

1 (Appearances continued)

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1 (Call to the Order of the Court.)

2 THE COURT: All right. Good afternoon, everyone. And
3 good morning to my west coast people that may be signed on
4 here.

5 We're here for our MDL hearing in Case 21-03015; it is
6 regarding Johnson & Johnson Aerosol Sunscreen Marketing Sales
7 Practices and Products Liability Litigation.

8 We've got a number of you that are here, that I'm sure
9 are going to be speaking here today. Before we start, I just
10 do have to issue this blanket warning. You know, we're in
11 strange times, in terms of security and things like that, so
12 there can be no recording at all, whether it's from lawyers or
13 civilians. I will tell you, the marshals are really good
14 monitoring our Zoom, and they're very quick to show up at
15 people's doors, and it's pretty shocking for them to have that
16 visit. So I just have to lay that out there before every big
17 Zoom hearing because it is the way we live now.

18 That having been said, let me start off by getting
19 appearances for plaintiffs' side first, and then we'll go to
20 defense side. Then I'll get a formal appearance, as well, from
21 our one filed objector, who I see in the top right of my
22 screen. So let's start then with plaintiffs' counsel first.

23 MS. GROMBACHER: Good afternoon, your Honor. Kiley
24 Grombacher, of Bradley/Grombacher, one of the class counsel for
25 plaintiffs this morning.

1 THE COURT: And listen, nice to see all of you, so I'm
2 not going to say that individually to each of you when you
3 announce your appearance.

4 MR. AYLSTOCK: Good afternoon, Your Honor. Bryan
5 Aylstock, and my partner, Jason Richards, also for the
6 plaintiffs.

7 THE COURT: Of the two of you, whoever decides to
8 speak, if you could just say your name first, only so that my
9 court stenographer can get that down, that would be ideal.

10 MR. AYLSTOCK: Absolutely, Judge.

11 MS. WALSH: Good afternoon, Your Honor. Alexandra
12 Walsh, of Walsh Law, also for the plaintiffs.

13 MR. BYRNE: Good afternoon. David Byrne, with Beasley
14 Allen, for the plaintiff class.

15 MR. DRAVILLAS: Alex Dravillas for the plaintiffs.

16 THE COURT: Mr. Rumberger, you're on mute.

17 MR. RUMBERGER: Thank you, Your Honor. Timothy
18 Rumberger, plaintiffs' counsel.

19 THE COURT: I think that just leaves Mr. Berman, right?

20 MR. BERMAN: And Mr. Zalesin.

21 MR. ZALESIN: Your Honor, Steven Zalesin for Johnson &
22 Johnson Consumer, Inc. And Mr. Berman, as well, for the
23 defendant, JJCI.

24 THE COURT: Great. All right.

25 Any other counsel for either the plaintiffs or the

1 defendants?

2 And then, Mr. Andren, if you want to formally make an
3 appearance. And you're on mute, as well.

4 MR. ANDREN: Thank you. John Andren on behalf of
5 objector, Theodore H. Frank.

6 THE COURT: All right, everyone. Good to have you
7 here. We set this hearing, obviously, a while ago.

8 Just to recap, I don't want to go through each of the
9 80 plus docket entries. I don't think there's any need to do
10 that. You all are well familiar with the case. I will tell
11 you, and I think you all know, just based on the few hearings
12 that we've had, that I read every word of every page of what
13 you all filed. And so I would like you to know that I've read
14 everything that has come in, including an updated filing that
15 came in probably about 45 minutes ago, which is Docket
16 Entry 91, with an exhibit. It's a declaration, supplemental,
17 of Jason Rabe.

18 So I'm very well familiar with the case. Basically, we
19 all know that in October, 2021, the judicial panel on
20 multidistrict litigation created this MDL case. At that time,
21 they sent several matters to me from a variety of states. And
22 the litigation generally concerns carcinogenic aerosol suntan
23 lotion. There's a carve-out for personal injury cases, so
24 that's not at all what we're doing here. We're dealing simply
25 with that product.

1 So what I would like to do then is kind of just really
2 hear from each of you and get you to have your positions out
3 there. Knowing that I've read everything, obviously, the
4 record's a little bit different in terms of the hearing. I
5 know there are points that you all want to highlight. I do
6 have some specific questions. I think, probably, it's best for
7 me to actually kind of lay that out upfront, even though I'm
8 not trying to alter your presentations. But I think sometimes
9 that helps.

10 And so maybe if I could start this way: Basically, my
11 understanding of this case and the way it's been presented is
12 that it goes back as far as the litigation part. So May 25th
13 of 2021, there was an action by Valisure. That same date, the
14 Serota plaintiffs went ahead and filed claims.

15 Now, going forward then to July 14, 2021, we had the
16 recall, and we had some follow-up that occurred. Mr. Zalesin,
17 you can speak to that when the time is right. But I think the
18 timing is significant because the recall and all of that is
19 approximately two months after the complaint was filed, as
20 opposed to recall and then complaints coming in.

21 Then during the course of time, this MDL was created.
22 And shortly after it was created, the formal notices of
23 settlement came in. We then went through all of the procedures
24 that we would go through in terms of notice and responses and
25 those kinds of things.

1 Ultimately, in looking at the filings that I have, it
2 seems like there are three baskets of recovery, so to speak.
3 One is the coupon recovery. Two is the recovery that amounts
4 to close to \$10 million that deals with the actual recovery in
5 amounts about \$29 each to 300,000 plus people. And three is
6 the value of nonmonetary relief, which has been argued is
7 approximately \$80 million.

8 So we have really what appears to be a total of about
9 \$92 million or some odd in value out there, 80 million of it
10 which is nonmonetary. We have a claim today that amounts to
11 approximately \$2,600,000 at the top, 2,500,000 of attorney's
12 fees, 100,000 in costs. We have an objection from the objector
13 that really outlines a lot of the reasons why we do or don't
14 have class actions. It's a very interesting objection, very
15 interesting case.

16 And just to kind of put it all in a nutshell, this
17 settlement was something that the plaintiffs and defense
18 unusually worked on quickly and quietly, so to speak, in terms
19 of how a lot of our litigation normally goes.

20 So that's my nutshell in terms of how I see the case.

21 My narrow issue, though, is how you all see that
22 \$9.8 million recovery, because there's something I saw
23 specifically in the objector's pleading that says you can't
24 give the settling attorneys credit for moneys that were paid
25 prior to the settlement agreement. And so I would like you

1 all, at some point today, to flesh that out. Because in the
2 objector's papers, it said, as a matter of law. And then it
3 has that line there. And I just -- I would like to learn about
4 that because, frankly, logically, and from a common sense
5 perspective, it makes zero sense to me as someone who's been in
6 the law for 35 years.

7 So with that background, Ms. Grombacher, do you want to
8 go first?

9 MS. GROMBACHER: Sure, sure. I mean, I think Your
10 Honor touched on a lot of things when you gave the synopsis.
11 This has been, in a lot of ways, an atypical litigation.
12 Atypical in terms of an MDL. And, in some ways, atypical in
13 terms of a class action. But I think that's actually inert to
14 the class' benefit.

15 You know, rather than having to wait years for
16 recovery, bearing the risk of litigation, and watching as
17 litigation costs rise and recovery diminishes, what we were
18 able to do here, because of a lot of factors, is secure relief
19 that was meaningful in the three buckets that you laid out. So
20 meaningful, in a monetary way, in terms of extending programs
21 that JJCI had put into motion following the litigation, and
22 building on those in terms of creating this voucher program for
23 products that the evidence in the record overwhelmingly showed
24 did not have the issues that we alleged.

25 So there was no indication that these products, the

1 nonaerosol products for which the vouchers are being paid,
2 contained or were contaminated with levels of benzene. But
3 nonetheless, we were able to get a monetary value, and it was a
4 value that hundreds of thousands -- or almost 170,000 claimants
5 thought had value and decided to take advantage of and avail
6 themselves of. And then there was this injunctive component.
7 And so all the purposes of the litigation were effectuated in
8 an efficient way, and in a quick way.

9 You raised a point about it being a little bit
10 secretive. It wasn't done so purposefully. It was done so
11 because too many cooks in the kitchen spoils the broth. Right?
12 So we've already had a lot of firms, as you know, you've
13 appointed them as class counsel, who were working towards the
14 settlement.

