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AMERICAN COLLEGE OF	:	SUPERIOR COURT OF NEW JERSEY
CARDIOLOGY– NEW JERSEY	:	CHANCERY DIVISION: MONMOUTH COUNTY
CHAPTER and THE MEDICAL SOCIETY :	:	DOCKET NO. MON-C-360-04
OF NEW JERSEY as Representative	:	
Plaintiffs, AND THE CARDIAC CARE	:	
CENTER, HAMILTON CARDIOLOGY	:	
ASSOCIATES, BART DE GREGORIO,	:	
M.D., LLC, MONMOUTH CARDIOLOGY :	:	
ASSOCIATES, LLC, MORRISTOWN	:	
CARDIOLOGY ASSOCIATES, P.A. and	:	
DIAGNOSTIC AND CLINICAL	:	
CARDIOLOGY, P.A., as Individual	:	
Plaintiffs and/or as members of the	:	
Representative Plaintiff,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
HORIZON HEALTHCARE SERVICES,	:	
INC. d/b/a HORIZON BLUE CROSS/BLUE:	:	
SHIELD OF NEW JERSEY AND	:	
MEDIGROUP OF NEW JERSEY, INC.,	:	
	:	
Defendants.	:	

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**PLAINTIFFS’, THE MEDICAL SOCIETY OF NEW JERSEY, MORRISTOWN  
CARDIOLOGY ASSOCIATES, P.A. AND DIAGNOSTIC AND CLINICAL  
CARDIOLOGY, P.A.’S BRIEF IN OPPOSITION TO DEFENDANTS’ MOTION AND IN  
SUPPORT OF THE PLAINTIFFS’ CROSS MOTIONS**

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*Of Counsel and On the Brief:*  
Steven I. Kern

**KERN AUGUSTINE  
CONROY & SCHOPPMANN, P.C.**  
1120 Route 22 East  
Bridgewater, New Jersey 08807  
(908) 704-8585  
Attorneys for Plaintiffs, The Medical Society  
of New Jersey, Morristown Cardiology  
Associates, P.A. and Diagnostic and Clinical  
Cardiology, P.A.

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF FACTS ..... 1

    A.    HORIZON HAS FRAUDULENTLY MISREPRESENTED THAT  
          IT OVERPAID CARDIOLOGISTS AS A RESULT OF A COMPUTER  
          PROGRAMMING ERROR ..... 1

    B.    HORIZON HAS ENGAGED IN A PLAN AND PATTERN OF  
          FRAUD, DECEPTION AND UNCONSCIONABLE BUSINESS  
          PRACTICES ..... 7

LEGAL ARGUMENT:

    POINT I:    HORIZON MUST IMMEDIATELY RETURN MONIES  
                  IT FRAUDULENTLY “RECOUPED” FROM CARDIOLOGISTS  
                  AND BE ENJOINED FROM ENGAGING IN ANY FUTURE  
                  “RECOUPMENT” EFFORTS ..... 9

        A.    THE PLAINTIFFS WILL SUCCEED ON THE MERITS ..... 9

        B.    THE EQUITIES OVERWHELMINGLY FAVOR  
              THE PLAINTIFFS ..... 10

    POINT II:    PLAINTIFFS ARE ENTITLED TO A COMPLETE ACCOUNTING .. 13

    POINT III:    DEFENDANTS MUST ANSWER THE DISCOVERY  
                  DEMANDS OF THE MEDICAL SOCIETY OF NEW JERSEY ..... 14

