

1 UNITED STATES DISTRICT COURT
2 MIDDLE DISTRICT OF FLORIDA
3 FORT MYERS DIVISION

3 COUNTY OF MONMOUTH,) Fort Myers, Florida
NEW JERSEY,)
4 PLAINTIFF,) Case No.: 2018cv201SDMMRM
)
5 vs.)
) October 29, 2019
6 FLORIDA CANCER)
SPECIALISTS, P.L.,) 9:30 a.m.
7 RESPONDENT.)
_____)

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11 TRANSCRIPT OF FAIRNESS HEARING PROCEEDINGS
12 BEFORE THE HONORABLE MAC McCOY
13 UNITED STATES DISTRICT JUDGE
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19 Court Reporter:
20 Rebekah A. Plunkett
21 Naples Court Reporting
and Legal Services
22 2315 Stanford Court, Suite 301
Naples, FL 34112
Telephone: (239) 316-7733

23
24 (Proceedings reported by Stenotype; Transcript produced by
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A P P E A R A N C E S

PLAINTIFF COUNSEL:

EDMAN O'KELLY, ESQ.
Robins Kaplan, LLP
399 Park Avenue
#3600
New York, New York 10022
212-980-7400

LAWRENCE A. FARESE, ESQ.
Robins Kaplan, LLP
711 5th Avenue South
#201
Naples, FL 34102
239-430-7070

MICHAEL FITZGERALD, ESQ.

DEFENDANT COUNSEL:

ELIZABETH A.N. HAAS, ESQ.
Foley & Lardner, LLP
777 East Wisconsin Ave
Milwaukee, WI 53202
414-297-5083

MICHAEL P. MATTHEWS, ESQ.
Foley & Lardner, LLP
100 North Tampa Street
Suite 2700
Tampa, FL 33602
813-229-2300

ALSO PRESENT:

MARLENE STRADER
MIRIAM BOND
JOHN BOND
GERALD BERNARD
CYNTHIA TRATTORE
NANCY PRINGAL
KIMBERLY VANBUREN

E X H I B I T S

| DESCRIPTION | ADMITTED |
|----------------------------------|----------|
| Mr. Menard's Exhibit No. 1 | 77 |

1 COURTROOM DEPUTY: 18CV-201-SDM-MRM, County of
2 Monmouth, New Jersey versus Florida Cancer Specialists,
3 P.L., et. al.

4 THE COURT: Good morning, counsel, please state your
5 appearances, beginning with counsel for the Plaintiff.

6 MR. O'KELLY: Good morning, Your Honor. Edman
7 O'Kelly from Robins Kaplan in New York for the Plaintiff
8 and for the Class.

9 THE COURT: Good morning, and welcome back to Ft.
10 Myers.

11 MR. O'KELLY: Thank you, Your Honor.

12 MR. FARESE: Lawrence Farese, also of Robins Kaplan,
13 Naples office, for the Plaintiff.

14 THE COURT: Good morning.

15 And Counsel for the Defendants?

16 MS. HAAS: Elizabeth Haas of Foley & Lardner on
17 behalf of the Defendants.

18 THE COURT: Good morning.

19 MS. HAAS: Good morning.

20 MR. MATTHEWS: Good morning, Your Honor. Mike
21 Matthews of Foley & Lardner, Tampa office, for Defendants.

22 THE COURT: Good morning. As I understand it, we
23 have some class members and potential objectors here
24 today. Ladies and gentlemen in the back of the room,
25 would you please introduce yourself for the record so I

1 know who you are?

2 I'll start with Ms. Marlene Strader. I understand,
3 Ms. Strader, you are present?

4 MS. STRADER: Yes, I'm Marlene Strader, and I'm
5 representing Randy Strader.

6 THE COURT: Ma'am, would you please spell your last
7 name?

8 MS. STRADER: S-T-R-A-D-E-R.

9 THE COURT: Ma'am, are you requesting permission to
10 address the Court today in this hearing?

11 MS. STRADER: Oh, no. I wouldn't know what to say.

12 THE COURT: You're here just to observe; is that
13 correct?

14 MS. STRADER: Yes.

15 THE COURT: Thank you. You may have a seat now,
16 thank you.

17 I understand that we have Mr. and Mrs. Bond as well,
18 Marian Bond and John Bond; is that correct?

19 MR. BOND: That's Miriam Bond. I call her Maid
20 Miriam.

21 THE COURT: Miriam Bond and John Bond. Mr. and Mrs.
22 Bond, do you wish to address the Court concerning a
23 proposed settlement here today?

24 MR. BOND: I'm here to observe.

25 THE COURT: You're here just to observe; is that

1 correct?

2 MR. BOND: Just to observe and see what's going on.

3 THE COURT: Thank you. You may have a seat. And I
4 believe we have Mr. Gerald Menard as well; is that
5 correct?

6 MR. MENARD: Correct.

7 THE COURT: Good morning, Mr. Menard. Sir, I
8 understand that you attempted to file an objection to the
9 proposed settlement; is that correct?

10 MR. MENARD: I did.

11 THE COURT: Where you submitted it to the settlement
12 administrator; is that right?

13 MR. MENARD: And to the Court.

14 THE COURT: And you also sent it to the Court?

15 MR. MENARD: I did.

16 THE COURT: Okay. That's an issue that we'll be
17 addressing with the attorneys today, because apparently
18 your objection was not filed with the Court, but there may
19 be a reason for that, and I'll address that with the
20 attorneys first, and then turn to you.

21 Sir, are you asking for leave to address the Court
22 today?

23 MR. MENARD: I am.

24 THE COURT: You are, okay. Mr. Menard, what's going
25 to happen, because you're the only class member who's here

1 today asking to address the Court concerning their
2 objections, is I'll hear from the attorneys first, and
3 then I will give you an opportunity to address the Court
4 directly concerning your objection.

5 Do you understand, sir?

6 MR. MENARD: Yes.

7 THE COURT: Thank you, sir. You may have a seat at
8 this time. Counsel, thank you for your indulgence.

9 As I understand it, Counsel does not intend to
10 present any witnesses or evidentiaries, that it's beyond
11 what's already been filed in the Court's docket; is that
12 correct?

13 MR. O'KELLY: That is correct, Your Honor.

14 THE COURT: And, Ms. Haas and Mr. Matthews for the
15 Defendant, who will be addressing the Court primarily?

16 MS. HAAS: I will, Your Honor.

17 THE COURT: Ms. Haas, is that correct?

18 MS. HAAS: Yes.

19 THE COURT: Counsel, what I would like to do is in
20 light of Judge Merryday's recent, meaning just yesterday,
21 referral, Plaintiff's pending motion for fees, costs and
22 approval of the incentive award, is to hear all argument
23 first on the unopposed motion for final approval of class
24 settlement and plaintiff allocation, docket entry No. 92,
25 as well as the contained supplemental statement by the

1 Plaintiff at docket entry No. 97.

2 And then I'd like to turn to the issue of attorney's
3 fees, expenses and the incentive award addressed by the
4 motion at docket entry No. 93. As I understand, all of
5 these motions are unopposed for the Defendants, or
6 otherwise not making any statement, regarding these
7 motions, particularly as to the attorney's fees in light
8 of the clear ceiling provision of the proposed settlement.

9 Ms. Haas, do I have that correct?

10 MS. HAAS: Your Honor, that's correct.

11 THE COURT: Very well. Mr. O'Kelly, I presume that
12 means you'll take the lead in addressing the Court as to
13 the opposed settlement, and also to the Plaintiff's
14 request for fees, costs and approval of the incentive
15 award; is that correct?

16 MR. O'KELLY: That's correct, Your Honor.

17 THE COURT: Are you prepared to proceed?

18 MR. O'KELLY: I am prepared. If it may please the
19 Court?

20 THE COURT: Please.

21 MR. O'KELLY: So, Your Honor, this class action
22 lawsuit was filed on March 26th, 2018. And the Defendants
23 named in the original complaint were Florida Cancer
24 Specialists and 21st Century Oncology. And the complaint
25 alleges an unlawful agreement under the Sherman Act to

1 allocate markets between the two cancer providers in five
2 counties, Southwest Florida, and also conspiracies to
3 monopolize sub-markets for radiation oncology and medical
4 oncology.

5 Shortly after filing the complaint it was brought to
6 our attention that 21st Century had already filed for
7 bankruptcy protection. So we filed an amended complaint
8 naming only FCS as the Defendant, but the nature of the
9 claims remained unchanged. FCS moved to dismiss the
10 complaint, but more or less simultaneously approached us
11 and asked if we would be willing to engage in an
12 information exchange, primarily financial information,
13 under Rule 408 so that the parties could determine if an
14 early settlement would be possible. And we agreed to do
15 that.

16 So Your Honor entered a stay of discovery pending the
17 decision of the motion to dismiss with the limited
18 exception that we could exchange information under Rule
19 408 for potential settlement purposes.

20 THE COURT: Sorry to interrupt, Counsel, but just so
21 the record is clear, there's an active second Defendant,
22 William N. Harland; is that correct?

23 MR. O'KELLY: Oh, I beg your pardon, Your Honor.
24 Yes, Dr. Harland is the principal officer of FCS.

25 THE COURT: I just want to be clear on that.

1 MR. O'KELLY: We sort of mentally conflict them as
2 FCS at this point, Your Honor, but you're absolutely
3 correct.

4 THE COURT: Please continue.

5 MR. O'KELLY: While we were in the initial stages of
6 exchanging information we received an order from the Court
7 ordering us into mediation, with the mediation to be
8 completed by -- I think it was the 25th of January, it was
9 late January of 2019 -- and appointed Peter Greely, a
10 well-known, local mediator as our mediator.

11 So we met with Mr. Greely and had a day-long
12 mediation session. And while we didn't settle it on that
13 day both sides felt that sufficient progress had been
14 made, and that we wanted to resume at the next available
15 date for Mr. Greely. In fact, we had two subsequent
16 meetings with Mr. Greely, following which we resolved the
17 case and entered into a settlement.