15 And I think what's notable here is, there were a lot of
16 firms in this litigation, preeminent plaintiffs' firms, that
17 were not part of the settlement counsel, that had
18 opportunities, that were invited to review the settlement,
19 oppose the settlement, preliminary approval, file objections
20 after receiving all the discovery in this case. They saw the
21 data we saw. They saw the documents we saw. They reviewed the
22 depositions that class counsel took. And they chose not to
23 file objections. There is one sole voice in opposition to this
24 settlement.

25 And I think you noted rightly that the objection that's

1 filed is more -- it is more an ideology than perhaps relates to
2 this settlement, although, you know, there's relevancy here.

3 You know, Mr. Frank is a crusader, and he uses the
4 objection as a sword sometimes to move his ideology. And
5 that's not to say that he doesn't assist the Court sometimes,
6 or that we don't agree sometimes with some of his objections.
7 The objection process can work. I don't think, though, in this
8 litigation, it makes sense to amend and deny approval of a
9 settlement that is by all means fair, reasonable, and adequate
10 for the grounds that are raised in the objection.

11 We spent a lot of time and a lot of paper on those, and
12 I'm happy to move on them more. But I would say that as a
13 preliminary way to address some of the issues that you talk
14 about.

15 I think what really comes down, if you boil it down,
16 there are some objections about whether the relief is
17 meaningful to the class. I mean, I think whether it's a
18 voucher, whether it's a coupon -- and I'm happy to talk about
19 that -- there is some questions about whether the injunctive
20 component is meaningful. And we put that in our brief. I
21 think we can talk about that. But I think that it's hard to
22 argue with the fact that there are -- there's testing
23 implementation. There are protocols here to ensure that there
24 isn't contamination that occurs. Or that it's caught early and
25 that it doesn't go to market, it doesn't go to the consumers

1 here. And there is a settlement agreement that binds the
2 defendants to that conduct, to ensuring that they comply with
3 these protocols. And that's meaningful, too.

4 And so I guess the question really comes down to a fee
5 issue. You know, how much does ride in fees. Because when
6 we're looking at the value of the settlement, which is what you
7 talked about, when we're valuating that, that's important,
8 really, I guess, when you're down to the fee component.
9 Because when you're looking at fair, reasonable and adequate,
10 the question is what are class members getting, and what are
11 they giving out. Right? Here, they had the ability to get 100
12 cents on the dollar for products that was affected. You know,
13 if they printed out their Amazon usage history, and they sent
14 that to JJCI, they got paid for that. You know, they paid them
15 whatever was in the proof or they paid them, you know, the
16 retail value. And so that -- there's nothing better you can do
17 there. And in terms of the voucher, they're getting value for
18 a product that had they gone to trial, they would likely get
19 nothing for.

20 So I think if you're looking at all of the components,
21 and you're looking is this fair, reasonable and adequate, well,
22 the value that's going to the class, it's real, and it would be
23 hard to say that they could do any better if they went to trial
24 in this case.

25 THE COURT: Let me ask you this, Ms. Grombacher. When

1 you said had they gone to trial, certainly, you're talking
2 about the class as a whole. But how hard would it be in your
3 mind for one individual who bought one product that was worth
4 \$10.98 to find a lawyer to sue Johnson & Johnson to recover
5 \$10.98?

6 MS. GROMBACHER: Sure. I mean, with all these cases,
7 the value and the ability to move forward is because of the
8 class action device. Right? No lawyer -- any lawyer who
9 calls, it's just diminishing returns. The fees would outweigh
10 the benefit to the class member.

11 So, you know, they've got the option of standing alone
12 in small claims court, maybe, or you have the class device,
13 which is the only real meaningful way to get value to class
14 members who have small value claims.

15 THE COURT: All right. Let me do this. There, I
16 think, are really six screens with plaintiffs' counsel. So let
17 me give each of you an opportunity to add on to that or say
18 whatever you want to. And that way, I can make sure I've heard
19 everyone.

20 I think, kind of going in order, Mr. Aylstock or
21 Mr. Richards, you'd be next.

22 MR. AYLSTOCK: Thank you, Your Honor. Brian Aylstock
23 for the plaintiff class.

24 To touch on that last question you just asked, having
25 spent my career litigating against Johnson & Johnson and other

1 large corporations, I can't imagine a lawyer that was -- be
2 able to take a case and even attempt to litigate. This is
3 really, as Ms. Grombacher said, the only -- the class vehicle
4 is the only means for recovery. And certainly, understand that
5 people can have different views about the class vehicle and
6 whether it's right or wrong, and it seems to me that's a
7 question for the legislative bodies. If they choose to deal
8 with it as opposed to the Court's, you know, making some policy
9 decision as to whether that's right or wrong.

10 But the fact of the matter is, but for the class
11 vehicle, it would make no economic sense for any lawyer to
12 every take that claim, and for an individual to try to do it on
13 their own. Again, time is money. We're talking about lots of
14 time for very little recovery.

15 As for the voucher program, you know, those are
16 transferrable. It's certainly something that is, I think,
17 meaningful, as reflected by the number of claimants who applied
18 for it. And, in fact, I think they will get real value for it.
19 And, again, these are products that simply, after our
20 investigation, as confirmed by the discovery, were not affected
21 products. So that's, to me, a windfall. And I don't know how
22 we could do any better than that.

23 And so I echo what Ms. Grombacher said. But I
24 certainly think this is a fair and reasonable settlement, and
25 added tremendous value. And the alternative for, you know,

1 litigating for years and years was only going to delay the
2 implementation of these very important safeguards that are now
3 protected by this agreement. And if it's approved by the class
4 settlement itself. And those, you know, protections are
5 meaningful. And so we're proud of this settlement, and we'd
6 ask Your Honor to let it go forward.

7 THE COURT: Thank you, sir.

8 Ms. Walsh, how about I go to you next.

9 MS. WALSH: Thank you very much, Your Honor. I really
10 don't have much to add beyond what I think is very well laid
11 out in the briefs and as sort of underscored by Ms. Grombacher
12 and Mr. Aylstock. You know, I would just, as point of
13 emphasis, Mr. Aylstock's final point regarding the, you know,
14 speed with which we were able to get agreement that put
15 safeguards in place so that this doesn't happen again, you
16 know, in addition to the value of these vouchers, I think that,
17 you know, for the plaintiffs, you know, that I've spoken with
18 and just, you know, given the issues that arose here, those
19 have tremendous value, and I think very well warrants the
20 approval of this very reasonable settlement.

21 THE COURT: Thank you, Ms. Walsh.

22 Mr. Rumberger, let me go to you.

23 MR. RUMBERGER: Thank you, Your Honor. I've been on
24 the periphery of this. I filed one of the earlier cases. But
25 I appreciate just the opportunity to have -- participate by

1 listening.

2 I think the settlement is fair and reasonable.
3 Plaintiff's counsel always want more, or want more of a result.
4 But I would echo it. We've heard from counsel already. And
5 maybe add just that the class vehicle really is the only
6 legislative tool available to hold the makers of defective
7 products accountable. And I think that's one of the reasons
8 that we have that.

9 I'm familiar with the arguments of Ted Frank, and I
10 think they really do go more to policy, and not the specifics
11 of this particular resolution and settlement, as has been
12 pointed out in the briefs. Thank you.

13 THE COURT: Thank you, Mr. Rumberger. Mr. Dravillas,
14 I'm going to go to you next. And I apologize if I
15 mispronounced your last name.

16 MR. DRAVILLAS: It's fine, Your Honor.

17 Ms. Walsh really chimed in with the only thing that I
18 would add, which is the alacrity with which this case has been
19 resolved really serves as benefit to the class. You see these
20 cases drag on for years and years, especially in the consumer
21 context, and it's really remarkable that in what's essentially
22 just a year, you have class members who not only get a monetary
23 value, but injunctive relief. And that's really great, I
24 think.

25 THE COURT: Thank you, sir. And then how about

1 Mr. Byrne?

2 MR. BYRNE: Thank you, Your Honor. Well, my colleagues
3 have done a wonderful job of covering the important points of
4 this settlement.

5 Again, like my colleagues, I have to say that this is a
6 remarkable result that was produced, yes, in a very short
7 period of time. These MDLs tend to keep a lot of attorneys
8 employed for a lot of years, and a lot of deserving class
9 members on the sidelines waiting for relief that sometimes they
10 don't see for decades. Class members pass away. Class members
11 really over time seem to lose a little faith in the overall
12 process. And I think this settlement helps to restore people's
13 faith in the system.