    POINT IV:    THE DEFENDANTS’ COUNTERCLAIM MUST  
                  BE DISMISSED ..... 15

CONCLUSION ..... 16

**TABLE OF AUTHORITIES**

<u>Cases:</u>	<u>Page:</u>
<i>Bubis v. Kassin</i> , 353 N.J.Super. 415 (App. Div. 2002) .....	10
<i>Dairy Queen, Inc. v. Wood</i> , 369 U.S. 469 (1962) .....	13
<i>Energy Rec. v. Dept. of Env. Prot.</i> , 320 N.J.Super. 59 (App. Div. 1999), <i>aff'd o.b.</i> , 167 N.J. 246 (2001) .....	15
<i>Messina v. National Store Co.</i> , 140 N.J.Eq. 312 (Ch. 1947) .....	13
<i>Sherman v. Sherman</i> , 330 N.J.Super. 638 (Ch. Div. 1999) .....	10
<i>Wear-Ever Aluminum, Inc. v. Townecraft Industries, Inc.</i> , 75 N.J.Super. 135 (Ch. Div. 1962) .....	13
<i>Zoning Board of Adjustment of Township of Sparta v. Service Electric Cable Television of New Jersey, Inc.</i> , 198 N.J.Super. 370 (App. Div. 1985) .....	10
 <u>Court Rules:</u>	
<i>Rule 4:6-2(e)</i> .....	15
<i>Rule 4:23-5(c)</i> .....	14

## STATEMENT OF FACTS

### **A. HORIZON HAS FRAUDULENTLY MISREPRESENTED THAT IT OVERPAID CARDIOLOGISTS AS A RESULT OF A COMPUTER PROGRAMMING ERROR**

In September of 2004 Horizon Healthcare (“Horizon”) began efforts to regain approximately \$15,000,000 it paid to New Jersey’s Cardiologists. Horizon claimed that it had overpaid for cardiac catheterization procedures due to a computer programming error. Specifically, it claimed that a programmer had failed to incorporate into their computer code recognition of a modifier “26”. As a result, according to Horizons’ representations, cardiologists were paid both for the professional and the technical components of the cardiac catheterization.

On February 7, 2005 Horizon provided plaintiff American College of Cardiology with a very limited amount of discovery. It has still provided no response to the discovery demands of the Medical Society of New Jersey. However, even the small amount of discovery provided by Horizon proves, in no uncertain terms, that they have perpetrated a fraud upon New Jersey’s cardiologists and have no entitlement to any reimbursement.

Contrary to Horizon’s previous assertions and mis-representations to this Court that a computer programming error resulted in an innocent mistake, Horizon’s own internal e-mail demonstrates, unequivocally, that Horizon made a conscious and improper decision to reverse its prior correct policy of treating and paying for cardiac catheterizations as a surgical procedure. These internal communications reveal that as late as March of 2004 it was Horizon’s stated policy to correctly treat cardiac catheterization as a surgical procedure. According to these internal e-mails, attached hereto as Exhibit A:

We consider Cardiac Cath to be surgery. Therefore, we do not have a professional component. By processing this code as surgery, we

assume that the provider is billing for his professional services.”

3/24/03 10:38 AM e-mail from Roxanne B. Alrutz to Ramon Miranda. Subject: Re: Prof Comp on Cardiac Cath proc range.

We (here at Horizon) consider Cardiac Catheterizations to be a surgical procedure. Surgical procedures are not eligible for professional component. When modifier 26 comes in on a claim, BCL ignores that 26 and pays as a TOS 200.

Cardiac Caths are done in a hospital setting (in patient or outpatient). They should be coded as surgery in all our systems and the modifier 26 be ignored or bypassed. If for whatever reason you are loading fees for modifier 26 on these codes, the fees should be the same as a 200

To the best of my knowledge, we have never had a problem in BCL with Cardiac Catheterizations.

2/27/04 9:06 AM e-mail from Roxanne B. Alrutz to James Hartigan. Subject: Re: 93501-93545 (Modifier 26).

We (here at Horizon) consider Cardiac Catheterizations to be surgical procedure. Surgical procedures are not eligible for professional component. When modifier 26 comes in on a claim, BCI ignores that 26 and pays as TOS 200. ***Cardiac Caths are done in a hospital setting (in patient or outpatient). They should be coded as surgery in all our systems and the modifier 26 be ignored or bypassed.*** If, for whatever reason you are loading fees for modifier 26 on these codes, the fees should be the same as 200.