18 And the fundamental structure of the settlement is
19 that FCS is required to pay a total of \$7,187,500 into a
20 settlement fund. Payment to be made in two tranches. One
21 payment, the first payment, had to be made, and was made,
22 within ten days of the entry by Judge Merryday of the
23 preliminary approval order. And the second tranche is to
24 be paid within ten days of the entry of final approval
25 order, if the court enters the final approval order. And

1 in return for the payment into the settlement fund, FCS
2 obtained a release from all the claims arising out of the
3 anticompetitive conduct alleged in the complaint.

4 On June the 5th, 2019, the Court preliminarily
5 approved the settlement. And there's a long definition in
6 our papers in the settlement agreement for the settlement
7 class. But if I may sort of summarize the essence of it.
8 It's every individual person and entity, that is,
9 primarily health plans, that paid either FCS or 21st
10 Century for oncology services during the approximately
11 eight-year period, class damages period, set forth in the
12 complaint. It excludes entities, primarily federal and
13 state government entities, such as Medicare and Medicaid,
14 state institutions like prisons, et cetera. So it's
15 individuals and primarily private insurance companies.

16 A feature of the settlement is that there is no
17 claims process. Judge Merryday, when he was scrutinizing
18 our original proposal, which did have the claims process,
19 urged us to go back and see if we could do this without a
20 claims process and simply send checks directly to the
21 class members. His reasoning was that FCS and 21st
22 Century between them would have records of all of the
23 payments that had been made of class members, and from
24 that we should be able to determine what the awards were
25 for all of the class members.

1 We had in fact -- we -- Plaintiffs and FCS had
2 previously discussed the feasibility of doing that, but
3 had hesitated to do so because we weren't confident that
4 we could get sufficiently detailed and accurate
5 information from 21st Century, which was not a party.
6 After we received Judge Merryday's directions we went back
7 and conferred with counsel for 21st Century, and lo and
8 behold they discovered they could actually provide us with
9 sufficiently detailed information.

10 So we are -- the claims administrator will be able to
11 determine from the information produced by 21st Century
12 and FCS what the award from the settlement should be for
13 each class member, be they a health plan or an individual.
14 The distribution will be on a pro rata basis. That is,
15 each class member shares the settlement fund, which
16 proportionately will be the amount that he, she, or in the
17 case of a health plan, paid to FCS or 21st Century for
18 oncology services during the class period.

19 However we are aware that many individuals will have
20 paid relatively small amounts. These are individuals who
21 would have had insurance. These are individuals who would
22 have insurance, but had to make copays or make relatively
23 small payments in order to reach a deductible. So that we
24 don't end up sending out checks for very small amounts
25 we've proposed that had there be a minimum award to every

1 class member of \$5.

2 And the release -- any settlement class member who
3 doesn't opt out will release FCS from all claims relating
4 to the subject matter of the action, that is, to the
5 alleged -- of anticompetitive conduct and subsequent
6 injury to class members alleging the complaint. And that
7 includes federal and Florida antitrust claims, claims
8 under the Florida deceptive and unfair trade practices
9 act, and claims for unfair competition, unfair practices
10 and price discrimination.

11 It's important to note, however, for purposes of one
12 of the objections that was received that the release does
13 not extend to, and let me quote, "Individual claims
14 arising in the ordinary course of business for any alleged
15 medical malpractice or breach of contract related to FCS'
16 oncology services."

17 (Woman entered courtroom.)

18 THE COURT: The objection you're referencing is the
19 Elias' objection?

20 MR. O'KELLY: The Elias' objection, yes, Your Honor.

21 So the order requires that the settlement
22 administrator, Epic, would mail notice in a form that had
23 been approved by the Court to all class members by no
24 later than July 22nd, 2019. And based on Epic's original
25 analysis of the data produced by FCS and 21st Century to

1 determine that there was 94,595 class members, notice was
2 mailed by that date to 94,583 of those class members,
3 because there were no valid mailing addresses available
4 for 12 of those. And at that time FCS or 21st Century
5 wasn't able to provide a mailing address for those 12
6 individuals.

7 Subsequent to the mailing on further analysis a
8 further 38 class members were identified and notice was
9 mailed to them as well. The post office returned out of
10 those 95,000, approximately, notices, the post office
11 returned 1,223 notices as being undeliverable. Epic,
12 using standard skip tracing, the methodology, was able to
13 locate addresses for 497 of those people, so that
14 ultimately only 726 notices were undeliverable. That's a
15 pretty small proportion for a class of this size. It's
16 about three quarters of one percent.

17 The order also required that Epic post a notice of
18 the class settlement in two local newspapers in Southwest
19 Florida, the Ft. Myers News Press and the Sarasota Herald
20 Tribune by no later than August 5th, 2019. And, in fact,
21 notice was published on two dates, on Thursday, July 25th,
22 2019, and again on the following Sunday, July the 28th.
23 Epic also created a dedicated website with full details of
24 the settlement. And as papers were subsequently filed
25 with the Court, the website was updated with those papers

1 being posted on them. And finally Epic set up a toll-free
2 information website for class members.

3 There are two provisions in the settlement that I
4 think I need to note that were covered in our supplemental
5 papers. There was a provision in paragraphs 39 and 40 of
6 the settlement agreement that allowed FCS to unilaterally
7 terminate the settlement if the aggregate amount of
8 payments made to FCS and 21st century during the damages
9 period exceeded what was defined -- labeled the exclusion
10 amount, that is, a certain dollar threshold. That
11 exclusion amount was set forth in a confidential aside
12 letter between Plaintiff and FCS.

13 There is also a provision in paragraph 28 of the
14 settlement agreement stating that if FCS does not
15 terminate the settlement then in certain circumstances the
16 total amount that FCS pays into the settlement fund would
17 be reduced. By September the 20th, 2019, which was the
18 opt-out deadline set by the Court, the settlement
19 administrator received 54 timely requests for opting out
20 by class members, that's 54 out of almost 95,000. I
21 haven't done the calculation, but it's much, much less
22 than that 1 percent of the total class members.

23 All but two of the opt-outs were individual cancer
24 patients -- are in the case of individuals who had died at
25 their estates. The other two were health plans. They

1 were sister companies, apparently under common ownership
2 and under common management, and they also opted out.

3 And according to the data provided by FCS and 21st
4 Century the sum of payments made by the 54 opting out
5 class members was \$38,409,359.24. And I'm happy to be
6 able to inform the Court that that amount was less than
7 the exclusion amount specified in the side letter between
8 FCS and the Plaintiffs, and, therefore, the settlement
9 will not be terminated, and the total settlement fund will
10 not be reduced. I know we're going to talk about
11 objectors later, but --

12 THE COURT: I'll hear your position on the objections
13 of record now.

14 MR. O'KELLY: Okay. So there were -- there was one
15 objection filed by Mr. and Mrs. Elias, William and Sandra
16 Elias, that was received timely.

17 Then I understand Mr. Menard is in court, an
18 objection from Mr. Menard was received by the settlement
19 administrator two days after the deadline, but I note for
20 the record that it appears to have been mailed by Mr.
21 Menard on the 23rd of September, that is, seven days
22 before the expiration of the deadline.

23 We also understood that it had not been received by
24 the court clerk, unlike the Elias' objection, which is on
25 the docket. I don't believe that Mr. Menard's objection

1 is on the docket. So procedurally there are two questions
2 as to whether that is a valid objection or not.

3 If I may address the Elias' objection first, let me
4 note that from -- I assume Your Honor has read the
5 objection filed by the Elias'?

6 THE COURT: Yes.

7 MR. O'KELLY: It's clear that Mrs. Elias suffered
8 greatly during the course of her cancer treatment, and I
9 think anybody would be extremely sympathetic to her
10 situation. But it needs to be noted that Mrs. Elias and
11 her husband do not contend that the settlement is unfair,
12 unreasonable or inadequate, insofar as the settlement
13 relates to the antitrust claims that the plaintiff
14 asserted on behalf of the class.

15 They object to the pro rata distribution as it
16 applies to them. And they contend that the Court should
17 take into consideration, and I quote, "The historical
18 findings and unfortunate circumstances," end quote,
19 relating to Mrs. Elias' oncology treatment, rather than
20 simply applying a mathematical formula.

21 And there are a number of problems from a legal
22 perspective with their proposal. First of all, the
23 settlement was not, and was never intended to, compensate
24 class members for any alleged injuries that they have
25 suffered arising out of their oncology treatment. The

1 settlement relates purely to the claims that were asserted
2 in the complaint, that is, antitrust claims, and thus
3 claims based on alleged incorrect use of the chemotherapy
4 drug are not germane to the fairness, or reasonableness,
5 or adequacy of the settlement. And as I mentioned
6 previously, the release specifically excludes individual
7 claims arising in the ordinary course of business for any
8 alleged medical malpractice or breach of contract related
9 to FCS' oncology services. So class members like the
10 Elias' remain free to bring medical malpractice or any
11 other claims that they may have. They're not prejudiced
12 in their ability to bring such claims by the release in
13 the class settlement.

14 So to the extent that the Elias' object because the
15 settlement doesn't compensate Mrs. Elias for her alleged
16 medical injuries, I think the Elias' simply misunderstand
17 the nature of this settlement, which is purely a
18 settlement of antitrust claims.

19 And, second, even if hypothetically it were
20 appropriate for the Court to make exceptions to the pro
21 rata distribution rule, in order to consider individual
22 class member's medical histories, that would make any
23 class settlement of this antitrust lawsuit unviable. If
24 the Court had to consider thousands, who knows how many,
25 medical histories in making special awards for, you know,

1 medical suffering, individual issues would predominate
2 over the common question in this case, which is whether
3 class members had been overcharged for oncology services
4 during the damage period and by how much. And that would
5 thwart the purpose of Rule 23.

6 Indeed, we cited cases in our brief that I think
7 stand for the pretty self-evident proposition that
8 antitrust overcharge cases are particularly susceptible to
9 being resolved on a class basis, whereas medical
10 malpractice are not, because they almost invariably
11 involve individualized issues.

