

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF ARIZONA

3
4 JOHN DOE,)
)
5 Plaintiff,)
)
6 vs.) CV-91-261-TUC-JMR
)
7 JOHN FIFE SYMINGTON, III,)
 et al.,)
8)
 Defendants.) Tucson, Arizona
9) November 22, 2010

10
11 TRANSCRIPT OF MOTIONS HEARING
12 BEFORE THE HONORABLE JOHN M. ROLL
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

15 On Behalf of the Plaintiff: Ms. Anne C. Ronan
16 Arizona Center for Law in the
17 Public Interest
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18 On Behalf of Defendant ADHS: Mr. Gregory D. Honig
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20 On Behalf of Defendant Mr. Paul E. Steen
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22
23 Court Reporter: Aaron H. LaDuke
24 Official Court Reporter
U.S. District Court
405 W. Congress St.
25 Tucson, AZ 85701

P R O C E E D I N G S

THE CLERK: In civil matter 91-261, John Doe versus Symington, et al., on for a motions hearing.

Counsel, please state your appearance.

MS. RONAN: Anne Ronan, attorney for the plaintiffs.

MR. HONIG: Greg Honig, counsel for defendant Arizona Department of Health Services.

MR. STEEN: And Paul Steen, appearing for defendant John Betlach.

THE COURT: Good afternoon. This is the time set for the hearing on some pending matters in this case.

Are the parties ready to proceed?

MS. RONAN: We are, Your Honor.

MR. HONIG: Yes, Your Honor.

MR. STEEN: Yes.

THE COURT: Thank you.

I have had a chance to consider the briefing that the parties have made in connection with issues presented in this matter.

As a preliminary matter, I would note that this month I celebrate my 19th year on the district court, and this case is 19 years old. This case started when I was first appointed to the district court. I know that early on I had indicated concerns about the possibility that it would see me to senior status, and I am only two years from that and we are on track

1 to do that. I am concerned about that.

2 In reading the parties' contentions, it appears that
3 there is considerable disagreement regarding some of the basic
4 premises and goals that are involved in the
5 settlement agreement and as to whether they have been
6 satisfied. The defense maintains that they have, and the
7 plaintiff argues that they have not been satisfied and, in
8 fact, have proffered expert witnesses who have said that there
9 were objectives that the defense were to meet and that they
10 have failed to do that with appropriate dispatch. I consider
11 all of that.

12 I would like to hear from the parties first regarding the
13 defense contention that Section 9 of the settlement agreement
14 has not been complied with at this point, and that is, there
15 is a progressive number of steps that have to be followed
16 before the time that the matter is brought to the district
17 court for consideration. Section 9 refers to collaborative
18 negotiation, and the defense argues that that did not occur in
19 this case, that just the mere exchange of some correspondence
20 without notification, that this was in the stage -- this was
21 pursuant to Section 9 and as a preliminary step to bringing
22 the matter to the Court has not been complied with.

23 After I have heard from that, I will discuss with you the
24 possibility of mediation, unless you have something you want
25 to add concerning mediation. And I know that you have met in

1 the past with an individual for the purpose of seeing whether
2 resolution of the case was possible. I understand it was
3 somewhat limited in that you met with this individual
4 separately and then the conclusion was drawn that there was no
5 possibility of resolution. Perhaps a more aggressive
6 mediation could be utilized in this matter.

7 But the first question is whether the collaborative
8 negotiation has actually been met. The defense argues that it
9 has not.

10 MR. HONIG: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. HONIG: I wouldn't say that that's quite the
13 defendants' position here. I think that that was included in
14 the briefs for illustrative purposes. The defendants haven't
15 raised the issue with plaintiffs or in the briefs that have
16 been filed in any way, shape, or form arguing that the
17 plaintiffs participated in bad faith in collaborative
18 negotiations, and I think that --

19 THE COURT: Oh, I didn't mean that it was in bad
20 faith.

21 MR. HONIG: Sure.

22 THE COURT: I just meant that it hadn't been
23 satisfied, that the requirement hadn't been satisfied.

24 MR. HONIG: I don't think that's one of our arguments
25 here today. I think, in essence, our argument essentially

1 boils back down to the March 6th, 2009 letter, which began the
2 dispute resolution process, which under the settlement
3 agreement the plaintiffs were required to present essentially
4 what's tantamount to a complaint, give us notice of their
5 concerns/complaints regarding the implementation of the
6 settlement agreement, and provide at least enough of a factual
7 basis to support those claims.

8 If you go back to the March 6th letter, I think that the
9 plaintiffs -- the argument essentially is that, at the
10 absolute worst for the defendants, the plaintiffs are limited
11 to the arguments that are set forth or the points set forth in
12 that March 6th letter.