14 Everyone got together, worked through the facts, came
15 up with a discovery plan that would help suss out whether
16 everyone was addressing this problem right on the factory
17 floor. And this settlement produced a workable injunctive
18 relief plan that I think allows all of us to ensure class
19 members that this problem is not going to come up again. The
20 feed stocks that were contaminated have been addressed. They
21 are subject to ongoing testing. They weren't necessarily
22 tested in the past. And I hope that will give everyone comfort
23 when they use these products in the future. And I hope they'll
24 be able to look to this class as the reason for the assurance
25 they have, that it's safe and effective for their use.

1 THE COURT: Mr. Byrne, let me ask you this.

2 MR. BYRNE: Yes, sir.

3 THE COURT: Just last week, the Eleventh Circuit
4 decided not to reconsider the Johnson case en banc. I know you
5 may have all been waiting for that a little bit. So I guess
6 the timing of this hearing is actually pretty good in terms of
7 that.

8 That case is interesting because -- obviously, the
9 circuits are different. But the Eleventh Circuit seems to
10 indicate that incentive awards for plaintiffs are not
11 appropriate. The cases I've dealt with, incentive awards are
12 typically around \$10,000 a plaintiff. In this case, I think
13 there's 12 plaintiffs with a proposed incentive award of \$250
14 each. And frankly, we'll talk about this a little more. But
15 it's also a unique case for me because I, frankly, never had a
16 class action type case in my years as a lawyer and as a judge
17 with such low incentive fees and such a low request for
18 lawyer's fees.

19 So could you touch upon those two issues a little bit
20 before I move over to the defense side?

21 MR. BYRNE: Sure. Absolutely.

22 Well, obviously, as Your Honor knows, incentive awards
23 are an important part of the Rule 23 construct. You know, when
24 you have named plaintiffs who step in and carry the load for
25 the rest of the class, their effort needs to be recognized. It

1 needs to be rewarded in some way. Certainly, not in a way
2 that, you know, is -- I wouldn't call it over the top, but
3 here, I think, the low incentive award really boils down to the
4 fact that the named class members didn't have to carry as much
5 water of the thing as they normally would. And the attorneys
6 for that matter didn't have to carry as much water as they
7 normally would. We were certainly prepared to. But as my
8 colleague said, you know, once you've obtained all of the
9 relief you can, gosh, you know, it's time to stop, get the deal
10 down on paper, and quit spending up hours just for self-serving
11 reasons, you know. And I think that's what we've got here.

12 But it is a low incentive award. I agree with Your
13 Honor. This certainly is the fastest resolution of any class
14 case that I've ever been involved in. And it's all the lowest
15 fee request I've ever seen. But again, I think those two
16 things go hand in hand.

17 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock.

18 THE COURT: Yes, sir. Sorry.

19 MR. AYLSTOCK: I just wanted to point out that I was
20 with -- actually, I think it's Mr. Dravillas' partner, Ashley
21 Keller, yesterday, in Federal Court here in Pensacola in the 3M
22 MDL, and we're talking about the Eleventh Circuit decision.
23 And my understanding is that he had intended to appeal that to
24 the Supreme Court -- ask for a writ, rather, to the Supreme
25 Court. So I'm not necessarily sure that the issue is full and

1 final yet, but, hopefully, the Supreme Court will take it and
2 reconsider, because I do think that it is important that people
3 who work hard for -- on behalf of the class and receive
4 something to incentivize them to do so. Obviously, right now,
5 the Eleventh Circuit disagrees with me.

6 THE COURT: Sure.

7 MR. AYLSTOCK: And I respect their decision unless and
8 until it's overturned.

9 THE COURT: I appreciate your bringing that up. I
10 mean, certainly, it wasn't an across the board unanimous denial
11 of a rehearing. I think it was seven to four. I haven't
12 really looked at the numbers in that. But, certainly, there is
13 some disagreement on that issue. I think you're right there.

14 So now, let me go to defense counsel. Before I do
15 that, Mr. Byrne, you know, the comments you made kind of
16 reminded me of something we all talked about at one of the
17 hearings, I had brought up that, as a long-time criminal
18 defense lawyer who had handled capital crimes, we're all taught
19 as litigators to not trust each other, and to fight; and
20 sometimes you don't recognize when you're winning, and you keep
21 fighting. And so I think that this case is a bit unusual in
22 many respects. And I think you're right. The -- many parts of
23 it go hand in hand. And so that's kind of where we are.

24 So, Mr. Zalesin, if I could go over to you and
25 definitely make whatever presentation you want. But if you

1 could also address your view of the nonmonetary portion,
2 because I think you may be in the best position to educate me
3 on that.

4 MR. ZALESIN: I'm happy to do that. Thank you very
5 much, Your Honor. And if I may begin by just correcting one
6 statement that the Court made at the outset.

7 THE COURT: Please.

8 MR. ZALESIN: I think you may have characterized the
9 products at issue here as carcinogenic aerosol sunscreens.

10 THE COURT: I did. I always try to take 100 words and
11 boil them down into 10. And so those 90 words that are missing
12 probably would have been better adjectives for you.

13 So why don't you go ahead and tell me what you want to
14 say.

15 MR. ZALESIN: Just on that issue, and on behalf of my
16 clients, so the record is clear, as always. Johnson & Johnson
17 Consumer, Inc. has said many times and strongly believes that
18 the products which were found to be contaminated with low level
19 of benzene in them, these aerosol sunscreens, did not pose a
20 risk of any significant or serious health or adverse events for
21 people who use them. They were clearly out of spec and should
22 not have had the amount of benzene in them that they did. A
23 root cause investigation was quickly performed. The cause was
24 isolated and identified. And Johnson & Johnson Consumer took
25 corrective action in recalling those products from the

1 marketplace, announcing that very thoroughly in the month of
2 July, and then voluntarily offering refunds to all the
3 consumers who had purchased those products and were instructed
4 to discard them.

5 So while they were certainly products we did not
6 encourage people do use, we, in fact, told people to stop using
7 them. They were not carcinogenic or otherwise harmful.

8 On the other issue, Your Honor, in terms of just
9 nitpicking your summary, the 80 -- just so we're clear, the
10 \$80 million value of, I think you described it as the
11 noninjunctive, or, rather, the nonmonetary or injunctive type
12 relief. That number, it's probably more like 70 million, if
13 you want to segregate out the value of the refunds that were
14 set. So the 9.8 or 9.9 million, roughly 10 million in refund
15 checks that were issued by Johnson & Johnson Consumer, are
16 included within that 80 million.

17 And what that number effectively represents is the cost
18 to Johnson & Johnson Consumer to do all of the things that it
19 has done to remediate the problem that was identified by
20 Valisure back in May of last year; the investigation, the
21 testing, the refund program, the destruction of inventory. You
22 know, Johnson & Johnson had a lot of goods on hand that were
23 still in its possession or in its retail distribution pipeline
24 that had to be discarded. It had to recall not only from
25 consumers, but from retailers and distributors, goods that were

1 out there in the retail chain ready to be sold. And in some
2 cases, our customers, our major retailers, said we don't want
3 to be responsible for discarding these or removing these from
4 our shelves. We want you to do that and bear that cost. And
5 we did.

6 So when you add up all of the various things that were
7 done to make sure that these products were not in the market as
8 -- following the recall, to make sure that we knew exactly what
9 the problem was, how it had happened, and how we could prevent
10 it from ever happening again, and to implement all of those
11 programs, and to refund consumers their money, which, by the
12 way, the cost of that was not just the checks, but there was an
13 enormous infrastructure created around that to get that money
14 out to consumers and to handle those claims in an efficient
15 way. And so when you bundle all that together, we're talking
16 about roughly \$80 million in hard costs to Johnson & Johnson,
17 which we believe is a fair measure. It may be, perhaps, not a
18 perfect economic model, but it's a fair way of thinking about
19 the value of the relief that has been obtained by the class.
20 And that is not including the 1.75 million in vouchers for
21 these unaffected products.

22 Now, in terms of the settlement itself, your Honor, I
23 think it's important to keep in mind the big picture here, that
24 we have now, following preliminary approval and following the
25 notice program that was carried out under the Court's

1 direction, we have more than 175,000 validated claims by
2 households throughout the United States, which is a very
3 healthy claims rate. And as Your Honor knows, in the notice,
4 consumers were notified that they had the right to opt out or
5 exclude themselves from the class. And we had two people do
6 that. Out of all of the probably millions of purchasers and
7 hundreds of thousands of claimants, we had exactly two
8 opt-outs. We don't know exactly the reasons why. And we have
9 one objection that I guess we're going to deal with shortly,
10 but Your Honor knows and is familiar with the subject matter of
11 that objection.