12 Mr. and Mrs. Elias also object to the proposed
13 incentive award of \$2,500 for the County of Monmouth in
14 its role as class representative. It's not clear from
15 their papers why they object to this. Perhaps they
16 believed that the County of Monmouth should have asserted
17 medical malpractice as well as antitrust claims on behalf
18 of the class. I would note that it seems doubtful to us
19 that even if the County of Monmouth had wanted to do that,
20 they were standing to do so, the County of Monmouth's role
21 is here as -- it's self-insurer for the medical expenses
22 of its current and retired employees, many of whom lived
23 in the State of Florida. And it's very doubtful to us
24 that it would have standing to assert medical malpractice
25 claims on behalf of over 90,000 individuals, most of whom

1 had no connection whatsoever with the Plaintiff.

2 (Mr. Menard left the courtroom.)

3 MR. O'KELLY: But as we discussed previously, even if
4 we overcame those hypothetical what-ifs again, we'd enter
5 a problem that this could not be done on a class-made
6 basis, because individual issues would predominate.

7 Turning to Mr. Menard's objection. His objection is
8 that we're -- we don't -- basically, his objection is that
9 we don't have a claims process. We don't require class
10 members to submit proof of what they have paid to FCS or
11 21st century for their oncology treatments. As I stated
12 previously, the settlement -- the plan of allocation here
13 provides for a pro rata cash distribution rather than
14 requiring proof of claims.

15 (Mr. Menard entered the courtroom.)

16 THE COURT: I'm sorry to interrupt you, Mr. O'Kelly.
17 Mr. Menard, while you stepped out Counsel turned to
18 addressing your objections. So I just want to alert you
19 to the fact that at this point I'm hearing from
20 Mr. O'Kelly concerning the objection that you submitted,
21 so that you're aware.

22 Please continue, Counsel.

23 MR. O'KELLY: And the reason that Judge Merryday
24 wanted us to have a direct cash payment allocation rather
25 than a claims process is that out of the, you know, 95,000

1 class members -- experience shows that when you have a
2 large class that a significant percentage of the class, of
3 the potentially eligible class members, are simply unable
4 to put together the records that are needed to make a
5 claim.

6 I think in a case like this this would have been a
7 particularly acute problem, because some of the treatments
8 for which payments were made go back almost nine years at
9 this point, eight years from the time of filing of the
10 complaint. And in many cases, as we've learned over the
11 course of working through the administration process, many
12 of the original class members are deceased, and it's
13 actually now their estates that stand to get the awards.
14 So it was both more efficient and -- we and, I think,
15 Judge Merryday, believed fairer to have a direct
16 distribution rather than a claims process.

17 As the Court pointed out in an earlier order a claims
18 process is not necessary here where, quote, "The Defendant
19 possesses the records necessary to provide a satisfactory,
20 inexpensive and accurate distribution of the settlement
21 fund."

22 So I understand we'll hear from Mr. Menard later, but
23 that's our view on the objections.

24 So to return to the fairness, adequacy and the
25 reasonableness of the settlement the Court, in its

1 preliminary approval order, found that we -- that the
2 settlement -- excuse me, Your Honor -- the settlement
3 class satisfies the requirements of Rules 23A and one of
4 the requirements of Rule 23B3. I don't know if you need
5 me to go back over the reasons why the Court found that or
6 --

7 THE COURT: Well, I'm very familiar with Judge
8 Merryday's approval order. For purposes of the record,
9 Mr. O'Kelly, have any circumstances changed in
10 cross-counsel's view that would affect Judge Merryday's
11 preliminary findings with respect to the elements of 23A
12 and 23B?

13 MR. O'KELLY: None at all, Your Honor, no change.

14 THE COURT: I'm happy to hear anything else you'd
15 like to say, that was my question.

16 MR. O'KELLY: Thank you. The Court also found that
17 the settlement was the product of a good faith informed
18 and arm's length negotiation between the parties. And,
19 indeed, in our preliminary approval papers we submitted a
20 declaration from the mediator which also attested to that.
21 And, again, nothing has changed in our view since that
22 would throw that conclusion by Judge Merryday into
23 question.

24 So turning to the standard for fairness adequacy and
25 reasonableness, in Bennet v. Behring Corp., a 1984 case,

1 the 11th Circuit set forth the standards for final
2 approval of a settlement, and those standards still apply
3 in this circuit.

4 If I just go briefly through the factors one by one?

5 THE COURT: Please.

6 MR. O'KELLY: The first factor is the likelihood of
7 success at trial. And this factor does not require the
8 Court to make a determination as to whether or not the
9 Plaintiff would or would not have succeeded at trial. It
10 simply involves, and I quote, "A limited inquiry into
11 whether the possible rewards of continued litigation with
12 its risks and costs are outweighed by the benefit of
13 settlement."

14 And I'm quoting from a 1992 case from this district,
15 Ressler v. Jacobson, it's cited in our papers. I don't
16 know if you want the citation, Your Honor.

17 THE COURT: I have them.

18 MR. O'KELLY: So we believe that the claims that the
19 Plaintiff asserted in the complaint were meritorious, and
20 that the Plaintiff and the class would prevail if this
21 matter proceeded to trial. But as I noted earlier, FCS
22 denies any liability and moved to dismiss the complaint
23 after it had been filed.

24 And it raised non-trivial objections to the complaint
25 in its motion to dismiss. There were statutes of

1 limitations arguments. And there were also arguments
2 regarding the sufficiency and plausibility of the
3 Plaintiff's allegations regarding the relevant antitrust
4 markets and the existence of an anticompetitive agreement.

5 If we had, as we expected to -- if we survived the
6 motion to dismiss, then we would have had to go through,
7 undoubtedly, contested motions for class certification,
8 and ultimately for summary judgment, all of which would
9 also implicate considerable costs and risks. And that's,
10 of course, to say nothing of the risks associated with
11 taking the case to trial, and any -- possibly even a
12 post-trial appellate review.

13 Therefore, given the cost and uncertainty regarding
14 the ultimate outcome, we concluded that a settlement with
15 FCS according to the terms set forth in the settlement
16 agreement was in the best interest of the class.

17 The next two benefactors are the range of the
18 possible recovery, and the point on or below the range of
19 recovery at which a settlement is fair adequate and
20 reasonable.

21 So in connection with mediation FCS produced to us
22 very considerable and detailed financial information,
23 payment information, information regarding payments that
24 had been made by members of the class. And, in fact, as
25 we dug deeper into it we had to go back to them several

1 times and ask for even more detailed information. So this
2 was produced to us over a period of two or three months,
3 and ultimately ended up being some very detailed
4 information.

5 We then had that information analyzed by economic
6 consultants, persons who, had this case gone to trial,
7 probably would have been proffered as our damages experts.
8 And based on their analysis they came up with a range of
9 damages attributable to FCS of between \$12.7 million and
10 \$16.4 million.

11 I note, by the way, that FCS also had its own damages
12 consultants and they used an alternative method of
13 estimating damages and came up with an amount of no more
14 than 2.9 million in damages. So there was a spread
15 between what FCS believed the damages to be and what our
16 consultants indicated they should be.

17 For purposes of estimating those damages we assumed
18 that we would be able to overcome the challenges posed by
19 the then-pending motion to dismiss, and ultimately class
20 certification and summary judgment. Any one of which, of
21 course, had we been wrong, would have resulted in no
22 recovery at all.

23 So here we believe that the certainty of a class
24 settlement of 7,187,500 provides an excellent recovery for
25 the settlement class given the complexity of the matter

1 and the risks endured. We note that the cash payment
2 represents between 43.8 percent and 56.7 percent of our
3 consultant's estimate of the class damages, which is well
4 within the fair, adequate and reasonable recovery under
5 11th Circuit case law.

6 The next benefactor is the complexity expense and
7 duration of the litigation. And the prospect of continued
8 litigation would pose a substantial risk for the Plaintiff
9 and the class, and pursuing the claims would be expensive
10 and time consuming. I don't need to repeat the various
11 obstacles that would have to be overcome, but the outcome
12 of the cost. And given the fact that this is an antitrust
13 class action, those costs would also include, inevitably,
14 liability expert's fees as well as damages experts, and
15 possibly industry experts as well.

16 In addition, under the original scheduling order,
17 trial isn't scheduled until 2021, and even if we prevailed
18 at trial, it's also possible, of course, that the
19 litigation could continue for further periods beyond that
20 due to appeals by whichever party lost at trial.

21 So, on the other hand, the settlement provides
22 definite and immediate benefits now. And, again, I'm
23 quoting from a case within this circuit, *Behringer v.*
24 *Rentco Enterprises* from the Southern District of Florida,
25 "The law favors compromises in large part, because they're

1 often a speedy and efficient resolution of long, complex
2 and expensive litigations in the court."

3 The next benefactor is the positive reaction of the
4 class. And a case from this district from 2017, the
5 Bastian case, says a low percentage of objections
6 demonstrates the reasonableness of a settlement. As we've
7 already discussed there were at most two objections, if
8 one admits Mr. Menard's objection, out of a class of
9 95,000 members. And there were only 54 opt-outs from the
10 class, which is approximately one tenth of one percent.
11 So in a class of this size this reaction shows that there
12 was overwhelming support among the class for the
13 settlement. And that, again, establishes the
14 reasonableness and warrants final approval.

15 And the final applicable benefactor is the stage of
16 the proceedings at which the settlement was reached. So a
17 Court has to consider the state of proceedings in order to
18 ensure that the Plaintiff's had access to sufficient
19 information to adequately evaluate the merits of the case,
20 and weigh the benefits against further litigation.

21 So despite the fact that discovery was stayed pending
22 the motion to dismiss we did have access to very detailed
23 financial information, which was produced to us over a
24 couple of months. And we retained economic experts who
25 analyzed that information. So we were able to come up

1 with a reasonable estimate as to the potentially total
2 amount of damages that could be one where we prevail at
3 trial.

4 And because of this, and our own experience as a firm
5 in litigating, and often settling, complex antitrust
6 cases, we were able to put a probability on what our
7 likelihood of success would be, and adjust the total
8 damages accordingly so we could evaluate the value of the
9 settlement against the prospects for success.

10 So by settling now the settlement class would be
11 spared the burden and expense of discovery and continued
12 litigation and stretch it on for the next few years and
13 possibly beyond and even to appeals.

14 So for all of these reasons we believe that the
15 settlement is fair, adequate and reasonable and serves the
16 best interest of the class. And that's all I have to
17 offer Your Honor on the fairness and reasonableness of the
18 settlement.

