for pretrial proceedings pursuant to 28 U.S.C. § 1407 concerning multidistrict litigation, and one forum where the claims are not part of the MDL.

Both cases involve simultaneous settlement negotiations proceeding in both the MDL forum and the non-MDL forum. Both cases involve the efforts of a defendant managed care insurance company to defeat or avoid the jurisdiction in one of the courts by attempting to settle the case in the other court without the express approval and involvement of the court being avoided.

Both cases involve the filing of a motion for a preliminary injunction by the class plaintiffs to restrain the

defendant insurance company from settling in another forum. In both cases, granting the injunction would have the ultimate effect of enjoining an action in a fellow federal court.

In both cases the injunction seeks to prevent a settlement (while in most instances the issuance of an injunction would be in order to protect a settlement). In both cases failure to grant the injunction would divest one of the courts of the jurisdiction to shepherd, manage, administer, try and decide or settle the litigation before it.

In both cases the enjoining court is cloaked with the authority to enjoin the other court by virtue of the All Writs Act. And in both cases the type of injunction requested does not fall within the scope of the typical injunction governed by Federal Rule of Civil Procedure 65. Therefore, in both cases plaintiffs do not have to meet the Rule 65 requirements. Nevertheless, in both cases the petitioners do meet the prerequisites of Rule 65.<sup>42</sup>

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<sup>42</sup> There are at least four differences between the Managed Care Litigation case and the Grider injunction. The first difference is that initially the Managed Care Litigation case involved a federal-state jurisdictional dispute, but the Grider injunction involves two federal jurisdictions.

Initially defendant CIGNA in Managed Care Litigation attempted to settle aspects of the Florida MDL in a class action brought in an Illinois state court. Conflicting jurisdiction between a federal and state court implicates the provisions of the Anti-Injunction Act, 28 U.S.C. § 2283. See In re: Diet Drugs, 282 F.3d 220 (3d Cir. 2002).

The Anti-Injunction Act provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as  
(Footnote 42 continued):

It is, of course, ironic that I find myself relying upon Judge Moreno's sound discretion, logical reasoning and persuasive articulation in the Managed Care Litigation decision to support my decision to enjoin the Grider defendants from settling the Grider class action in Judge Moreno's forum.

Relying, in part, upon In re Lease Oil Antitrust Litigation, 48 F.Supp.2d 699 (S.D.Tx. 1998), Judge Moreno concluded that the All Writs Act authorized his court to enter an injunctive order against the parties in order to preserve its jurisdiction over his MDL litigation. 236 F.Supp.2d at 1341.

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(Continuation of footnote 42):

expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

Subsequently defendant CIGNA removed the case to federal district court in the Southern District of Illinois, rendering the initial federal-state dispute moot.

On the other hand, there is no state forum involved in the Grider injunction; and, therefore, the Anti-Injunction Act is inapplicable to Grider.

The second difference between the Managed Care Litigation and the Grider injunction is that in Managed Care the MDL forum is enjoining its parties from settling in the non-MDL forum. In Grider the non-MDL forum is enjoining its parties from settling in the MDL forum.

The third difference between the cases is that terms of settlement were agreed upon in the non-MDL forum in the Managed Care case. In Grider, settlement has not been achieved in either forum, although it appears to be imminent in the MDL forum.

The fourth difference is that in the Managed Care case the requested class in the non-MDL forum encompassed a class previously certified by the MDL forum. In Grider, as outlined in this Adjudication, the class certified in my non-MDL forum is distinctly different factually, procedurally and substantively from the potential class in Judge Moreno's MDL forum.

In light of the numerous more important similarities between the cases, these slight distinctions in the two cases do not negate the applicability of the Managed Care Litigation holding and rationale to the Grider injunction.

Judge Moreno also relied upon the ITT Community Development Corporation case, supra, for the proposition that a court may not rely on the Act to enjoin conduct that is "not shown to be detrimental to the court's jurisdiction." Instead, any order under the All Writs Act must be "directed at conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to its natural conclusion." In re: Managed Care Litigation, 236 F.Supp.2d at 1339-1340, citing ITT Community Development Corporation, 569 F.2d at 1359.

The defendants in both the Florida Managed Care Litigation and Pennsylvania Grider injunction proceedings sought to avoid the injunction by relying upon the strong public interest favoring settlements. In disposing of that argument, Judge Moreno stated

This Court is well aware of the strong public interest favoring settlements. However, it cannot turn a blind eye to the underhanded maneuvers CIGNA took to obtain this settlement agreement. CIGNA snookered both this Court and Judge Murphy in Illinois in an obvious attempt to avoid this Court's jurisdiction. CIGNA settled the claims of **this court's Plaintiff class** and yet seeks approval from another judge in Illinois without informing that judge, apparently, of the proceedings in this case.

236 F.Supp.2d at 1342 (emphasis in original). The parallels between Judge Moreno's case and my case in this regard are striking.

Judge Moreno also concluded that although courts normally lack the power to enjoin absent class members, they do have power over the parties before them. "This includes the power to enjoin the defendant from entering into a settlement class action with another plaintiff in another forum, at least without notice to the court and its approval." In re: Managed Care Litigation, 236 F.Supp.2d at 1340, citing In re Lease Oil, 48 F.Supp.2d at 706.