I now have two concerns, the first is that we were paying claims with TOS 2 from March 2002 to July 2003 and ITS stopped because of the modifier 26 being billed on the claims. Was ITS informed that the decision was made to pay the codes with TOS 2 instead of TOS P? Does this comply with HIPAA regulations for changing claims? ***Second, what do we advise pv's if they dispute how the claim processed when it pays with TOS 2?***

3/16/04 1:14 PM d-mail from Christina Monroy to Ramon Miranda, Jennifer Juo, Kathleen Veary, Susan Mengert. Subject: Re: 93501-93545.

Holly is correct. TOS P with these codes is (has always) been routed

to the surgery benefits, unless we had been directed to do so otherwise.

9/10/04 10:56 AM e-mail from Tammy L. Mindo to Marbara Morella, John Sweeney, Ramon Miranda, Holly Ellis. Subject: Re 93501-93545 (Modifier 26), emphasis added.

The first evidence provided by Horizon that it was going to alter its long-standing policy and wrongly begin to treat cardiac catheterizations as non-surgical was on September 10, 2004.

According to the e-mails received:

Below is a summary from the meeting that was held yesterday, please respond.

As per John Monaghan and John Sweeney, the rates for the full component will be reduced as of 10/1/04 as an interim solution by Susan Mengert area. However they would still like testing to be completed to confirm that ***claim payments will remain paying according to surgery benefits and not professional component*** providing the proc flip logic is changed to include modifier 26.”

One question asked by Barbara was, “Where does benefits drive when changing from surgery to professional component” As per Tammy, ***the claims will remain paying the same (as surgery)*** unless otherwise directed to change the criteria for the codes to pay differently.

9/10/04 8:59 AM e-mail from Holly Ellis to Ramon Miranda, Tammy Mindo, Barbara Morella, John Sweeney, John Monaghan. Subject Re:93501-93545 (Modifier 26).

Indeed, a cardiac catheterization is a surgical procedure. It is procedure which requiring invasion of the anatomy to insert a catheter into a major blood vessel and manipulating the catheter through the vessels of the heart and includes coronary angiography, left ventriculography, aortography and right heart catheterization. It necessitates difficult clinical decisions when the results are obtained, and much time is expended in discussions with the patient and family. The time involved for a procedure, including discussions of risk and results, range from 2 to 2.5 hours.

There are also significant risks to both the operating physician and the patient. Risks to the operating physician include cumulative radiation exposure over many years as well as potential exposure to blood borne diseases. The risks to the patient, while uncommon, are also numerous. Major risks are myocardial infarction, limb loss, stroke and death. Minor risks include bleeding from the surgical site, requiring transfusions, severe allergic reaction, infection and renal failure to name a few.

To perform these procedures in a proficient and safe manner requires years of training. One must be trained in clinical cardiology (2 years) and at least six months additional training in invasive techniques. This does not include training needed to perform percutaneous interventional procedures. Accordingly, there can be no doubt that the performance of a cardiac catheterization procedure is a surgical procedure requiring the skills of a physician as opposed to a technician. See supporting certification of Craig Rosen, M.D., submitted herewith.

In September 2004, based upon clearly erroneous assumptions, Horizon, inexplicably, decided that it was no longer going to treat cardiac catheterizations as surgical procedures. Rather, it wrongly concluded that the physicians' only involvement with the process was the reading and interpretation of the catheterization. In so doing it wrongly assuming that the actual procedure was performed by a technician. This is documented by an e-mail from Maria V. Maramara to Iain D. MacMillan, and Anne Marie Veges, dated 11/12/2004 at 11:15 AM. Subject Cardiac Catheterization. It reads in relevant part:

Usually, if the procedure is done in an inpatient or outpatient setting, the provider is only providing the reading and interpretation service or professional component. This will ensure that we pay at the lower allowance going forward for professional component services.