19 THE COURT: Thank you, Mr. O'Kelly. Before we turn
20 to the issue of the fees, expenses and the incentive award
21 I do have several questions concerning, essentially, the
22 mechanics of notice and mechanics of the proposed
23 settlement. I wanted to allow you a full opportunity to
24 present your prepared remarks, but some of this will
25 backtrack into comments you've already made.

1 In Chief Judge Merryday's June 5th order on
2 preliminary approval of proposed settlement and notice,
3 the docket entry No. 86, footnote six, required the
4 parties to amend the notice to include conforming
5 explanations of the requirements for any objection from
6 any class member to the proposed settlement. And I
7 believe the pinpoint cite is docket 86, at page eight,
8 footnote six, but in the body of the order Judge Merryday
9 was fairly deliberate in specifying the requirements, but
10 the notice had potential objectors to comply with.

11 One of those was that any objection must state the
12 name of the action and the case number. My review of the
13 actual notice that went out, however, as filed by the
14 Plaintiff, docket entry 92-2 at ECF page 14, suggests that
15 the notice did not, in fact, instruct the class members to
16 include the name of the action and the case number of the
17 action on any objection.

18 And the reason I raise this is, one, it's
19 technically, if I'm correct in my reading of the notice, a
20 departure from what Judge Merryday ordered. And,
21 secondly, it may actually have material consequences, for
22 example, Mr. Menard's objection, which as everyone heard
23 at the offset of this hearing, Mr. Menard is prepared to
24 tell us that he submitted his objection to the Court, and
25 I'll hear from him further on that. In looking at the

1 actual objection that was filed within the Court, as
2 received by the settlement in this, the objection did not
3 include the case name, the case number.

4 So thinking about this mechanically, if Mr. Menard
5 attempted to submit his objection to the Court, to the
6 Clerk of Court, and did not contain the case name or the
7 case number, it would have never ended up in the court's
8 docket or the court's file, which might explain the
9 discrepancy between your view of the docket and Mr.
10 Menard's prepared remarks today.

11 And he may not be the only potential objector who may
12 have run afoul of that if the notice did not, in fact,
13 instruct them to include the case name and the case
14 number. So while this seems like a relatively small
15 detail, it's one that can have consequence with any
16 potential objectors, technical compliance with Judge
17 Merryday's expectations in terms of both submitting an
18 objection to the settlement administrator, but also to the
19 Clerk of Court.

20 Mr. O'Kelly, I'd like you to address that, but also,
21 as I construe, Judge Merryday's order granted preliminary
22 approval, although there may be some ambiguity in this
23 regard. The notice technically did not also advise the
24 objectors to limit their objections to 20 pages. But as I
25 understand it no objection or purported objection came

1 anywhere close to 20 pages. So that may be an immaterial
2 noncompliance as well.

3 So would you please address the materiality of those
4 two issues, and then class Counsel's position on whether
5 the notice was insufficient in any respect by virtue of
6 not complying with Judge Merryday's order.

7 MR. O'KELLY: I apologize for the technical failures
8 to comply with that aspect of Judge Merryday's order in
9 the class notice. Other than Mr. Menard, we have no
10 reason to believe that any objector fell afoul of that
11 requirement. Because if Epic or a settlement
12 administrator logged all communications it received from
13 class members -- and other than the Elias' the only
14 objection they received was the one from Mr. Menard.

15 THE COURT: So if I understand your point, we would
16 be at least on notice of any other objection, because it
17 would have -- the objector complied with the notice also
18 being sent to the settlement administrator, who logged all
19 correspondence received in connection with this matter; is
20 that correct?

21 MR. O'KELLY: That's correct, Your Honor. And as for
22 the 20 page requirement, as you can see, neither the
23 Elias' or Mr. Menard came close to exceeding that
24 requirement.

25 THE COURT: The address listed for the settlement

1 administrator in the notice was 40 Cancer Specialists
2 Antitrust Settlement Administrator, with the corresponding
3 PO box, and city, state and ZIP code information. So
4 there's no potential then, if an objector complied with
5 that address information in the notice, that the
6 administrator would have failed to note a potential
7 objection, but then also not having been filed with the
8 Court based on this oversight on the notice. Is that your
9 position, Mr. --

10 MR. O'KELLY: That is my position, Your Honor. That
11 was a dedicated PO box that was set up especially for this
12 purpose by Epic.

13 THE COURT: I see. So it's not a settlement
14 correspondence PO box that would be with other potential
15 objections, or correspondence with any potential
16 settlements?

17 MR. O'KELLY: No, Your Honor. That's the sole
18 purpose of that PO box.

19 THE COURT: Very well. Mr. O'Kelly, you said, I
20 believe at least twice in your remarks, that based on the
21 consultants engaged by class counsel in this matter a
22 proposed settlement here of \$7,187,500 would represent
23 approximately 43.8 to 56.7 percent of the estimated
24 settlement classes damages contributable to FCS.

25 As class Counsel, in light of your experience

1 handling cases of this nature, is it your position that
2 that, with those percentages, on their face with the
3 proposed settlement here, is fair, presents fair value to
4 the class members?

5 MR. O'KELLY: Yes, Your Honor.

6 THE COURT: With respect to the pro rata calculation
7 for individual class members in the receipt of any cash
8 payments in this matter, Mr. O'Kelly, can you please
9 explain in more detail what the pro rata means here?
10 Specifically, how you intend to calculate it with respect
11 to any individual class members? I note from the
12 plaintiff allocation at docket entry 92-1 at ECF page one,
13 it states that the payment will be proportionate to the
14 amount the class member paid to the Defendants.

15 But mechanically, or mathematically, how are you
16 calculating that, because I don't see that represented
17 anywhere in the papers?

18 MR. O'KELLY: Let's assume hypothetically that
19 somebody's cancer treatment cost \$5,000 and they had
20 insurance. And the insurance covered 4,800 of that
21 \$5,000, and the individual was required to pay \$200 out of
22 pocket, either by having to satisfy a deductible or by
23 making copayments. So for every -- let me get my math
24 right -- so for every \$480 of -- and let's say that the
25 overcharge amounted to -- I'm making this too complicated,

1 Your Honor. Let me start again. I'm not great at doing
2 math in my head on the fly.

3 Let's assume again that it was \$5,000 and that the
4 patient paid \$100. So the insurance company for that
5 claim would receive 490 times a larger amount of an award
6 than the individual received. It will be proportionate to
7 the amount that was actually paid out of pocket either by
8 the health plan or by the individual. There are a
9 relatively small number of class members who paid entirely
10 out of pocket, so they would be reimbursed, or at least
11 get an award, based on those entire payments. But for
12 most individual class members who only paid either copays
13 or deductible amounts they would get much smaller amounts,
14 because the bulk of the payment for their treatment was
15 made by their insurance plans.

16 And I also mention that because some of those amounts
17 payable to individuals, once they're calculated, will
18 amount to very small amounts of money. We proposed in the
19 settlement, as presented for preliminary approval, that we
20 have a \$5 cutoff. So if, once the calculation is done, an
21 individual patient who only paid, for example, copays,
22 only got \$2.17 of an award, it will be rounded up to \$5
23 for those individuals who had very small payments.

24 THE COURT: But in terms of the common fund here, is
25 there a proportionate reduction in how you're calculating

1 how individual or entity recipients will receive payment?

2 MR. O'KELLY: Yeah, the common fund, after payment of
3 any taxes, if there are any, attorney's fees, and costs,
4 the settlement administrator's costs, and an award to the
5 class representative, there would be a formula where that
6 amount of money, what was left, would then be allocated
7 across the class based on the total payments received by
8 FCS and 21st Century attributable to all members of the
9 class. So it's almost as if each dollar that was paid
10 into the class would have a decimal associated with it,
11 and then they'll be multiplied by the amount that each
12 individual health plan or each individual class member
13 paid.

14 So the total payments will then, in aggregate, amount
15 for the amount of the settlement fund. Oh, and there
16 would be an adjustment in the algorithm to round up the \$5
17 amounts for the individuals who are getting very small
18 amounts. And then it will be run again with those people,
19 with a flow of \$5 in there, and then there would be an
20 amount for each of the health plans and the individual
21 patients whose awards are greater than \$5, and it would
22 spit out a number for each of those. I hope I'm
23 explaining that clearly, Your Honor.

24 THE COURT: I think I follow you. That's what I
25 expected. But I don't see that in any of the papers. So

1 I just wished to be clear. The amount any individual
2 class member will receive of any individual or entity will
3 be calculated based on the amount of money still remaining
4 in the common fund after the payment of those things
5 authorized to be paid for the individuals of the class
6 members are paid, and then will be proportionately reduced
7 based on everyone else who needs to be paid out of the
8 fund. Is that correct so far?

9 MR. O'KELLY: It's correct, Your Honor.

10 THE COURT: With some adjustment by the minimum \$5
11 payment, to go to anyone whose recovery would be less than
12 \$5?

13 MR. O'KELLY: Correct, Your Honor.

14 THE COURT: I think I follow. That was my
15 expectation as well, or my assumption, rather, based on
16 what was represented to me, but I wanted to ask the
17 question in a more pointed fashion. Anything further on
18 that before I move on with my question, Mr. O'Kelly?

19 MR. O'KELLY: No, Your Honor. You explained it
20 better than I did.

21 THE COURT: Not so sure about that, thank you.

22 With respect to the \$5 minimum payment, this is where
23 I'm going to be challenged, particularly, my question, the
24 Plaintiff allocation states that although settlement will
25 be pro rata, each member of the settlement class will

1 receive a minimum of \$5, unless that settlement fund is
2 insufficient to allow such a minimum payment to each class
3 member, in which case, the amount paid to all class --
4 excuse me -- in which case the amount to be paid to all
5 class members will be adjusted on a pro rata basis.