12 I also think it bears repeating what Ms. Grombacher
13 alluded to earlier, which was that, you know, at the outset of
14 this, because perhaps it was done as quickly as it was and came
15 as something of a surprise to some of the plaintiffs' lawyers
16 who had filed complaints, but were not privy to the original
17 settlement negotiations, that there was skepticism, and I would
18 say, healthy skepticism, expressed by some other counsel about
19 whether the settlement was approved. Settlement, how it had
20 been arrived at, whether there representations that Johnson &
21 Johnson Consumer had made during the mediation and ensuing
22 negotiations could be validated, which they were during
23 discovery, both -- rather, documentation and deposition
24 discovery.

25 And so following that process and having made the

1 discovery record available to all counsel, whether they were
2 part of the settlement group or not, no one in that sphere has
3 raised any concern, and everyone is supportive of the
4 settlement. And I think, you know, as Your Honor says, we are,
5 as lawyers and advocates, trained to be skeptics and, you know,
6 to fight. And I think the fact that having seen all the
7 evidence, that no one on that side of the case has any interest
8 in opposing this settlement; in fact, as far as supportive of
9 it, is an important thing for the Court to consider.

10 Mr. Aylstock said at one point that he's very proud of
11 this settlement, and I want to echo that sentiment. I'm proud
12 of this settlement. I think Johnson & Johnson Consumer is
13 proud of it. I think we've accomplished a lot by working
14 together with plaintiffs' counsel from the outset in this case.
15 We brought fast, efficient, and low cost relief to the
16 plaintiff class, which is an exception to the rule that we tend
17 to see in these types of cases, especially once a whole bunch
18 of them get filed, and we have an MDL, they tend to take on a
19 life of their own and they could go on for a very long time,
20 but very high cost to the parties, ultimately, to the class,
21 which has to fund a portion of, you know, a part of their
22 recovery winds up going to the lawyers who spent years
23 accumulating legal fees. And obviously, at high cost to the
24 judiciary, which, you know, all of it has to preside over many
25 contentious battles, be they discovery or motion practice or

1 what have you. And none of that has happened here because of
2 the cooperation that, you know, took place between the parties
3 from the outset.

4 And the reason, Your Honor, I think that cooperation
5 and that rapid outcome was attainable is because Johnson &
6 Johnson Consumer, you know, really acted in an exemplary
7 fashion from the outset of this, before any -- you know, it
8 wasn't just the Neutrogena and Aveeno sunscreens that were
9 found to have benzene contamination in these aerosol products,
10 there were multiple products from many different manufacturers.
11 But no one got out ahead of the issue as quickly as Johnson &
12 Johnson Consumer did. No one undertook a recall with the speed
13 and efficiency that JJCI did. No one instituted a refund
14 program like we did, or paid out the kinds of claims and
15 numbers we did, as quickly as we did.

16 So you know, as I think a number of the plaintiffs'
17 counsel have said, there really wasn't much left for them to
18 accomplish, and, yet, they did. They did accomplish a number
19 of things. We are extending vouchers to consumers who
20 purchased the nonaerosol products that were included in the
21 complaint. These are lotion-type products that did not have
22 benzene contamination in them. Because they don't contain any
23 -- because they're not aerosols, they don't contain a
24 propellant, such as isobutane, which was determined to be the
25 cause of the contamination. Nevertheless, we recognize that

1 some consumers, when the news first broke about this potential
2 contamination in a variety of sunscreens, including ours, may
3 have had concerns about using those products, may have
4 discarded them unnecessarily. But it may have happened. And
5 we're comfortable compensating them in the way that we have
6 compensated them.

7 The vouchers are not coupons, in the sense that they
8 certainly do not require customers to go out and repurchase the
9 same products that they potentially have concerns about now, or
10 might have had concerns, although those products were
11 unaffected. They can buy with those vouchers, which the
12 overwhelming majority of claimants will receive two vouchers,
13 the value of which will be roughly \$10, \$9 and 90 some odd
14 cents.

15 There are hundreds if not thousands of Neutrogena and
16 Aveeno products that people can use those vouchers to obtain,
17 and the vouchers are transferrable. So if they want to sell
18 them to a friend, they can do that, as well. So those have
19 real cash value, they're not just coupons that are a way of
20 drumming up additional business for Johnson & Johnson Consumer.

21 And as has been said through the settlement agreement,
22 we have undertaken to carry out a variety of corrective
23 actions, which are, by now, enforceable promises by contract
24 and with the imprimatur of the Court, once final approval is
25 granted. These corrective actions include specifications,

1 testing specifications, and benzene level testing that is well
2 in excess of what the FDA would require this industry leading.
3 They require testing of finished goods, and they require a
4 variety of other steps to ensure the safety of the products
5 going forward, which we are happy to do, but which can't be
6 denied have value to consumers who purchase our products going
7 forward.

8 And one of the things I thought was interesting in the
9 paper back and forth with Mr. Frank's objection was, you know,
10 the assertion by Mr. Frank that the consumers who bought the
11 products and are members of the class are not the beneficiaries
12 of the settlement because, you know, they are past purchasers,
13 and their settlement can only benefit future purchasers in
14 terms of the nonmonetary relief.

15 But as I think the plaintiffs appropriately pointed out
16 in response, we're not talking here about a one-time purchase,
17 or even something you buy for a limited period of time, like
18 baby formula or diapers, until your kids move on to another
19 stage of life. This is sunscreen. And if people are being
20 healthy and wise, they use it, you know, on their kids from the
21 time they're infants until, you know, throughout their entire
22 lives. And so there's, I think, likely to be if not
23 100 percent, near 100 percent overlap between the past
24 purchasers of these products and sunscreen users of the future,
25 and there should be, and that's a good thing.

1 So at bottom, Your Honor, I think this settlement
2 brings relief to the class. It brings finality. It brings
3 efficiency. And it removes the risks, uncertainties, and
4 delays of at litigation would entail, had the settlement not
5 come to fruition at the time that it did.

6 We have defenses that we might have raised against
7 consumers, had we been unable to settle. I don't think it
8 would have been easy, if possible at all, for any individual
9 purchaser to show that their particular unit product was
10 contaminated with benzene, and nevertheless, everyone is
11 treated the same under this settlement. That would have raised
12 Article III standing issues, it would have raised, certainly,
13 class certification issues. And all of those issues are
14 resolved and don't need to be litigated. And those risks don't
15 need to be faced by the class because of this settlement.

16 And so, to my mind, this is the type of settlement the
17 Court should not only approve, but encourage, and the consumer
18 advocates should embrace. And I wish every case went as
19 smoothly as this did, and accomplished as much in as little
20 time, and at such a low cost.

21 Thank you, Your Honor.

22 THE COURT: Thank you, Mr. Zalesin.

23 Mr. Berman, anything that you wanted to add?

24 MR. BERMAN: Nothing, Your Honor, other than to say
25 that this really is, in my experience, anyway, an

1 extraordinarily unique case. And such a rapid settlement, as
2 everyone has said. And is really, in my experience, it stands
3 entirely alone.

4 THE COURT: Thank you, Mr. Berman.

5 Any other lawyers, plaintiffs' or defense counsel, that
6 I haven't heard from that need to make an appearance that want
7 to be heard?

8 MS. GROMBACHER: Your Honor, you heard from me. I
9 would just ask that I have an opportunity to respond to the
10 objector's counsel once he makes --

11 THE COURT: Oh, of course. Of course. Sure. We've
12 got a good amount of time set aside, and we're consistent with
13 how the case has gone. We've moving along fairly quickly, so
14 no worries. I absolutely want to make sure everyone's heard.

15 So we do have one objector, and that's Theodore H.
16 Frank, or Ted Frank. And he is represented today by
17 Mr. Andren.

18 So, Mr. Andren, how about you take it away at this
19 point. And I would say that whether we agree with what the
20 filings say or not, the quality of the filings all around,
21 including Mr. Andren, your documents and Mr. Frank's documents,
22 are just really excellent. And I appreciate the arguments very
23 much. I think that that's what good lawyering is all about.
24 You know, ultimately, I'm going to make a decision, and
25 someone's going to be happy and someone isn't, or maybe

1 nobody's going to be happy. As you know, it's never that
2 everyone's happy. And then, of course, there's recourse after
3 that.

4 But, Mr. Andren, I would like to hear from you, and
5 then I have a few questions for you, as well.

6 MR. ANDREN: Excellent, Your Honor, thank you.

7 I just want to start by maybe trying to address some of
8 the points you raised at the beginning regarding the 9 million
9 and the refund.