Of course, this is not the case. Horizon's assumption is pure fiction and Horizon should, unquestionably have known this. That there can be no doubt of Horizon's duplicity, rather than announcing that it was no longer going to treat cardiac catheterizations as surgical procedures – an announcement which would have met with ridicule throughout the medical community, Horizon, instead, fraudulently represented that it had erred in paying for catheterizations as a result of “computer error.” It then, immediately, began to “offset” monies back from the smaller cardiology practices and threatened to “recoup” monies from larger practices, as of November 30, 2004. Horizon literally reached in and stole monies properly paid to cardiologists – and Horizon had to know that this is what it was doing.

The decision to change reimbursement rates was apparently not made by Horizon's Medical Director, but by the Pricing Department.<sup>1</sup> This is apparent from the e-mails provided. An e-mail of 9/28/04 from Susan Mengert to John Sweeney, John Monaghan, Dawn Eps, Kathleen Veary, and Kimberly Patterson confirms this:

The Pricing Department will proceed to load the Professional Component allowance to the Full Component Bucket in BCL only. Providers who perform the Full Component Service or the Professional Component Service will be paid at the Professional Component Allowance. (Lower Fee)

A “chronology of events related to cardiac cath for NASCO” dated 11/16/2004, 4:15 PM from Patricia Cooney to Susan Mengert, Barbara Morella, Florinda Reverendo, John Sweeney, Kathleen Veary, Ramon Miranda, Tammy I. Mindo, and Iain D. Macmillan was forwarded, on that same date, at 5:16 PM to Christy W. Bell. The memo details the fact that cardiac catheterizations

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<sup>1</sup>No e-mails were provided by Horizon indicating any affirmative decision by the Medical Director to approve its change in policy.

were considered to be surgical procedures and paid as such, since at least 1989. It further documented that as late as February 27, 2004 Horizon confirmed that its Medical Policy indicates that cardiac catheterization is a surgical procedure and that any claim including a professional component type of service be “flipped” to a full service surgery. Only on August 4, 2004, according to this memo, did “Finance” decide to change the allowance for the service. No reason was provided.

Despite receipt of this memo, Christy Bell, outrageously, signed an affidavit to this Court falsely claiming that Horizon’s “recoupment” efforts were a result of a computer error. See, Certification of Christy Bell in Opposition to Plaintiffs’ Application for Injunctive Relief dated December 7, 2004. The memo reads as follows:

Here is the chronology of events related to cardiac cath for NASCO:

1) ***Medical Policy Sheet dated 3/2/89 indicated allowable types of service for cardiac cath are surgery, assistant surgery and anesthesia.***

2) E-Mail response from ***Medical Policy on 3/24/03 indicated cardiac cath does not have a professional component but it is only considered to be surgery.***

3) 12/09/03 - In response to question from Operations on why we do not recognize professional component type of service for cardiac cath, Med Pol instructs NASCO to recognize modifier 26 professional component for these services.

4) 2/27/04- ***Medical Policy indicates cardiac cath is a surgical procedure and we should not pay professional component. Finance requests that any claim with professional component type of service be flipped to a full service surgery.***

5) 8/24/04- Finance requests estimate for how long it will take to remove proc flip logic for cardiac cath codes. ***Finance indicates allowance will change.***

6) 9/29/04 - Medical Policy sheets received requesting professional

component type of service be added to existing surgical types of service for cardiac cath and pricing changed accordingly.

It also appears clear that the President of Horizon, Bill Marino, was well aware of the true facts of this case. According to an email of the same date, Mr. Marino met with Christy Bell on the very date of the above memo to discuss “the issues with the Cardiac Cath Codes.”

**B. HORIZON HAS ENGAGED IN A PLAN AND PATTERN OF FRAUD, DECEPTION AND UNCONSCIONABLE BUSINESS PRACTICES**

Horizon has been caught “red handed.” It has committed a fraud upon physicians, upon its subscribers, and upon this Court. In light of the above it is clear that Horizon must be enjoined from any further efforts to “recoup” payments from cardiologists, must immediately return all monies taken, and must provide an accounting so that the full extent of its fraudulent practices may be exposed, and must be otherwise sanctioned for its egregious conduct.