6 What does that mean, Mr. O'Kelly?

7 MR. O'KELLY: I believe at this point that that
8 doesn't mean anything, Your Honor. This came out of our
9 discussions with FCS when we were putting the mechanics of
10 the settlement together. And the situation that we
11 envisioned could happen is that if a very large portion of
12 the class opted out, considerably in excess of the
13 exclusion amount, that would trigger FCS's ability to
14 terminate the settlement, but FCS determined that it
15 wouldn't terminate the settlement, but would instead take
16 a reduction of what it had to pay into the full settlement
17 fund so that the fund was considerably reduced, it might
18 reach the point where even paying a \$5 minimum would so
19 burden the other members of the class, that it would no
20 longer be fair to have the minimum. Fortunately, those
21 provisions were not triggered, because the exclusion
22 amount was not reached. And that's a hypothetical that
23 has not, and will not, arise.

24 THE COURT: Thank you. The Plaintiff allocation also
25 states -- and I'm looking at document -- I believe it's

1 92-1 at FCS page one that if after the initial
2 distributions from the net settlement fund have been made,
3 and the void date has passed, that being the 120-day
4 redemption period, for the checks to be cut to the
5 individual -- to the class members, a balance remains in
6 the fund that is too small for a further distribution to
7 be economical, the class representative may request the
8 Court for its approval to distribute that balance to
9 charities or other appropriate beneficiaries. No money
10 will be returned to FCS after the court finally approves
11 the settlement.

12 This, for lack of a better term, tail-end process,
13 Mr. O'Kelly, seems very vague to me. How is it that it
14 would be determined whether the balance remaining in the
15 fund would be too small for further distribution to be
16 economical? That's my first question.

17 My second question, relatedly, is if it is
18 economical, what is then the Plaintiff's plan for further
19 distribution of any remaining funds?

20 If it's not economical, this is the third question,
21 why does the Plaintiff allocation say the class rep may
22 request the Court for distribution to charities, et
23 cetera? Why is it permissive as opposed to mandatory?

24 And my fourth question is, if there is any money
25 leftover and the class rep does not request for approval

1 for the balance to be given to charities or other
2 appropriate beneficiaries, what happens to that residual
3 money?

4 Hopefully those questions will be clear. Can you
5 explain that aspect of the proposed process?

6 MR. O'KELLY: With respect to the last two questions,
7 if I may address them first, Your Honor. I think you read
8 this far more closely than we did, and we probably should
9 have read it so closely. By "may" we intended simply that
10 if the circumstance that we described there arose, then
11 that's what would happen, but, of course, we can't be
12 certain that that circumstance will arise, that there will
13 be a residual amount leftover that's too uneconomical to
14 distribute.

15 So anyway, to take your questions in order. How do
16 we determine if it's too small to be economically
17 distributed? We would get an estimate based on what they
18 had already done in making the main distribution from Epic
19 as to what it would cost to make a second distribution to
20 the class members, what their actual fees for making a
21 second distribution would be. It obviously would be less
22 than what they had to spend making the first distribution,
23 because the algorithms would already have been created.
24 Obviously there would no longer be a \$5 minimum for the
25 second distribution, because those individual would have

1 gotten the their \$5.

2 So the question would be, if the amount is
3 sufficiently large that Epic can run another distribution,
4 mail another 90 something thousand dollar -- excuse me
5 90,000 checks, and still actually send -- have money left
6 to send the check to the class members, the distribution
7 will be made. If it turned out that the cost of making
8 the second distribution would overwhelm the relatively
9 small amount that was left in the fund then there wouldn't
10 be a second distribution. But we certainly didn't intend
11 "may" to be discretionary, and in retrospect I think
12 "shall" would have been a better choice of words on our
13 part.

14 THE COURT: Judge Merryday doesn't like the word
15 "shall." We also use "well." I don't want to speak for
16 him, but having had conversations with the Judges of the
17 district regarding amendments to the local rules, there is
18 apparently different viewpoints as to whether "shall" is
19 also permissive.

20 But there is no objection from you, as class Counsel,
21 to considering or revising the allocation plan to make
22 that a mandatory requirement?

23 MR. O'KELLY: Absolutely not. We intended it to be
24 mandatory if the situation arose where the residual amount
25 could not be distributed to the class members.

1 THE COURT: Thank you. I'd like to turn our
2 attention to the confidential side letter that you have
3 addressed in your submissions to the Court, but also there
4 were remarks here today. As I understand, that side
5 letter specified a benchmark, or a threshold, for what
6 you're calling the exclusion amount, which if that had not
7 been satisfied would have triggered FCS' right to
8 unilaterally cancel the proposed settlement. That
9 contingency was not triggered, but I'm curious about this
10 side letter and what else it may say beyond simply the
11 exclusion. And I'm to understand that that letter is
12 deemed by the parties as being confidential.

13 Does it contain any other terms that have bearing on
14 the proposed settlement here beyond the specificity of the
15 exclusion?

16 MR. O'KELLY: To answer the last part of your
17 question first, no, it doesn't contain any other material
18 terms. A side letter like this is, I would say, common in
19 antitrust class action settlements where there is what's
20 known as a blow provision, where the Defendant has the
21 right to blow up the settlement. Typically, as
22 Plaintiff's lawyers, we prefer not to have such
23 provisions, but sometimes you end up negotiating them in
24 the give and take of negotiating a settlement.

25 The reason that the trigger amount, or the exclusion

1 amount, that's described here remains confidential is to
2 prevent unfortunate mischief making by some lawyers who
3 would try to corral a number of large class members who
4 would then threaten to blow the settlement unless they
5 were given a separate settlement that would be more
6 advantageous than what they get by remaining members of
7 the class.

8 So by keeping the exclusion amount, the trigger
9 amount confidential, one, ensures against that type of
10 mischief making, which unfortunately does happen. I'd be
11 happy to show the confidential side letter to Your Honor
12 if it would help resolve any doubts about this.

13 THE COURT: I saw in the filings -- or at least maybe
14 in the settlement agreement docket entry 80-1 in paragraph
15 41 that the parties stated that if required a confidential
16 side letter could be either reviewed in camera or filed
17 under seal. Based on the proffer here today from
18 Mr. O'Kelly I'm not inclined to ask to review it in camera
19 or file it under seal.

20 But Mr. O'Kelly, just so I'm clear, your
21 representation as class Counsel and as an officer of this
22 Court is that the side letter contains no other agreements
23 between the parties beyond the agreement as to the
24 exclusion act; is that correct?

25 MR. O'KELLY: That's absolutely correct, Your Honor.

1 THE COURT: In your motion for final approval of the
2 settlement, Mr. O'Kelly, the docket entry No. 92 at ECF
3 pages 11 through 12, you described the parties compliance
4 with the settlement agreement to obtain the first tranche
5 of the funds to the escrow agent of the bank. And, A, if
6 I'm not mistaken, also a docket entry No. 92 at ECF page
7 12, note three, footnote three, there is a request that
8 the Court approve the appointment of Huntington as the
9 escrow agent for these purposes.

10 Is that formal appointment necessary? If so, simply
11 for the record, is there anything you'd like to add
12 regarding the statements made in your filing as to the
13 suitability of Huntington National Bank and as the escrow
14 agent here, Mr. O'Kelly?

15 MR. O'KELLY: I don't believe it's necessary, Your
16 Honor. I've seen settlements where the class plaintiffs
17 requested courts to approve the appointment of the escrow
18 agent. I have been in other settlements where no such
19 request was made. It was -- I guess, what I might say, is
20 a belt and suspenders type of move on our part to ask for
21 approval of Huntington in this footnote, but I don't
22 believe it's necessary. I've certainly seen settlements
23 where it hasn't been done, and I've seen settlements where
24 it has been done. And I couldn't find any rule to address
25 the question either way.

1 THE COURT: Nor did I. Nevertheless, it's class
2 Counsel's position that Huntington National Bank, N.A., is
3 adequate to serve as an escrow agent for the reasons you
4 specified in the motion for final approval.

5 MR. O'KELLY: That is absolutely our position. We
6 used them many times. We find that they discharge their
7 duties very well. And their fees tend to be more
8 reasonable than other banks and institutions that provide
9 similar services.

10 THE COURT: I see. Mr. O'Kelly, I'd like to address
11 correspondence that was received by the Court, and filed
12 as docket entry No. 90 in the court's docket. This
13 correspondence came from an entity -- let me pull it up,
14 I've got the name of Ciox Health. It makes certain
15 representations regarding the transfer of a line of
16 business to a different entity.

17 As I construe this correspondence, which was received
18 by the courts, reviewed by me, and that's what the Clerk
19 of Court's docket -- the letter in the docket, for the
20 record, would be clear, that we received by
21 correspondence. But as I read it, this appears to be an
22 attempt by the author of the letter, Ciox, to comply with
23 the notice that was sent to the class, specifically docket
24 entry 92-2 ECF page 12, which directed class members to
25 notify the settlement administrator if there was another

1 paying person or entity who should receive the notice.

2 Mr. O'Kelly, is that consistent with your
3 understanding of that correspondence, or do you have a
4 different view?

5 MR. O'KELLY: No, that is my understanding of that
6 correspondence, Your Honor.

7 THE COURT: Very well, it doesn't constitute an
8 objection or anything else that we need to do in terms of
9 assessing fairness?

10 MR. O'KELLY: I think it relates to the sale of a
11 business, which in turn potentially transferred ownership
12 of the claims.

13 THE COURT: Because I don't believe it was covered by
14 your remarks if any class member -- if someone else had
15 actually paid and should receive notice to the settlement
16 administrator, provide notice to those persons or
17 entities.

18 Did that happen; if so, what was the settlement?

19 MR. O'KELLY: I'm not aware that it happened, Your
20 Honor. And --

21 THE COURT: Well, it happened once.

22 MR. O'KELLY: Well, aside from Ciox, yes, Your Honor.
23 And that one was brought to our attention, in addition to,
24 you know, having it on the docket, was brought to
25 attention by Epic. And I can't envision a situation where

1 Epic would receive such notice and not act on it, not
2 notify us of it.

3 THE COURT: Let's turn now to attorney's fees, the
4 expenses and the incentive award, Mr. O'Kelly.

5 MR. O'KELLY: Certainly, Your Honor. Since the
6 Camden 1 decision by the 11th Circuit in 1991, the 11th
7 Circuit requires courts in this circuit to use the
8 percentage of the common fund method for determining
9 whether the request for attorney's fees are reasonable.
10 And in Camden 1 the 11th circuit rejected our load sum
11 multiplier methodology used in many of the other circuits.