Defendant CIGNA in the Managed Care Litigation case argued that an inability to comply with conflicting orders from the Florida and Illinois district courts gave it a complete defense to any efforts to enforce Judge Moreno's injunction. In disposing of this argument Judge Moreno stated

The Court, at the outset, completely rejects CIGNA's concerns over the potential for conflicting court orders. CIGNA cannot be permitted to use underhanded and questionable procedural means to avoid this Court's jurisdiction and then come before the Court complaining that it might be subject to conflicting court orders. Ordinarily, the inability to comply with a court's order is a complete defense. However, an exception exists when the person charged is responsible for the inability to comply.

236 F.Supp.2d at 1343 (citations omitted).

The defendants in both the Florida Managed Care Litigation and Pennsylvania Grider injunction proceedings also argued that enjoining the settlement in the other forum was unnecessary because plaintiffs could either opt out of the

settlement or object to its fairness in the other forum. Judge Moreno rejected this argument by reasoning that the Joint Panel on Multidistrict Litigation, even after a conditional transfer, would have to wait the appropriate time to hear objections to the transfer of the Illinois federal case as a tag-along case, but that a speedy resolution of the issue is necessary where the harm is imminent.

The parallels to my case where the JPML has already denied defendants' request to transfer the Grider case to the Florida MDL proceedings as a tag-along action<sup>43</sup>, and where I have ordered class notice to be served on all class members by March 15, 2007, are again striking.<sup>44</sup>

#### **Rule 65 Injunction**

As noted above, the type of injunction requested in this case does not fall within the scope of the typical injunction governed by Federal Rule of Civil Procedure 65. Therefore plaintiffs do not have to meet the Rule 65 requirements. Nevertheless, for the reasons stated below, I conclude that the petitioners do meet the prerequisites of Rule 65.

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<sup>43</sup> See Findings of Fact 22-25, above.

<sup>44</sup> See my December 20, 2006 Order, filed December 21, 2006, granting in part Plaintiffs' Amended Motion for Class Certification.

The standard for evaluating a motion for preliminary injunction is a four-part inquiry under Rule 65. These elements are:

(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

United States v. Bell, 414 F.3d 474, 478 n.4 (3d Cir. 2005).

#### Success on the Merits

In this type of case, plaintiffs need to demonstrate a likelihood of success on the merits in one respect. Plaintiffs must demonstrate the likelihood of success of this court granting an injunction. Plaintiffs are not required to demonstrate the likelihood that the Joint Panel on Multidistrict Litigation would transfer the Grider case, as a tag-along action, to the Florida MDL court. In re: Managed Care Litigation, 236 F.2d at 1344. Because I have granted an injunction in the Decree accompanying this Adjudication, plaintiffs have clearly demonstrated the likelihood of success that I will do so.

#### Irreparable Harm

In all cases of concurrent jurisdiction the court which first has possession of the subject matter must decide it. Smith v. McIver, supra. As noted in the Summary of Decision

subsection, and in Findings of Fact 1, 2, 10 and 11, above, my court is the first, and only, forum in which the Grider class claims have been filed.

If the Grider defendants are permitted to settle the Grider class claims in Florida, they will deprive the plaintiff class a forum to decide their lawsuit. Failure to grant the injunction, therefore, would deprive plaintiffs of the forum which must decide the case of the jurisdiction to do so. Thus the movants will be irreparably harmed by denial of their requested relief.

#### Balancing Harms

Granting the injunction will result in little, if any, harm to the Grider defendants. They will still be able to settle the Love and Solomon claims in Florida. They will still be able to settle the Grider claims in Pennsylvania. They may even be able to settle the Grider claims in Florida with the permission of the Grider Class Representatives and my approval.

The only thing the Grider defendants will be prohibited from doing because I granted this injunction is that which they have no legal right to do anyway.

On the other hand, failure to grant the injunction would greatly harm the Grider plaintiffs by depriving them of a forum in which to litigate their claims and by subjecting them to a potentially unfair and disadvantageous settlement if it is

allowed to be negotiated in a forum where they are neither present nor represented. Thus granting preliminary relief will not result in even greater harm to the nonmoving party.

#### Public Interest

Although there is a strong public interest favoring settlements, there is a stronger public interest in ensuring that settlements are fair and are reached in a way which does not violate anyone's fundamental rights. Depriving a party of the right to be present and to participate in the negotiation of a fair settlement, and depriving a party of a forum in which to litigate his dispute if a fair settlement cannot be achieved, is contrary to the public interest. Therefore, granting the injunction will be in the public's best interest.

For the foregoing reasons, the Grider plaintiffs satisfy all of the prerequisites of Federal Rule of Civil Procedure 65 for the obtaining of an injunction.

#### **Fairness**

The decision whether to grant plaintiffs an emergency injunction to enjoin defendants from settling plaintiffs' managed care class action claims in a global settlement in another forum, in another state, in a substantially different case where the claims of plaintiff medical provider class are not represented, and the allegedly offending defendant Health Maintenance

Organization is not a party, presents important issues of fundamental fairness.

To once again quote Judge Moreno, with whom I most wholeheartedly agree:

This Court must be efficient. This Court must exercise great discretion. Yet this Court must be just. In this Court's opinion, it is of the greatest public interest to ensure public trust in the judiciary. This trust comes from rendering *just* proceedings. The issuance of an injunction is necessary to render a just and fair proceeding.

In re: Managed Care Litigation, 236 F.Supp.2d at 1345 (emphasis in original).

#### CONCLUSION

For all the foregoing reasons, I grant plaintiffs' motion for an injunction; and I enjoin the parties in the within Grider class action, or anyone acting on their behalf, from settling, or attempting to settle, the class and subclass claims which I certified in Grider and which are pending before this court, in any other forum without my advance knowledge and approval.