Based upon information received from a number of sources it is apparent that an accounting will reveal the following additional plans and patterns of fraudulent activity:

- 1 Routine underpayment of claims.
- 2 Routine denial of claims without justification.
- 3 Routine delay in payment of claims. Clean claims of over \$1,000 are routinely held for longer than 30 days.
- 4 Inordinate numbers of readjustments of claims (mostly downward) or recouping of paid claims requiring thousands of hours of administrative time by physician practices. Indeed Horizon admits that it readjusted claims over 2.3 million times in 2004 alone.
- 5 A plan and design to make it virtually impossible to determine the reasons for such readjustments or to challenge the validity of such readjustments or “recoupments”.

- 6 Routine denial and delay of claims because Horizon falsely claims that the patient had a pre-existing condition excluded from coverage, even after Horizon had previously acknowledged that no pre-existing condition existed.
- 7 Routine claims by Horizon that records are not received despite certified mail receipts proving that Horizon received the claims.
- 8 Repeated inappropriate denial of claims, first for one reason, when that reason is proven unfounded, a second reason, and when that is proven unfounded, yet a third or fourth reason.
- 9 Falsely claiming that Horizon is not the primary insurer.
- 10 Denial of claims under a patient's prior policy, even though current policy information is provided on the claim form.

## LEGAL ARGUMENT

### POINT I

#### **HORIZON MUST IMMEDIATELY RETURN MONIES IT FRAUDULENTLY “RECOUPED” FROM CARDIOLOGISTS AND BE ENJOINED FROM ENGAGING IN ANY FUTURE “RECOUPMENT” EFFORTS**

##### **A. THE PLAINTIFFS WILL SUCCEED ON THE MERITS**

As set forth in the Statement of Facts, Horizon’s stated reason for “recoupment” of monies from cardiologists for cardiac catheterizations was its claim that it had just discovered a “computer error.” Documents received from Horizon prove that claim was absolutely false. Horizon, as recently as March, 2004, confirmed, through internal communication, that it was properly paying for cardiac catheterizations as surgical procedures. Not until September of 2004 did Horizon seek to reverse that position – not because of any computer error, but because it, either fraudulently or recklessly, assumed that physicians were only reading and interpreting the catheterizations rather than actually performing the procedure.

Having made that decision, Horizon immediately instituted efforts to “recoup” monies from cardiologists, beginning with the smallest practices – no doubt hoping they would not have the resources to challenge its action. It did so under false and fraudulent pretenses, claiming that its decision resulted from a computer error, not from a decision by Horizon’s finance department to alter its medical policies which had, heretofore, correctly considered cardiac catheterizations as surgery.

There is no doubt that cardiac catheterization is performed, as a surgical procedure, by interventional cardiologists. The procedure involves a high level of skill, the entry into a major blood vessel, exposure to blood and radiation, and two to two and one-half hours of the

cardiologist's time.

**B. THE EQUITIES OVERWHELMINGLY FAVOR THE PLAINTIFFS**

Temporary injunctive relief should be issued when the injury to the plaintiff outweighs the harm to the defendant if the injunction is not issued. *Sherman v. Sherman*, 330 N.J.Super. 638, 653 (Ch. Div. 1999), citing to *Zoning Board of Adjustment of Township of Sparta v. Service Electric Cable Television of New Jersey, Inc.*, 198 N.J.Super. 370, 379 (App. Div. 1985). Additionally, when the Court is asked to merely preserve the *status quo*, a less rigid view is taken of the tests for the issuance of an injunction. *Sherman*, at 643. In exercising its broad discretion in determining whether to grant injunctive relief, a court of equity is required to consider the relative hardships to the parties as well as other equitable circumstances. *Bubis v. Kassin*, 353 N.J.Super. 415, 424 (App. Div. 2002).