12 I just note from the record that here, based on our
13 fees through -- from February 14th, 2018, when we began
14 investigating the claims here, through August 31st, 2019,
15 when we filed our fee application, the load sum multiplier
16 would be about 1.82, which is quite low compared to the
17 multipliers in antitrust actions.

18 And under Camden, in determining whether a requested
19 fee is reasonable, courts in the circuit are required to
20 consider several factors. And I'll go through them one by
21 if Your Honor permits me.

22 THE COURT: Yes.

23 MR. O'KELLY: One is the time and labor required, a
24 detailed description of the various types of work that
25 were performed by lawyers from our firm on pages six

1 through eight of the fee application. And there is also a
2 time and billing rates summary in the appendix for
3 lawyers, paralegals and other professionals. We have a
4 number of economists on our staff and they are primarily
5 used by the other professionals. And all of this work was
6 reasonable and necessary for the prosecution and
7 settlement of the case.

8 I will note that one item required far more attention
9 than one might expect at such an early stage of the case,
10 and that was the damages analysis, which one doesn't
11 normally face before one is even having a ruling on a
12 motion to dismiss. And that turned out to be a very
13 complex process that spent three or four months, and that
14 was a major factor in our fees one normally wouldn't
15 encounter at such an early stage.

16 THE COURT: Was it undertaken because Judge Merryday
17 ordered the firms to mediation?

18 MR. O'KELLY: Correct.

19 THE COURT: So it was to inform the settlement
20 discussions of mediation?

21 MR. O'KELLY: It was to inform settlement
22 discussions. And I'll touch on in a moment, it turned out
23 to be more complicated than I think we or FCS had
24 originally expected.

25 THE COURT: Please continue.

1 MR. O'KELLY: So we think that the time and labor
2 that was expended on the case was reasonable and necessary
3 for the prosecution and settlement of this case. The
4 second Camden factor is the novelty and difficulty of the
5 questions involved. First of all, I think it's generally
6 recognized that antitrust cases are notoriously complex,
7 and this was no exception.

8 And to sort of elaborate a little bit more on the
9 complexity of the damages analysis, we set about doing a
10 benchmark analysis where you compare the prices charged
11 for products and services that may have been affected by
12 the conspiracy, with the prices for similar products and
13 services in an area that's not affected by the alleged
14 conspiracy.

15 And the obvious benchmark here, because both FCS and
16 21st Century operate statewide in Florida, was to compare
17 the prices charged for oncology services in the five
18 county area with the prices charged with the rest of the
19 State of Florida.

20 What we found was that a straightforward comparison
21 of charges for a type of cancer with -- for oncology
22 services generally led to wide fluctuations. And really
23 there was something wrong with the fairly simple benchmark
24 approach we were taking. Cancer treatment is not widgets,
25 they're not found throughout the state. And based on

1 discussions with FCS as counsel and a more detailed review
2 of the information that FCS had provide to us for our
3 consultants, we identified 23 different types of cancer
4 treated by FCS, each of which involved different
5 diagnostic and treatment ratings.

6 So, therefore, what we concluded is that you can't
7 compare the price paid for, say, colon cancer with the
8 prices paid for bone cancer or breast cancer. You have to
9 compare colon cancer in the five counties with colon
10 cancer treatment outside the five counties.

11 That, of course, meant we were dealing with
12 frequently very small sample sizes when you took the
13 entire universe of people who had received treatment and
14 split it up into 23 different baskets. Some of those
15 baskets were very small. And, statistically, when you
16 have a small sample size, outliers can distort the
17 analysis.

18 And outliers in this case could have arisen in two
19 circumstances, at least, to maybe perhaps oversimplify it.
20 One is where unfortunately somebody didn't survive through
21 the full treatment. And if you look at what they had paid
22 or what their insurance company paid, just as a set of a
23 round number, it would reduce the average payment for that
24 type of cancer, because they really only had taken maybe
25 taken 40 percent of the treatment before they died. So

1 you had to adjust for outliers like that.

2 At the other extreme you had patients who presented
3 with a particular type of cancer, but the treatment turned
4 out to be far more complex than originally had been
5 anticipated. Or in some cases while they're being treated
6 they were diagnosed with a second or sometimes even a
7 third form of cancer. But they were logged at admission
8 as having the first form. So if you took the entire cost
9 of that, that would overstate the cost of treatment for
10 that particular type of cancer. And again in a small
11 sample size that could distort the sample.

12 The reason I'm telling you all this is this turned
13 out to be a far more complex analysis than I think either
14 side expected at the beginning. And it -- you know, just,
15 I think, emphasizes the complexity of this case and the
16 need for lawyers dealing with this to be sufficiently
17 apprised as to what the complexities are and how they can
18 deal with them.

19 The next factor, Camden factor, is the skills that
20 performed the legal service properly. In our papers I
21 discussed Robins Kaplan's role and reputation as one of
22 the nation's leading antitrust class action firms. We've
23 been involved in some of the largest antitrust
24 settlements, and some of the most complex antitrust cases
25 in several decades.

1 Three cases I would highlight are the air cargo case
2 where we recovered over \$1.2 billion in settlements for
3 class members. The auto parts case where we recovered
4 over a billion dollars in settlements for class members.
5 And in both of those we were either leads or colleague
6 counsel. And the payment card interchanged where we were
7 co-lead, and where a settlement class of 10 million
8 merchants with a 6.25 billion settlement has been
9 certified by the District Court, but it still has to run
10 through an appeals process. So these are, you know,
11 examples -- obviously, exceptional examples -- of my
12 firm's ability to provide the legal service properly.

13 Then I also discussed in my papers my own experience
14 of over 20 years litigating antitrust actions both as a
15 defendant and a plaintiff. I spent most of my
16 professional career on the defendant side. And for the
17 last three years I've been on the plaintiff's side of the
18 field.

19 I just mention one case in which we are co-leads, and
20 I am senior lawyer for my firm, which is the disposable
21 contact lens case, which is pending in the Middle District
22 of Florida in Jacksonville. In our papers we talked about
23 how a settlement class and the litigating class have been
24 certified. Since we filed our papers a second defendant
25 has settled. Some now we have two certified settlement

1 classes. That case, by the way, is scheduled to go to
2 trial in Jacksonville in February of 2020.

3 The next factor is the preclusion of other employment
4 by the attorneys due to acceptance of the case, and
5 through the end of August 2019, attorneys, paralegals and
6 other staff from my firm spent a total of 1,673.4 hours on
7 this case. And Michael Fitzgerald, our co-counsel who is
8 sitting in court today, he devoted 68.3 hours to the case
9 in the same time period. Obviously, while we were
10 spending those hours on this case we couldn't spend those
11 hours litigating any other cases.

12 The next factor is the customary fee. And that
13 means, according to the case law, in situations where
14 plaintiffs negotiate a contingent fee up front, the
15 question is, how does the requested contingent fee compare
16 here, and we've cited cases in our papers showing that in
17 the 11th Circuit clients negotiate contingent fees of
18 between 30 percent and 40 percent, so we are well within
19 the customary range for negotiated contingent fees as we
20 have here.

21 The next factor is whether the fee is fixed or
22 contingent, and the risks taken on by plaintiff's
23 attorneys. This is a contingent fee case. And the risk
24 is simply that if we don't settle or ultimately prevail at
25 trial we get paid nothing. And we took on the case, and

1 it is typical, to give an award that compensates firms
2 like mine that take on the risks of achieving a settlement
3 for a class by taking on a class action on a contingent
4 basis. This was very complex.

5 Again, to recap, we faced a motion to dismiss, which
6 was never ruled on. We would have had to face a contested
7 class certification motion, summary judgment file and
8 possible appeals. The amount involved and the results
9 obtained, there's an X factor. We got an early
10 settlement, with what we believe is a great result for the
11 class, a settlement that represents between 43.8 percent
12 56.7 percent of the class potential damages, based on our
13 consultant's estimate.

14 The experience, reputation and ability of the
15 attorneys. Well, I've already talked about the experience
16 of the Plaintiff's lawyers here, but I also -- an
17 important factor in the case law is also the
18 representation and skill of the Defendant's lawyers, which
19 factors to an analysis of the probability of success in an
20 antitrust case. And I think it scarcely needs to be said
21 that Foley & Lardner is an extremely, highly regarded,
22 topnotch firm and it has very highly respected litigation
23 and antitrust practices.

24 The undesirability of the case. This is a factor
25 where they see how many other firms vied to bring this

1 case. Here the answer is simply none. We were the only
2 firm who -- when it became known that there was a
3 possibility that there was anticompetitive conduct in
4 oncology services in Southwest Florida, we were the only
5 firm that, having done an initial investigation,
6 determined to go ahead and bring this case. So I think
7 that weighs heavily in favor of the requested fees.

8 And, finally, there's a question of awards. In
9 similar cases our requested fee of 30 percent is well in
10 line with similar awards in the circuit we cite. Several
11 cases in our papers which, in turn -- some of which
12 connect cases showing that the de facto norm in most
13 complex cases in this circuit is about 33 percent. So
14 we're slightly under that with our request. So we believe
15 that all of those factors weigh heavily in favor of the
16 fee award of 30 percent, which is well within the range of
17 fees that are typically given in the circuit.

18 We also seek reimbursement of \$68,939.38 in
19 litigation expenses incurred today in our notice that was
20 disseminated to the settlement class. We stated that we
21 would seek reimbursement of expenses of up to \$100,000
22 incurred in the process of litigation. So far we've come
23 in under that, though we do anticipate having some
24 relatively modest amount of additional expenses primarily
25 associated with our being here today for the fairness

1 hearing. And we reserve the right to request or submit
2 for additional expenses subsequently.

3 The total amount of the expenses, almost \$69,000, is
4 modest in relation to the overall value of the settlement.
5 And I think it's also worth pointing out that of the
6 approximately 69,000 amount, \$54,000 represents the fees
7 that we had to pay to our economic consultants to do the
8 damages analysis that allowed us to get to the settlement.

9 So with all that you're taking into account I am
10 confident in saying that the expenses were reasonable and
11 necessary for this litigation, and they were expended for
12 the direct benefit of the class. And, therefore, we
13 request that that be granted also.