10 I think the cases for Your Honor to look at for that is
11 *Koby v. ARS National Services*, 846 Fd.3 at 1080. And then,
12 also -- that's a Ninth Circuit case. And then,
13 *Reynolds v. Benefits National Bank*, 288 Fd.3 at 277.

14 *Reynolds* says the injunction issued during settlement
15 negotiations don't bear on the final validity and could not
16 count -- could not be credited towards the settlement
17 agreement. In the *Koby* case, they discuss the -- it must be a
18 consideration. Whatever is given in the settlement must be a
19 consideration for the release in claims. And I think it's a
20 very easy answer here when you look at it. If Your Honor was
21 to reject this settlement, all the class members have the
22 refund and the recall provisions, whether the settlement's
23 approved or not. So it doesn't serve as any consideration
24 towards the release of their claims. So we would say that's a
25 pretty straightforward proposition.

1 The 70 million, 80 million, 70 million nonmonetary
2 relief. Mr. Zalesin just sat there and told you J&J was going
3 to do this no matter what. They said they did this in response
4 to the Valisure petition to the FDA. The plaintiffs' own
5 filing said J&J was not aware of the presence of the benzene.
6 They did an internal investigation. The FDA did an
7 investigation. To think that Johnson & Johnson, I mean,
8 they've already said, did that in response to that. But to
9 think they would not do that, especially with what they're
10 facing with the talcum powder litigation and a fear of any
11 other litigation here, with the FDA looking over their
12 shoulder, we're going to just not withdraw the products, not
13 offer the refund, but do anything to hurt their brand. It
14 justifies common sense. And the plaintiffs have not offered
15 any sort of record evidence that shows that they should be
16 credited with that \$70 million. Which, again, is measured as
17 the cost to J&J to go through those actions. Again, the cost
18 of the defendant is not the benefit to the class; and that is
19 what's important here, the benefit to the class.

20 I'm sorry. I do want to say one other portion here.
21 You had remarked that you weren't familiar with such a low fee
22 request here. I would point out to the Court that the
23 \$2.6 million fee request here, I point out to the Court, that
24 the Ninth Circuit's decision in *Bluetooth*, the fee request was
25 \$1 million. In Seventh Circuit's decision in the *Subway*

1 *Footlong* litigation, the fee request was \$500,000.

2 So there really isn't anything uniquely low about this,
3 you know, in absolute terms, in the \$2.6 million amount they're
4 requesting. But that's kind of besides the point anyway,
5 because the real question is what are they asking for in
6 relation to what the class is receiving. And that here is
7 \$2.6 million in cash to the plaintiffs' lawyer, and \$1.75
8 million, at best, in coupons to the class, with 97 percent of
9 the class receiving nothing.

10 And that's all you need to know. That is, at the very
11 best scenario, over 50 percent of the funds J&J was willing to
12 pay to settle this litigation. And if they get a poor
13 redemption rate on those coupons, then we're talking in excess
14 of 90 percent of the amount of the settlement that J&J was
15 willing to bring to the table, and is going to the class
16 counsel, as opposed to the class. And I think plaintiffs in
17 their papers, and I think they said again here today, well, you
18 know, you go to look, these claims were so weak, they weren't
19 actually harmed, and a lot of other things. But again, that
20 doesn't matter. That is a question about what the amount of
21 the settlement should have been. We are not objecting on those
22 grounds. I'm not here to tell you the plaintiffs needed to get
23 40 million, or they needed to get 4 million, or they needed to
24 get 20 million. It doesn't matter. They settled for an
25 amount, and they get a fair percentage of that amount, as

1 calculated as what the class receives.

2 And here, the best estimates for what the class is
3 going to receive is \$1.75 million in coupons. Again, under
4 CAFA, and we can go into this later, if you want, but I think
5 you called them coupons, and they certainly -- I think it's
6 obvious under any calculation, at least, these are coupons, but
7 the redemption rate is almost certain not going to be \$1.75
8 million. So that's another big issue here.

9 THE COURT: Mr. Andren, let me ask you this. If I were
10 to, consistent with your argument, put the \$70 million of
11 nonmonetary relief aside, consider only the \$1.75 million
12 coupon number that we're talking about, add to that the
13 approximate \$9.8 million of the actual monetary relief that I
14 know you're saying I shouldn't consider. But let's say I did
15 that. Then based on your understanding of Eleventh Circuit
16 case law and CAFA, would you then agree that \$2.6 million for
17 the plaintiffs' attorneys to recover in fees and costs in
18 reasonable?

19 MR. ANDREN: Well, it's certainly not the case here.
20 But I would think something in that range could be. But not
21 here. Again, like I've said, the \$9 million is simply just as
22 illusory as the \$70 million here.

23 THE COURT: So that's what I really want to talk about,
24 is why you think that's illusory. I've looked at the cases.
25 I've looked at the cases in -- I think Mr. Frank cited the *Aqua*

1 Dots case. Obviously, very well-written. It's Judge
2 Easterbrook. Everything he writes is well-written. So I
3 enjoyed reading that.

4 That case, though, really dealt with the class
5 certification time period, not the settlement time period,
6 where we are, number one. And number two, although the dates
7 aren't really laid out in the Seventh Circuit opinion, I get a
8 different idea when I read that case in the sense that there it
9 seemed clear the recall was happening, whereas, here you have
10 the May 25, 2021, date, which is the Valisure action and the
11 Serota complaint. Then you have another complaint that comes
12 the next day. The recall is not until July 14th of 2021.

13 MR. ANDREN: Mmm-hmm.

14 THE COURT: How do I just say, hey, the recall has
15 nothing to do with the filing of the complaints, and the
16 negotiations that began that very day, because that came up at
17 a prior hearing, that the negotiations were -- began the --
18 shortly after the complaint was filed?

19 MR. ANDREN: I would first just say, that's a bit of a
20 red flag, too. I mean, if you file a complaint on the same day
21 you said let's talk substantive settlements, that doesn't look
22 like somebody trying to litigate on behalf of the class, that
23 looks like somebody looking to settle as quickly as possible.

24 And I believe the Valisure did make -- and I could be
25 wrong with this, but I believe it was the day before the

1 complaint was filed that they actually announced what they had
2 found. They did, in fact, I think, file the next day, which is
3 also when you get the Serota complaint here.

4 THE COURT: I think that's accurate.

5 MR. ANDREN: But the larger part, I did make this
6 point, and I want to make it again, is if you don't approve
7 this settlement, that relief already is had by the class of
8 everything there. It's not a consideration for the settlement
9 that was reached in December. And *Koby* says it must be --
10 there must be consideration for the release of claims. And
11 *Koby's* great. Even if they're really weak claims, even if
12 they're not worth much, even if any of that, it still matters
13 that they're worth something. And like we all were talking
14 about here, the class action process is the way that we can do
15 a lot of this, and that's their value. And we need to protect
16 that value for them so that they can pursue valid actions, if
17 that's what they're going to do.

18 But at the end of the day, the refund already exists,
19 it's already come and gone. It's not consideration for the
20 relief. It's not a benefit to the class. Because they have it
21 no matter what happens to the settlement.

22 THE COURT: So let me absolutely read the *Koby* case. I
23 mean, it's important, and you've cited to it.

24 MR. ANDREN: Mmm-hmm.

25 THE COURT: I don't know what the context of it is now,

1 obviously, because I'd have to take a look at it. But --

2 MR. ANDREN: They're --

3 THE COURT: I was just going to ask, are the judges on
4 that case, are they actually with a straight face saying that
5 the day the settlement negotiation -- the day the settlement
6 agreement's signed is the date that counts, but all those
7 months of negotiating, where things are done, that doesn't
8 count? I mean, that just seems so foreign to common sense to
9 me.

10 MR. ANDREN: Yes. I think you had a slightly longer
11 period of time between the injunction there. And there were
12 some other issues, that the injunction wasn't worth a whole
13 heap of a lot either, which I'd say it's not here. But
14 nonetheless, I think I want to -- I mean, think about the
15 common sense. And this is the same as we talked about with the
16 \$70 million.

17 Do you really think that J&J was not going to recall
18 these products and offer refunds? I mean, they announced it.
19 Their announcement -- and it's in the record, it's in our
20 filing -- was J&J, or, you know, Johnson & Johnson offers
21 voluntary recall and refund. They put up their number; give us
22 a call, we'll give you a refund. There's no end date, there's
23 nothing. Of course, they sit down and say we will, you know --
24 they gotta put something in the settlement, and so, you know,
25 let's build this value up, let's do what we can so we can

1 justify our fees. That's just how this process goes.