In this case, Horizon is a multi-billion dollar corporation which cannot and will not be significantly affected by an inability to “recoup” immediately the \$15,000,000 it improperly claims from the State’s cardiologists. By contrast, many cardiology groups and cardiologists have been, and will be significantly adversely affected should Horizon be permitted to keep the monies it fraudulently “recouped” and those it now seeks to “recoup”. As set forth in the certifications of Mark L. Brown, dated November 29, 2004, and filed in support of the Order to Show Cause, Robert Mierzekewski, dated November 29, 2004, and filed in support of the Order to Show Cause, and Nicholas Brodyn, D.O. dated February 4, 2005, and filed herewith, Horizon’s action have, and will continue to wreak havoc upon these practices.

Indeed, as demonstrated by the certification of Dr. Brodyn, the small group and solo practices, from whom Horizon has unjustly “recouped” millions of dollars have been unable to

provide necessary services to patients, have lost key personnel, have been unable to timely pay taxes and make contributions to pension and profit sharing accounts, have been forced into re-financing arrangements for immediate cash availability, and most importantly, have had to interrupt patient care.

With no prior notice, between November 13, 2004 and November 30, 2004, Horizon withheld payments to Dr. Brodyn in the full amount of the alleged overpayment of approximately \$40,000.00. This amounted to 40% of his quarterly income. On average, Horizon accounts for more than 25% of his income. This “offset” resulted in an inability to pay daily bills or salaries to employees, including himself. As a result, both the doctor’s nuclear technician and his echo technician left for employment elsewhere and Dr. Brodyn was unable to perform the procedures and tests conducted by these technicians. The doctor lost \$20,000.00 per week in billings for four (4) weeks based upon the loss of the nuclear technician and an additional \$7,500.00 to \$10,000.00 per week in billings for three (3) weeks based upon the loss of the echo technician. He was unable to take any salary for a period of nine (9) weeks and the rest of his staff received no raises or bonuses typically provided during the holiday season. Horizon’s actions literally paralyzed the doctor’s medical practice.

The methods used by Horizon were outrageous. The doctor was unable to even contact Horizon or leave a message for someone to call him back. He was not offered a payment plan or even the opportunity to discuss the issue with Horizon. Rather, Horizon crippled the doctor’s practice with its immediate and merciless, non-negotiable “offset” of the entire alleged overpayment in a two to three week period. It did so knowing that they had no right to do so. It did not provide him with the ninety days notice required under the contract so that an appropriate challenge could

be made. And, it did so knowing that it had no right to the return of these monies.

The Medigroup of New Jersey, Inc. Physician Agreement states at paragraph 6, in pertinent part:

. . . Medigroup or its designee shall have the right to offset all such amounts referenced herein from future Payments payable to You or to require You to return excess amounts paid to You within ninety (90) days of a written request for reimbursement.

Horizon gave virtually no notice to Dr. Brodyn or to any of the other small cardiology groups before “offsetting” an estimated five-million dollars it had no right to offset. Had it provided the same contractually required notice to these cardiologists as it did to the larger cardiology practices, these cardiologists would have had the same opportunity to come before this Court and obtain the injunctive relief that all were entitled to receive. Only by breaching its own contract was Horizon able to unlawfully reach in and grab this money for which it had no entitlement. The money must be immediately returned.

There can be no doubt that in weighing the equities involved, Horizon has no argument. It wrongfully offset money, without basis, in contravention of its own contract, and under false pretense. It has no right to continue to hold this money. Horizon must give it back and not be permitted to again engage in such outrageous conduct.

## POINT II

### PLAINTIFFS ARE ENTITLED TO A COMPLETE ACCOUNTING

The wrongful acts of Horizon, detailed above, demonstrate a prima facie case of fraudulent, dishonest and deceptive business practices. The full extent of these practices can only be uncovered through a full accounting of Horizon's claims handling. The remedy of an accounting is available in a court of equity. *Wear-Ever Aluminum, Inc. v. Townecraft Industries, Inc.*, 75 N.J.Super. 135, 150 (Ch. Div. 1962). When the matters in controversy are complex in nature or character, an accounting is warranted. *Messina v. National Store Co.*, 140 N.J.Eq. 312, 314 (Ch. 1947). As aptly recognized by the United States Supreme Court, when accounts between the parties are of such a complicated nature, a court of equity can unravel them by use of an accounting. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962).