14 Do you want me, Your Honor, to turn to the incentive
15 award for the class rep?

16 THE COURT: You may. I do have some questions about
17 the fees. Please continue.

18 MR. O'KELLY: So we seek an incentive award for the
19 class representative, the County of Monmouth, New Jersey.
20 Just like we were the only law firm willing to step up and
21 take on this case, the County of Monmouth was the only
22 Plaintiff that was willing to put its name on the
23 pleadings and act as class representative.

24 And on behalf of the class, the class representative
25 has spent valuable time and effort in pursuit of

1 litigation and provided viable assistance to us as
2 lawyers. It assisted us in the initial investigation into
3 the anti-competitive conduct that was alleged prior to our
4 filing of the complaint. It reviewed the complaint before
5 we filed it. When we got into the mediation process it
6 provided us with its financial information, which we gave
7 to Defendant's counsel as part of the process of their
8 coming up with their damages analysis.

9 It considered whether the proposed settlement once we
10 had reached a proposed amount of settlement with FCS, it
11 considered whether or not that was a fair settlement. And
12 the County of Monmouth generally monitored the litigation
13 throughout the year and-a-half or so that it has been
14 pending.

15 So we believe an incentive award of 2,500 is
16 appropriate. We've cited several cases from the District
17 and from the 11th circuit where similar awards were given.

18 One case we cited was the Gibbs case, which approved
19 a \$5,000 incentive award for the class representative,
20 quote, "Participated in reviewing documents, participated
21 in discovery, and remained engaged throughout the course
22 of the litigation."

23 We're requesting half of that amount, Your Honor.

24 THE COURT: Anything further?

25 MR. O'KELLY: Nothing further, Your Honor.

1 THE COURT: Mr. O'Kelly, is it class Counsel's
2 position that the current demand for fees, or request,
3 rather, for fees, expenses and the incentive award does
4 not require further notice of the class or the cultural
5 line based on -- based on what was disclosed in the
6 existing notice?

7 What I'm getting at here, there was no -- there
8 probably could not be at that time with any specificity,
9 with respect to the amount of fees or estimated amount of
10 fees that counsel will be requesting, or expenses that
11 counsel will be requesting in the notice, which is, as I
12 understand, common -- but looking at Rule 23H1, I thought
13 to ask the question whether any further notice to the
14 class is necessary or required at this time?

15 MR. O'KELLY: It's our position that no further
16 notice is necessary. Let me point out that on the
17 dedicated website, as additional papers were filed,
18 including the fee request, those were posted on the
19 website, as well, of course, as being available on the
20 court's docket.

21 THE COURT: You anticipated my next question. So
22 there is some publication notice, for lack of a better
23 term, on the website as to the specifics of the current
24 fee, the expense and incentive award giving out?

25 MR. O'KELLY: Yes, sir, Your Honor.

1 THE COURT: As you pointed out in your remarks in
2 your filings with the Court the notice says to the class
3 members that class counsel will move for attorney's fees
4 not exceeding 30 percent of the settlement fund for costs
5 not exceeding \$100,000 for a class representative
6 incentive award not exceeding \$2,500. But I understand
7 your current costs don't exceed the \$100,000, but buried
8 in a footnote, docket entry number 93, which is your --
9 the motion -- the footnote six of docket entry No. 93, on
10 page 27, this is where you reserve the right to seek
11 reimbursement for further expenses incurred after
12 August 31st, 2019, including expenses related to this
13 fairness hearing.

14 And then, also, you indicate there that Plaintiff
15 will seek at a later time Epic's fees for settlement
16 administration, which is above and beyond the 39,000-plus
17 dollars already spent for notice of the class with a
18 current estimate of the fees to be paid to Epic the
19 remaining fees to be 200 -- in excess of \$200,000 it could
20 be as high as \$260,000. I assume those fees being paid to
21 Epic fall outside of the cost ceiling that was in the
22 notice of \$100,000.

23 Is that correct, Mr. O'Kelly; is that the intention?

24 MR. O'KELLY: Yes, they're separate from fees
25 incurred by the attorneys by my firm. And, again, it's

1 typical in class settlements that the settlement
2 administrator's costs are not counted as costs incurred by
3 the attorneys.

4 THE COURT: I presume, therefore, you anticipate a
5 subsequent motion to be paid the additional fees,
6 expenses, and Epic's fees for settlement administration as
7 well; is that correct?

8 MR. O'KELLY: Let me just clarify, Your Honor, we
9 don't anticipate a motion for any additional attorney's
10 fees. We simply anticipate having a motion for a payment
11 of any fees -- excuse me, any expenses that we incurred.
12 And, again, as I mentioned, the only ones I can think of
13 right now are the expenses associated with traveling to
14 and being in Florida for this fairness hearing. And,
15 then, separately, once we have a final reckoning from Epic
16 to file a motion for approval of Epic's fees.

17 THE COURT: What should be the timing of that motion,
18 Mr. O'Kelly, because that money comes out of the
19 settlement funds, correct?

20 MR. O'KELLY: It does, Your Honor.

21 THE COURT: So those matters should be determined
22 before the checks are cut to the class members; is that
23 correct?

24 MR. O'KELLY: Yes, Your Honor.

25 THE COURT: Or before they can be cut?

1 MR. O'KELLY: Before, indeed, Your Honor.

2 THE COURT: As you stand here today, sir, what do you
3 say the time of that motion should be, relative to the
4 final order approving the proposed settlement?

5 MR. O'KELLY: I would hate to commit to a date
6 certain.

7 THE COURT: You can't, because you don't know what
8 Judge Merryday is going to rule on the R and R.

9 MR. O'KELLY: Of course, Your Honor, but it would be
10 reasonably quickly after we got an order of final approval
11 of the settlement, because at that point Epic would have a
12 pretty clear estimate as to what its costs for performing
13 the remaining functions would be.

14 THE COURT: That would still be an estimate at that
15 point because it's sort of a cart before the horse
16 scenario in my mind. You're asking the Court to approve
17 payment of Epic's fees, but Epic will still have work to
18 do at that point to cut the check if the money's coming
19 out of the settlement fund.

20 MR. O'KELLY: That's sort of a chicken and egg
21 situation that comes up in most settlements.

22 THE COURT: Exactly what I said in chambers yesterday
23 when we were trying to figure out how you were going to do
24 this.

25 MR. O'KELLY: And it somehow always works itself out,

1 Your Honor. I don't know what more I can say, Your Honor.
2 They know how many class members there are. The part of
3 the estimate they come up with at the final approval stage
4 would be, typically, pretty accurate. As I said,
5 they're -- based on their budget the remaining amount is
6 about \$217,000, but I stuck in the paper, as sort of a
7 cautionary estimate, because typically budgets tend to be
8 exceeded, that's where the \$260,000 number came from in
9 adding a safety factor.

10 THE COURT: As class counsel, what is your position
11 as to whether Rule 23H1 would require further notice to
12 the class as to any subsequent additional requests for the
13 Court approval of expenses, and also payment to Epic?

14 MR. O'KELLY: I believe that simply posting them on
15 the website as we've done with everything that's been
16 filed with the Court since the website was set up
17 following the preliminary approval order should suffice.
18 I believe that's notice.

19 THE COURT: Anything further, Mr. O'Kelly?

20 MR. O'KELLY: I have nothing further, Your Honor.

21 THE COURT: Thank you. Before I turn to Mr. Menard,
22 because there is an objector, let me clarify.

23 In light of everything I discussed with Mr. O'Kelly,
24 Ms. Haas, do the Defendants have anything to add to the
25 remarks offered by Mr. O'Kelly today?

1 MS. HAAS: No, Your Honor. We have nothing to add.

2 THE COURT: As noted at the outset of the hearing we
3 do have some individuals in the back of the courtroom
4 today. And during Mr. O'Kelly's remarks some additional
5 folks have joined us. As I understand it the Court
6 security officer has informed the Courtroom Deputy that
7 the people who have joined us here today are Ms. Cynthia
8 Trottere.

9 Ma'am, how do you spell your last name?

10 MS. TROTTERE: T-R-O-T-T-E-R-E.

11 THE COURT: For the record, that was T-R-O-T-T-E-R-E;
12 is that correct, ma'am?

13 MS. TRATTORE: (Nods head.)

14 THE COURT: Ma'am, are you here to offer any
15 objection to the proposed settlement, or are you here only
16 to observe these proceedings?

17 MS. TRATTORE: I'm here to observe the proceedings.

18 THE COURT: Thank you. Also, I believe we have Nancy
19 Pringal is that correct, Ms. Pringal; are you present?

20 MS. PRINGAL: Yes.

21 THE COURT: Ma'am, how do you spell your last name?

22 MS. PRINGAL: It is P-R-I-N-G-A-L.

23 THE COURT: Ma'am, are you here to object to the
24 proposed settlement or are you here simply to observe
25 these proceedings?

1 MS. TRATTORE: To observe.

2 THE COURT: Thank you. As I understand it we also
3 have been joined by Ms. Kimberly A. VanBuren.

4 Ms. VanBuren, would you please spell your last name
5 for the record?

6 MS. VANBUREN: V-A-N-B-U-R-E-N, with a space, two
7 words.

8 THE COURT: Two Rs?

9 MS. VANBUREN: Two words.

10 THE COURT: Two words with a space, thank you.

11 Ms. VanBuren, are you here to object to the proposed
12 settlement or are you here simply to observe these
13 proceedings?

14 MS. VANBUREN: To observe.

15 THE COURT: Thank you. Is there anyone else who's
16 joined us in the interim that I'm missing? Looking around
17 the courtroom I don't see any new faces.

18 So, Mr. Menard, it appears that you are the only
19 person appearing here today to object to the proposed
20 settlement. Sir, would you step into the well of the
21 courtroom? And you may stand at the lecturn there with
22 the microphone. Yes, sir, please come on in. And take
23 the time you need.

24 Good morning, sir. It's still morning.

25 MR. MENARD: Yes.

1 THE COURT: Sir, I understand that you wish to make
2 an objection to the proposed settlement. I also
3 understand that you sent a handwritten objection to the
4 settlement administrator; is that correct?