2 THE COURT: Are there any suntan lotion aerosols from
3 any manufacturer still on the market?

4 MR. ANDREN: Yeah, I believe so.

5 THE COURT: So then how does that argument you make
6 make any sense?

7 MR. ANDREN: Well, because they're [audio distortion],
8 at least, for their own brand value. I mean, they've already
9 -- they stated they announced a voluntary recall. I don't want
10 to put words in his mouth, but I'm pretty sure Mr. Zalesin sat
11 there and said they were happy to do these things, and they
12 were going to do these things. Then he said, but, oh, by the
13 way, they also benefit the class.

14 But to say Johnson & Johnson is probably suffering, I
15 mean, I think any company would have done it. But Johnson &
16 Johnson is suffering with brand image issues with the talcum
17 powder and some other issues, like. They're going to do what's
18 best for their brand, and that's going to be to offer the
19 consumer the comfort of saying, you know, here's an issue, we
20 don't think it's an issue, but, you know what, we're going to
21 take everything off, and we're going to give you a refund of
22 your money back, because we're a good company, and we want to
23 make you feel good about doing this.

24 THE COURT: Sure. I hear what you're saying there.
25 But there's also the fact that on May 25th, the lawsuit was

1 filed here. And certainly, Mr. Zalesin has got to align in
2 terms of what he's saying, just like how he corrected my
3 preamble. And, you know, that's his job.

4 But my thought is, on these other companies that still
5 are manufacturing and selling aerosol suntans that haven't
6 pulled it, I'm assuming there's no lawsuit filed against them.

7 MR. ANDREN: Right. But, I mean, but they don't have
8 their name in the paper, and I think that's what's driving
9 their behavior more than anything else.

10 THE COURT: All right. So how could this settlement be
11 better?

12 MR. ANDREN: Give the class more money. That would
13 basically be the best way. I mean, cash would be better than a
14 coupon. But certainly, something worth more than \$5 would be
15 worth more. There's a lot of ways. Again, it's not about the
16 size that we're objecting to, it's about the proportion. It's
17 about the distribution. It's about the allocation.

18 THE COURT: Understood. And then let me ask you this:
19 Let's say that the parties litigated this case, took extensive
20 discovery, depositions, set it for trial, traveled here for
21 hearings, you know, did all of this, and now we're in 2025.
22 And then, on the eve of trial, they resolve the case, and the
23 resolution is just the same as it is today.

24 Under the CAFA rules, under the contingency fee model,
25 under the law in the Eleventh Circuit, your argument would be

1 that they would still be entitled three years from now, after
2 all of that work, to the same fee that you're arguing for
3 today, correct?

4 MR. ANDREN: Yes, correct. And that's Rule 23, and
5 that's CAFA. You are paid for results. You're not paid for,
6 you know, all the hard work.

7 THE COURT: Okay.

8 MR. ANDREN: But hopefully, it's commensurate. You
9 know, there are -- in certain instances, there could be
10 multipliers. There can be other things that can be awarded.

11 THE COURT: Maybe we should create a new lodestar which
12 says the quicker a case is resolved, then there's a multiplier.

13 MR. ANDREN: No, I'm not suggesting that, no. But it
14 is odd when you have -- the settlement was reached quickly.
15 There was, again, no motions practice. I mean, those aren't
16 necessarily good things. Efficiency is good, but there needs
17 to be --

18 THE COURT: Listen, I understand what you're saying. I
19 hear it. I go back to criminal cases a lot because that's
20 really my wheelhouse in terms of how I grew up as a lawyer.
21 You know, I handled numerous capital cases. And I remember one
22 particular defendant, a co-defendant on a case of mine, who was
23 offered, instead of a first-degree murder charge where he was
24 facing the death penalty, because they felt he would be a great
25 witness, they offered a plea to manslaughter where he would

1 actually be released on probation. And, of course, as many
2 criminal defendants would, his thought was, gee, that plea came
3 so fast, they must have no case on me. So he rejects the plea.
4 And that was 21 years ago. And he's done 21 years of his
5 sentence at this point. And he's going to serve his sentence
6 throughout his whole life.

7 So it's interesting how we make these decisions. And
8 sometimes we look at something that happens quickly as good and
9 sometimes as bad. But I mean, as lawyers, this is what we do.
10 We try to kind of pick at each issue and understand the law and
11 the policy of it. For me, this is very educational, so I
12 appreciate it.

13 Let me do this then, Mr. Andren. I am not sure you had
14 concluded what you wanted to say. So let me make sure you get
15 to say whatever else you want to say, and then I'm going to
16 give the lawyers a response, and then I'll give you one more
17 time, last word.

18 MR. ANDREN: Okay, great. I just have two other quick
19 moments before all the rebuttal and everything. I just want to
20 cover the CAFA settlement question.

21 Of course, we think this is a coupon settlement. The
22 Eleventh Circuit has not articulated a test or specifically
23 adopted any test. And CAFA does not defined coupon. We think
24 the best course of action here is for the Court to do what we
25 do in terms of define, and use of plain meaning; and we think

1 under any plain meaning a \$5 coupon good towards the purchase
2 of a Neutrogena or Aveeno product is plainly a coupon. But if
3 you are interested in applying something like the Ninth
4 Circuit's multifactor test in cases such as *Online DVD* and
5 *McKinney-Drobnis*, then we still have a coupon.

6 Those factors being whether the class members need to
7 spend more of their own money. Again, \$5. I submitted a
8 declaration with our objection, that's Exhibit 2. \$5, I think
9 there was -- I could be wrong -- I think something like six
10 products that you could buy with that. So it's almost certain
11 that the class members would have to spend more of their own
12 money if they were going to take advantage of the coupon. So
13 that's factor one, we failed.

14 The second would be whether it's good for a small set
15 of products. Here, Neutrogena, Aveeno, these are all skin care
16 sunscreen products. If you look at the *McKinney-Drobnis* case,
17 I believe there there's something like 231 different products
18 of creams and lotions and things that Massage Envy sold, that
19 the Court said, yeah, that's not sufficient. That's not, like,
20 everything under the sun that Walmart.com has, *Online DVD*. So
21 again, we fail that one.

22 And then lastly, is the flexibility and things like the
23 expiration dates, whether they -- the flexibility of the
24 coupons, whether they expire. Here, they expire after a year.
25 So clearly, we're not in some sort of cash equivalent

1 situation. We're at a coupon. But whether we have a CAFA
2 coupon or not a CAFA coupon, Rule 23(e)(2)(C) is still what
3 applies, and none of those issues are ameliorated by arm's
4 length negotiations, which they've said several times. I think
5 that's an important point. Is that an arm's length negotiation
6 process, that is a requirement of Rule 23(e)(2)(B). We are
7 here with the self-dealing issues. Those derive from Rule
8 22(e)(2)(C), and I think that, certainly, the Court would be,
9 like we mentioned, the *Briseno v. Henderson* case under the
10 Ninth Circuit, would be very enlightening to Your Honor.

11 I'll wait, and allow my colleagues to speak.

12 THE COURT: Thank you, Mr. Andren.

13 Ms. Grombacher, let me go back to you.

14 MS. GROMBACHER: Sure. So a couple of issues here. A
15 lot of it, if we spar back and forth, it's really just a
16 recitation of the papers, which I know Your Honor has read. So
17 I can talk about the CAFA stuff, but, again, what he brought
18 up, what we've addressed, it's all in the papers.

19 We disagree that this is a coupon. We think this is
20 clearly a voucher. They are transferrable. Mr. Zalesin talked
21 about this a little bit ago. You can transfer it. You can
22 sell it. There is no scenario where you can't buy a product in
23 whole where you would have to put your own money in. There are
24 products that are under the voucher amount, even if you just
25 receive just one voucher of which there are very few class

1 members who will do that. And that it's not just for
2 sunscreen, it's for shave gels, it's for face masks, it's for
3 cleansing towelettes. I mean, there's a number of products you
4 can purchase.

5 So there's no scenario where a class member is forced
6 into patronage. They can get something for free. They will
7 not have to put any money in.