In addition to the law permitting an accounting when there is a complex character to the events, there is also a right to an accounting under the contract between Horizon and the cardiologists. The contract, entered into with Horizon's subsidiary, Medigroup of New Jersey, Inc., specifically provides that it is obligated to account for its performance. Indeed, paragraph "4" of that Agreement states, in pertinent part:

Medigroup agrees that it is responsible for Payment and for the performance of administrative, accounting, enrollment, and other functions as are appropriate for the administration of this Agreement.

It is clear from the contract that the defendants agreed to account for claims and payments. The request for an accounting with respect to an alleged overpayment of claims, while a complex process, is certainly within the parties' rights especially since the defendants contractually obligated themselves to such and have engaged in fraudulent conduct and concealment.

**POINT III**

**DEFENDANTS MUST ANSWER THE DISCOVERY  
DEMANDS OF THE MEDICAL SOCIETY OF NEW JERSEY**

On December 21, 2004, the Medical Society of New Jersey served Horizon with interrogatories and a demand for production of documents. Horizon has simply ignored those demands, without justification or reason. The discovery sought by MSNJ is directly targeted to Horizon's defenses and the issues raised in this lawsuit. While the answers to interrogatories are not due to be served until February 22, 2005, the response to the document demand is long overdue. The Defendants have not even requested additional time to respond. Rather, they have ignored the demands in their entirety. Pursuant to *Rule, 4:23-5(c)*, the Court may compel the production of the requested documents. An Order compelling the production shall specify the date by which compliance is required. Further, if the delinquent party fails to provide the documents in accordance with the Order, the aggrieved party may, at that time, request dismissal or suppression.

Given the magnitude of this case, there is no doubt that the specific documents requested by the Plaintiffs are relevant to the issues and will serve to establish the full extent of the Defendants' scheme against the cardiologists of New Jersey. These documents must be produced.

#### **POINT IV**

#### **THE DEFENDANTS' COUNTERCLAIM MUST BE DISMISSED**

In its recently filed answer, the Defendants filed a Counterclaim alleging breach of contract which reiterates many of the conclusory and unsubstantiated statements made in the obviously false Bell certification.

Plaintiffs have not breached their agreement. Horizon “voluntarily” agreed to cease its unlawful “recoupment efforts.” Having agreed to do so, there is obviously no breach by the plaintiffs. Similarly, if this Court enjoins Horizon from engaging in improper action, that cannot constitute a breach.

*Rule 4:6-2(e)* permits the filing of a motion to dismiss for failure to state a claim upon which relief may be granted. Where a complaint states no basis for relief and discovery cannot provide such a basis, dismissal of the claim is appropriate. *Energy Rec. v. Dept. of Env. Prot.*, 320 N.J.Super. 59, 64 (App. Div. 1999), *aff'd o.b.*, 167 N.J. 246 (2001).

Accordingly, since there has been no breach by the plaintiffs, the defendants' counterclaim must be dismissed.

**CONCLUSION**

Based upon the foregoing, the Plaintiffs, The Medical Society of New Jersey, Morristown Cardiology Associates, P.A. and Diagnostic and Clinical Cardiology, P.A., respectfully request that the Court deny the motion filed by the Defendants and grant the cross-motion filed by the Plaintiffs seeking entry of an Order (1) for an immediate return of monies fraudulently “recouped”, (2) enjoining the Defendants from engaging in further “recoupment” efforts, (3) for a complete accounting, (4) compelling Defendants to respond to discovery demands, and (5) dismissing the counterclaim together with such other and further relief as deemed just and proper.

Respectfully submitted,

KERN AUGUSTINE  
CONROY & SCHOPPMANN, P.C.  
Attorneys for Plaintiffs, The Medical  
Society of New Jersey, Morristown  
Cardiology Associates, P.A. and  
Diagnostic and Clinical Cardiology,  
P.A.

By: \_\_\_\_\_  
Steven I. Kern

Dated: February 22, 2005