5 MR. MENARD: I sent one to them and to the Court.
6 And I have a copy of the letters that I sent.

7 THE COURT: Sir, may I see the copy of the letters
8 that you sent? Take the time you need.

9 Madame Deputy, would you please retrieve the copies
10 from Mr. Menard?

11 COURTROOM DEPUTY: Thank you, sir.

12 THE COURT: For the record, the copy of the
13 correspondence Mr. Menard has handed to the Court appears
14 to be identical to the copy filed by -- no, I stand
15 corrected. This is not identical to the copy filed by
16 Plaintiff's counsel --

17 MR. MENARD: It's close.

18 THE COURT: -- at docket entry 96-1 at ECF, page
19 three. The date of the correspondence in the Court's file
20 at 96-1 at page three is September 23rd 2019. The date of
21 the copy that Mr. Menard just handed to me is dated
22 September 24th, 2019. Otherwise, the content of the
23 letters is also different. One moment, Mr. Menard, while
24 I read what you've handed to me.

25 For the record, this correspondence dated September

1 24, 2019, that Mr. Menard just handed to me says, "To whom
2 it may concern, this is to inform the Court that I wish to
3 file an objection to the settlement with Florida Cancer
4 Specialists because of the plan of allocation. Enclosed
5 you will find documents showing that I paid Florida Cancer
6 Specialists approximately \$13,000. I have had several
7 conversations with administrator and as far as I can
8 determine it would not be necessary to provide any
9 documents to determine the amount of settlement to be paid
10 to each patient. This doesn't seem to be a fair way at
11 all to do that. Yours truly, Gerard R. Menard," with
12 Mr. Menard's contact information.

13 Mr. Menard, this letter dated September 24th, 2019,
14 is this the letter that you communicated directly to the
15 Court pursuant to the notice you received?

16 MR. MENARD: That's the one I sent to the Court, yes.

17 THE COURT: Sir, did this letter that you sent
18 contain anywhere in it, or in the envelope, a reference to
19 the name of this litigation, or the case number for this
20 litigation to your --

21 MR. MENARD: I believe it was on the envelope.

22 THE COURT: You think it was on the envelope?

23 MR. MENARD: Yes, in care of such and such.

24 THE COURT: Sir, I have no reason to believe that
25 this letter was actually received by the Court. I'm just

1 telling you that the record doesn't actually contain this
2 letter. I can't account to what may have happened to that
3 letter if it was received by the Clerk of this Court, but
4 I understand it is your position today that you did intend
5 to communicate with the Court.

6 Mr. Menard, I believe class Counsel, in his remarks
7 earlier, took the position that although the postmark of
8 your letter to the settlement administrator predated a
9 cutoff for submitting objections, your objection was not
10 actually received by the settlement administrator until
11 after the Court ordered that line for submitting that
12 objection.

13 So if I understand Mr. O'Kelly's position correctly,
14 it is class Counsel's position that your objection was not
15 timely received, which if the Court agrees with in
16 considering your objection, but because you're here today,
17 sir, and I have one opportunity to hear from you, what I'm
18 going to do is take that matter under advisement, which
19 means I'm going to consider whether your objection was
20 timely submitted, and whether it can be considered. But
21 I'm going to give you an opportunity to say today whatever
22 it is you'd like to say, so that the record is clear as to
23 the nature of your objection beyond what you've submitted
24 today, and otherwise to the settlement administrator.

25 Is that clear, sir?

1 MR. MENARD: That's clear. Can I ask just one
2 question?

3 THE COURT: I just want to make sure that you
4 understand, sir, that it is possible that the Court may
5 not consider your objection at all finding it to be
6 untimely; do you understand that, sir?

7 MR. MENARD: I understand that.

8 THE COURT: You can ask a question.

9 MR. MENARD: Well, I mean, my question would be, how
10 long maybe that letter had been sitting in their office
11 before they opened it? Because we have documentation to
12 show when it was mailed out. And when I mailed it out at
13 the post office they said they should receive that in
14 plenty of time.

15 THE COURT: I understand that.

16 MR. MENARD: And I have the receipt for the postage
17 here.

18 THE COURT: And I understand that would be your
19 position, sir. The postmark and the correspondence has
20 already established a record. Suffice to say that the
21 Court has the timeliness of your objection under
22 advisement. But I'm happy to hear anything you'd like to
23 add concerning the substance of your objection here today,
24 sir.

25 What else would you like to say to the Court?

1 MR. MENARD: Well, when I received this I called them
2 within two or three days to ask them how they were going
3 to divvy up the money. They said that's a very good
4 question, we don't have an answer, and we'll get back to
5 you. And they did get back with me two or three more
6 times. And I called them two or three more times and I
7 never got an answer on how they're going to divvy up the
8 money. I have documentation to substantiate the fact that
9 I spent out of my pocket almost \$13,000 to Florida cancer.
10 And I don't know if they're going to just cut a check --
11 apparently they're going to cut a check for everybody,
12 whether they paid \$5 or nearly \$13,000. If that's fair,
13 then I'll have to accept that, but --

14 THE COURT: Sir, the purpose of this hearing today is
15 so that the Court can assess whether the proposed
16 settlement is fair to the class members. Is it your
17 position that a mathematical formula to determine how much
18 each class member receives is unfair based on the total
19 amount of the settlement fund?

20 MR. MENARD: Well, I'm not sure that I know what that
21 is, so I can't say whether it's fair or not. And I
22 apologize for stepping out while the gentleman was
23 discussing my appeal, but due to the fact he was speaking
24 with his back to me, and my hearing is not too good, I
25 didn't catch very much of it anyway, so I apologize for

1 that.

2 THE COURT: No need to apologize, sir. Mr. O'Kelly
3 hadn't said very much by the time you stepped out. I was
4 watching carefully and I was about to interrupt him and
5 make him wait until you came back in, but fortunately you
6 came right back into the courtroom as he made his remarks.

7 Sir, is there anything else you'd like to say to the
8 Court concerning your objection?

9 MR. MENARD: I'll probably think of something after I
10 go sit down.

11 THE COURT: Well, if you'd like to take a breath and
12 think about it before you sit down, collect your thoughts.

13 Is there anything else you'd like to say, sir?

14 MR. MENARD: I think I stated my basic argument and
15 so --

16 THE COURT: Very well, sir. Thank you for your
17 remarks, Mr. Menard. I will consider the timeliness of
18 your objection, and if I deem your objection to be timely
19 summitted, also address your objection in my report and
20 recommendation to the presiding United States District
21 Judge in this case, who will in turn decide what to do
22 with your objection.

23 Do you understand that, sir?

24 MR. MENARD: Thank you, your Honor.

25 THE COURT: Thank you. Sir, you may have a seat.

1 of pocket subject to the question as to whether or not
2 that \$1,000 payer was rounded up to \$5 under the minimal
3 provision.

4 THE COURT: Anything further, Mr. O'Kelly?

5 MR. O'KELLY: No, Your Honor. Maybe perhaps one more
6 thing to address, a concern that Mr. Menard raised, as
7 we've noted in our papers and I noted today, we
8 acknowledge that his notice, his notice of objection,
9 mailed to the claims administrator was mailed on the 23rd
10 of February -- excuse me, 23rd of September, beg your
11 pardon, but the mailbox is automatically time stamped,
12 date stamped, when mail is received.

13 And the date-stamped receipt is included in our -- I
14 believe, included in our exhibit to show that it was not
15 received until the 2nd of October. I can certainly
16 understand why Mr. Menard would reasonably expect that a
17 letter mailed on the 23rd of September would be received
18 by Epic within a week, but that is not what happened.

19 THE COURT: Thank you. Mr. Menard, in light of
20 Mr. O'Kelly's remarks, sir, do you have any further
21 thoughts you want to share with the court?

22 MR. MENARD: No.

23 THE COURT: Thank you. For the record, he said no he
24 had no further comments to the Court.

25 Very well, Counsel and Mr. Menard, and ladies and

1 gentlemen who are here today to observe this proceeding,
2 the Court has no further questions at this time. I am
3 taking the Plaintiff's unopposed motion for final approval
4 of class settlement in plan of allocation filed as docket
5 entry No. 92, as well as the Plaintiff's counsel
6 application for an award of attorney's fees, reimbursement
7 of expenses, and class representatives incentive award,
8 docket entry No. 93, the letter objection filed by William
9 G. Elias and Sandra E. Elias in docket entry No. 91, the
10 Plaintiff's response to that objection in docket entry No.
11 96, the filings and submissions related to Mr. Menard's
12 objection and Plaintiff's supplemental statement regarding
13 exclusions from the settlement class docket entry No. 97,
14 all under advisement.

15 I will show a report and recommendation in due course
16 to Judge Merryday. We will take that matter up. And the
17 parties and any objector can file an objection to my
18 report and recommendation at that time.

19 Mr. O'Kelly, I presume when I enter my report and
20 recommendation that that documentation will also be added
21 to the website that's dedicated to this proposed
22 settlement; is that correct?

23 MR. O'KELLY: That is correct, Your Honor.

24 THE COURT: Thank you. Unless there's anything
25 further we'll be in recess. Anything further from the

1 Plaintiff, from the class, Mr. O'Kelly?

2 MR. O'KELLY: Nothing further, Your Honor.

3 THE COURT: Anything further from Defense?

4 MS. HAAS: Nothing further, Your Honor.

5 THE COURT: We're in recess.

6 (Court adjourned at 11:30 a.m.)

7
8 UNITED STATES DISTRICT COURT)
9 MIDDLE DISTRICT OF FLORIDA)

10 C E R T I F I C A T E

11 I, Rebekah A. Plunkett, Court Reporter for the United
12 States District Court, Middle District of Florida, do hereby
13 certify that pursuant to Section 753, Title 28, United States
14 Code that the foregoing is a true and correct transcript from
15 the stenographic notes taken in the above-entitled matter by
16 the undersigned and that the transcript page format in in
17 conformance with the regulations of the Judicial Conference of
18 the United States.

19
20 _____/S/Rebekah A. Plunkett_____

21 Rebekah A. Plunkett, Federal Court Reporter Date: 11/25/19
22
23
24
25