8 But I think, ultimately, what we need to go back to is
9 should you cast aside this settlement. I guess the two
10 Achilles heels really are the vouchers, which are -- I think
11 establish for products that have very little value, had this
12 case ever gone to trial. Because as Mr. Zalesin talked about,
13 this is an isobutane issue. This is not a Neutrogena issue,
14 this was an isobutane supplier issue. And it infected a number
15 of manufacturers. And it happened to products that require
16 propellant. To the lotion products that don't, there's not
17 contamination. And we tested. We had an independent lab test.
18 And we looked at Neutrogena, and they did testing on testing.
19 The product simply doesn't contain benzene. We would not have
20 been able, likely, to prevail on this at trial.

21 So that claim has little to no value. And yet, they
22 got a real value, a real benefit, nonetheless. And yet,
23 Mr. Frank, as a consumer advocate, is saying that we've done
24 something wrong there, by getting a value for a claim that had
25 essentially no merit. He's also saying that you can wash this

1 aside because we negotiated for a benefit, and they're going to
2 get it, regardless of whether you sign this or not in terms of
3 the objective. It's kind of this curious argument where I
4 guess the parties should have waited to implement the
5 injunctive relief, even though all the class members who I
6 spoke with, and I talked to probably more than 100 myself,
7 asked the same question: Is the product safe? Can I use the
8 product? Can I put the product on my child?

9 And I did talk to one of the individuals who chose to
10 exclude herself. And she didn't have a problem with the
11 settlement. She just was worried that there might be some harm
12 to her, personal injury harm, and she wanted to create a record
13 that she didn't ever participated in any kind of JJCI
14 settlement related to this product, even though she understood
15 that she wouldn't be releasing our clients. I can't speak to
16 the other exclusion, but I know for the one woman.

17 You know, that's kind of a curious argument to make,
18 that we shouldn't have put this in place, we should have waited
19 for the Court's order, because now you can just cast aside this
20 settlement, and give the benefit to the class, and just do away
21 with the parties' contractual agreement.

22 You know, from the outside looking in, it's easy to say
23 JJCI would have done this, or the FDA made them do that. And
24 he brings up talc, and talc is a good example. And my
25 colleagues on the plaintiffs' side can talk to that, because we

1 -- they have a lot of talc cases. I think Johnson & Johnson
2 just stopped selling talc. And it's moved to the
3 cornstarch-based product. Even though they've been embroiled
4 in litigation for years, and it's been a high profile
5 litigation.

6 So what a company will or will not do, and what their
7 tolerance is, is hard to say. And even with this company, who
8 has acted in different ways, in different capacities. But they
9 surely did the right thing here. And it was the result of
10 negotiation. The testing protocols were negotiated. They were
11 contested. The levels were contested. They were highly
12 disputed. We talked to toxicologists. We talked to chemists.
13 We sought the advice of independent third-party labs on
14 testing. We talked to people in cosmetic regulation people,
15 and quality control who worked in these fields, to design a
16 system that would work. And that was not the FDA. That was
17 us.

18 So even if you take the value of the settlement, the
19 big 80,000, you cut it, you give us 10 percent of that, we're
20 still going to get to a number that even the objector would say
21 is reasonable on his papers, if you really read it.

22 The objection is curious, given how important this
23 litigation was, and the potential for harm. Now, there may not
24 be carcinogenic products, but this benzene is a carcinogen.
25 And to have it in a product -- and we can talk about whether

1 it's harmful or not. But to have it in a product at all, it's
2 something the consumers certainly don't want, and something
3 that we wanted to ensure got out of the product and that we
4 ensure that it didn't get back in there, that there were
5 protocols in place.

6 And every class member I talked to, that was important
7 to them. And I don't know how many class members the objector
8 or his counsel spoke with. But, you know, I can personally say
9 I talked to over a hundred. And that was the refrain, that was
10 the question. Can I use this product? What sunscreen do I
11 use? How did they fix it? Are they going to fix it? How do I
12 have comfort that I can use the product?

13 And so that benefit is not illusory, and it was highly
14 contested, and it was negotiated. I'll let, you know, maybe
15 some of the other plaintiffs' counsel weigh in briefly if they
16 want to on that point, but that's simply what I would say about
17 that.

18 THE COURT: Thank you, Ms. Grombacher. Ms. Walsh?

19 MS. WALSH: Your Honor, I would just underscore a point
20 that Ms. Grombacher made which I think is very important.

21 As I understand it, what objector's counsel is asking
22 the Court to do is to make a decision based on speculation
23 about what the world might have looked like in the absence of
24 all the efforts of class counsel. And you know, what we would
25 ask and submit is correct, is Your Honor to make a decision

1 based on the facts in the world as they exist, which include
2 all of the efforts of class counsel, which have been led very
3 ably by Ms. Grombacher, and the protections that now are in
4 place as a result of those efforts. And I can personally
5 attest that I had many of those same conversations, not just
6 with named plaintiffs, but, you know, people in my life, what
7 sunscreen am I supposed to use, is it okay to use this, and the
8 relief that has been achieved by the hard work that was done is
9 really meaningful to people out there in the world.

10 THE COURT: You know, part of my concern is that if I
11 were to undo the settlement under the theory that these
12 individuals have received something, whether it's a coupon, a
13 voucher, or a check, or some combination of that, what
14 incentive do lawyers have to get involved in cases like this?
15 But that may be, Mr. Andren, part of your theory is just the
16 class action model, in and of itself, is not what you're
17 looking for.

18 I guess what I'm trying to figure out is what you would
19 think is a better solution. I think what you've told me is for
20 the plaintiffs to get more. I don't know. In this kind of a
21 class action, where we're not dealing with personal injury or
22 any claims like that, how you give someone more than what they
23 put in. And it seems like the resolution is that people are
24 getting back what they put in. Plus, there's injunctive
25 relief. So I'm just trying to iron that out in my mind.

1 But then the second argument, of course, that you made
2 is that the attorney's fees should be -- bear some percentage
3 relationship to the actual recovery. So we have to think of
4 that, as well.

5 Before I go to you, Mr. Andren, though, any other
6 plaintiffs' counsel that want to be heard?

7 Mr. Byrne?

8 MR. BYRNE: The only question I have, Your Honor, is
9 this: Mr. Andren and his client have argued that this class
10 should have gotten more. He can't really get his arms around
11 what more looks like, what it feels like, what it sounds like,
12 and he certainly hasn't articulated to the Court how he would
13 go about getting one dime more for this client. He is not in
14 the business of representing class members, and neither is his
15 client. That's just not what he does. He has absolutely no
16 idea how much time we spent in conference room after conference
17 room talking about this very thing. Is there any more? Can we
18 do better? Because all plaintiffs' counsel in this case were
19 ready, willing, and able to go to the mattresses, so to speak,
20 and fight as hard and for as long as it took to get everything
21 we could.

22 But, you know, meeting after meeting, we just -- we all
23 came to the considered conclusion that that's it. We've, much
24 like your client, who received this wonderful deal, but
25 thought, golly, you know, there must be a hook in there

1 somewhere. Usually, there is. Sometimes there isn't. We
2 talked a lot about this question, and we just couldn't find the
3 hook. And Mr. Andren can't find it either. And at the end of
4 the day, when you talk about what makes a fair and reasonable
5 class settlement, if you're going to come in as an objector,
6 you have to be able to sketch out a plan for how this class
7 gets more. Is he going to just fight harder? What's he going
8 to take, more depositions? He's going to -- I just don't
9 understand it.

10 And I would make this other point. I don't mean to go
11 on and on. But, you know, like my colleagues, I talked to
12 class member after class member, heard their concerns, heard
13 their worries. What do we do? How many of this do I throw out
14 of my house? How much can we use going forward under this
15 proposed injunctive relief you got? Well, you know, as part of
16 the relief, all cans of Neutrogena spray and Aveeno spray that
17 are implicated in this settlement are now specially marked. If
18 it doesn't have a specific marking on the can that came about
19 as a result of this settlement, you need to throw it away. You
20 need to throw it away.

21 And that's relief that we didn't need to wait on for
22 ten years. We waited, as class counsel, to be able to tell
23 class members right now, this is safe, this isn't safe. We
24 didn't want them to guess.

25 And yes, it's true, Johnson & Johnson had an incentive,

1 I think, to be able to tell the public that, look, this is
2 safe, this isn't safe. You trusted Neutrogena in the past.
3 We've solved this problem. You can trust it going forward.
4 And here's what you need to look at when you go in the store to
5 assure yourself that you've got a safe product. All of that
6 came about as a result of this settlement.

7 I have no idea what Mr. Andren or his client think they
8 would do to produce better relief.

9 Anyway, I apologize for going on and on, Your Honor.
10 But it just -- I think it's a point that needs to be made.

11 THE COURT: Thank you, Mr. Byrne.

12 Mr. Aylstock, I saw you unmuted and then you went back
13 on mute. Was there anything you wanted to add?

14 MR. AYLSTOCK: Not after Ms. Grombacher and Ms. Walsh.
15 I think they put it well.

16 THE COURT: Thank you.

17 Mr. Dravillas, anything?

18 MR. DRAVILLAS: No, Your Honor.

19 THE COURT: Mr. Rumberger, anything?

20 MR. RUMBERGER: No, Your Honor. Thank you very much.

21 THE COURT: Thank you.

22 Mr. Zalesin, back to you, then. Anything that you
23 wanted to add?

24 MR. ZALESIN: Yes. Thank you, Your Honor.

25 I just want to point out that the sort of binary choice

1 or dichotomy that Mr. Andren is asking the Court to apply to
2 evaluate the settlement, which is what happens if you approve
3 it on the one hand versus what happens if you don't approve it.
4 And he's saying that a lot of the things that came about, at
5 least in part because of this settlement, certainly, as Your
6 Honor points out, following the filing of not just one, but
7 multiple complaints. And we knew we were headed toward an MDL,
8 even if it hadn't been sent to Your Honor yet. Yeah, I think
9 it would be a very, very heavy precedent to set to indicate
10 that that's the model that a Court should use. You know,
11 what's the before and after approval, and not look at anything
12 else.

13 Let me give you one very concrete example of why I
14 think that's wrong. Yeah, sunscreen, it turns out, is kind of
15 a seasonal product, although in your part of the world, there's
16 sun year-round. In my part of the world, there isn't. And
17 people tend to buy sunscreen in the spring and use it in the
18 summer, then put it away in the fall, unless they go on a
19 Florida vacation.

20 And so there's a season for selling, and there's a
21 season to manufacturing. And the manufacturing season turns
22 out to be -- starts toward the very end of the year and
23 continues into the first quarter of the year, and that's where
24 the pipeline gets filled.

25 And so, you know, we were negotiating this settlement,

1 mediating before Judge Lifland, continuing our negotiations,
2 hammering out a term sheet, and ultimately a final definitive
3 agreement at the same time that the company was getting ready
4 to ramp up its manufacturing for the next season, having
5 identified the cause of the problem and having considered, you
6 know, what remediation or what preventative measures would be
7 applied. And to their credit, the plaintiffs negotiated hard.

8 For example, for a finished goods testing requirement
9 that would require a certain percentage of samples from every
10 lot to be tested for not just the ingredient, isobutane, but
11 the finished product. And that happened, that has been
12 happening for months. It happened throughout the last
13 sunscreen selling season because of the settlement in this
14 case.

15 And other positive things happened because of the
16 settlement in this case, as well, such as the extension of the
17 refund program for a full six months, and enabling people to
18 make claims who otherwise might not have been able to make
19 claims. And so to say that you should look at it from the date
20 of approval, which necessarily is going to come months after
21 the settlement itself is originally negotiated, finalized,
22 after which court approval is sought, you know, versus what
23 happens if you don't approve it, I don't think is a fair and
24 appropriate lens through which to view the value of the
25 settlement to the class. There are things that have already

1 benefited the class as a result of the settlement, and they
2 should be considered along with the prospective relieve, which
3 is obviously the continuation of the injunctive measures, but
4 also the award of these vouchers which has real value to class
5 members who otherwise almost certainly would have gotten
6 nothing.

7 Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Zalesin.

9 Mr. Berman, anything else?

10 MR. BERMAN: Nothing, your Honor. Thank you, Your
11 Honor.

12 THE COURT: And then, Mr. Andren, back over to you,
13 last word.

14 MR. ANDREN: Thanks again, Your Honor. I'm just going
15 to try to briefly touch on the things that everyone talked
16 about.

17 One, I want to address Mr. Byrne's points. I said it
18 before, I'm going to say it again. We are not saying they
19 should settle for more money. We are not saying -- if you want
20 to call it 4.3 million was not enough. We're not saying they
21 needed 40 million. We're saying, if you settled for 4 million,
22 4.3 million, whatever you want to call it, you don't get
23 2.6 million. That's what we're saying. Okay?

24 That point goes to, also, one of Ms. Grombacher's point
25 when she's talking about mentioning, well, our claims are so

1 weak, they don't even have benzene in it. Again, that's a
2 question about how much they should have settled for, how much
3 the claims are worth. That's not a question about the
4 distribution of the funds to the class to class counsel. These
5 are the Rule 23(E)(c)(2) problems. Okay.

6 Again, you know -- again, a little bit of talking out
7 of both sides of their mouth, too. Like, you know, if these
8 claims are really weak, these claims are really weak. Also,
9 we're over here helping everybody. We've got this bad stuff
10 off the streets, and we helped everybody. But, also, that
11 there's no benzene in this product, so there's actually not a
12 problem. So, okay, that's interesting.

13 But then there's one more point about the injunctive
14 relief. The one part per million of the raw materials versus
15 the two part per million of the final, which is the FDA's
16 standard. I'm pretty sure there's no record evidence that
17 that's any safer of a product. I think the FDA knows what
18 they're doing in having a two part per million threshold in the
19 final product. But they certainly have not submitted any
20 evidence that this one part per million in the raw goods is
21 leading to a safer end product.

22 I mean, we don't know -- does that mean J&J's throwing
23 out 90 percent of their potential raw goods, are they -- is
24 that just, like, a threshold that everybody meets? I don't
25 know. It's not in the record. Again, this is *Koby*. It is

1 their burden to prove the value of the injunctive relief.

2 Your Honor, we're both sitting here speculating, well,
3 okay, the date was this, and then that, and then the date came
4 here. Maybe it -- well, they could have provided better record
5 evidence to at least offer justification, which would give us
6 some proper notice, too, to challenge that valuation of the
7 \$9 million of any of this injunctive relief, I would say, they
8 really haven't met their evidentiary burden on.

9 And, you know, again, there was a point that we're
10 asking to speculate on the state of the world. Again, it's not
11 speculation, it's a rule of law. We have a record that we work
12 from, and we're talking -- we're asking the Court to evaluate,
13 as it's required to do, evaluate the settlement based on that
14 record. And that's the record on which we objected to it.

15 So unless Your Honor has any more questions, I don't
16 have anything further.

17 THE COURT: Thank you, Mr. Andren. I really appreciate
18 all the hard work you all have put into this case and into
19 today's hearing.

20 Before I close up for the afternoon, I just want to
21 make sure, did everyone get to say what they wanted to say?
22 Are there any points that we didn't touch on that we need to
23 address?

24 I think we're all clear there.

25 Okay. So what I need to do is read some of the cases

1 that were brought up specifically in today's hearing. As I
2 said, I've read all the papers, but I think you've pointed me
3 to a few areas that I need to read more closely.

4 What I always like to do is give the parties an
5 opportunity to submit proposed findings of fact and conclusions
6 of law, in Word, and get them over to me.

7 With regard to that, though, I'm not asking you to
8 spend hours and hours reinventing the wheel. You all have
9 already filed all of that in different forms. It may just be a
10 question of converting what you've already filed to a Word
11 document and cutting and pasting. I'm not trying to load you
12 all up with more work. You have plenty to do.

13 But if you are able to -- today's the 12th. If you're
14 going to submit any kind of proposed findings of fact and
15 conclusions of law, if you could get them to me by the 26th,
16 that would be great, of August.

17 MR. ANDREN: Thank you, Judge.

18 THE COURT: All right. And with that, if there's no
19 questions, I hope you all will have nice weekends. I set this
20 up specifically over Zoom, as you all know, several months ago
21 when we still didn't know where we were headed in terms of
22 COVID. But I do hope that I'll get to see you all in person at
23 some point here in sunny Florida.

24 MR. AYLSTOCK: Thank you, Judge.

25 THE COURT: All right. Take care, everyone. Be safe.

1 MR. ZALESIN: Thank you, Your Honor.

2 MS. WALSH: Thank you, Your Honor.

3 (Court recessed at 3:38 p.m.)

4

C E R T I F I C A T E

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6

7 I hereby certify that the foregoing is an

8 accurate transcription of the proceedings in the

9 above-entitled matter.

10 This hearing was held via videoconference and is

11 therefore subject to the technological limitations of

12 reporting remotely.

13

14

15 DATE: March 16, 2023 /s/Ilona Lupowitz
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