13 THE COURT: If you'll give me just one moment,
14 please.

15 Thank you. You may proceed.

16 MR. HONIG: I think in hindsight now, 17 months later
17 after the mediation and 18, 19 months after the collaborative
18 negotiation process, I think one thing at least to me is
19 perfectly clear. I think the parties had diametrically
20 different views on what was being submitted to collaborative
21 negotiations and mediation, and that didn't become readily
22 apparent, at least to the defendants, until we saw the motion
23 to enforce the settlement agreement which brought us here
24 today.

25 I think at the absolute worst from the defendants'

1 standpoint, the issues need to be limited to what was in that
2 March 6th letter, those four or five specific issues. Whether
3 or not there's enough of a factual basis in there to state a
4 claim, more or less, Medicaid, and whether or not there are
5 intensive community services in place for children with high
6 needs, I think those are nonissues.

7 THE COURT: Why wouldn't the parties at least be
8 required to submit something to the Court before we get to
9 this point where you indicate specifically what you agree on
10 and what you don't agree on? Because it's very difficult to
11 fathom that from what has been submitted in the respective
12 pleadings.

13 MR. HONIG: Sure. At what point is Your Honor asking
14 when something like that should be submitted?

15 THE COURT: Well, I guess before we arrived here
16 today, where I'm being asked to enforce the agreement and you
17 are arguing that the agreement has been complied with and
18 there hasn't been perhaps the specific discussion regarding
19 what still remains to be done.

20 MR. HONIG: Sure.

21 Now going back a step, I think whether or not the
22 specific provisions in the agreement that the plaintiffs have
23 raised had been completed by the defendants, I think that's a
24 factual issue that would be vetted through the course of a
25 trial or an evidentiary hearing. I don't think that's what we

1 are here arguing today.

2 The defendants are arguing here that one of three things
3 should happen: one, that this matter should be dismissed, that
4 even though there were hundreds of pages of pleadings and
5 exhibits filed, the plaintiffs have essentially failed to
6 state a claim under the settlement agreement with enough
7 specificity and enough facts to be able to tell the defendants
8 exactly what areas the issues lie in and what the basis for
9 those issues are. So under that assumption, we are asking
10 that this matter be dismissed for failure to state a claim.

11 As a second matter, I think if this thing moves forward,
12 the Court needs to pare down the issues in dispute to what's
13 in that March 6th letter. We will litigate those issues if it
14 goes down that path later on when we get to an evidentiary
15 hearing or a trial, and I think some of those issues that are
16 in that letter could be further whittled down through some
17 prehearing or pretrial motions, whether it's a motion to
18 dismiss or motion for summary judgment.

19 The settlement agreement is very specific. I think if
20 you read it objectively, it's fairly clear that it anticipated
21 that much smaller issues may be presented through the dispute
22 resolution process. It wasn't really designed to address all
23 of the issues under the settlement agreement or a large part
24 of the issues under the settlement agreement in dispute
25 resolution. That's why it references a hearing or an

1 evidentiary hearing, when in reality I think if this thing
2 moves forward we are talking about a fairly lengthy trial that
3 probably is, at a minimum, a week or two, depending on the
4 amount of issues in dispute.

5 But I think if this thing moves forward, the issues need
6 to be pared down to what's in the letter so both parties are
7 clear about what issues are on the table. And I think that
8 that issue alone, to me and to Mr. Steen, I think, explain why
9 the parties were so unable to get to the table and discuss the
10 issues objectively during the last mediation, because the
11 plaintiffs were on one side thinking that Medicaid and
12 everything else was involved in this lawsuit, and we thought
13 the issues were isolated to the five issues that were in that
14 letter. With those two perspectives, it was doomed to fail
15 from the start.

16 So I think if the issues are pared down and we are sent
17 back to mediation, we could mediate for a short period in
18 January. We could have a status conference with the Court at
19 the end of January and discuss the issues of the potential
20 expiration of the settlement agreement on February 1st, 2011,
21 and any other issues, whether we need additional mediation
22 time, whether we need to extend the settlement agreement and
23 those types of things, I think it might be a little premature
24 to address those issues at this point.

25 THE COURT: All right. Counsel, do you wish to be

1 heard?

2 MR. STEEN: I concur wholly. We are on the same
3 page, Your Honor.

4 THE COURT: All right. Counsel.

5 MS. RONAN: Your Honor, if I could respond to your
6 question about the collaborative negotiation process --

7 THE COURT: Yes.

8 MS. RONAN: -- that is required by the dispute
9 resolution provisions in the agreement.

10 I firmly believe that we did make an attempt. I think
11 both parties made an attempt to try to collaborate in
12 resolving this. As we said in our papers, we had been meeting
13 every two to three months, and if issues came up during those
14 meetings, we sent letters to the department explaining why we
15 were still concerned about the decisions they were making or
16 the lack of progress on the specific items that we identified.

17 We met. We wrote a long letter in December of 2008 to
18 the department and said to them in that letter, "We really
19 would like to avoid dispute resolution and we would like to
20 talk to you about these issues." They have been the
21 same issues probably for the last two years, Your Honor, and
22 we've had many discussions with the department and with their
23 lawyers about the issues we are concerned about.

24 What happened in March when we filed our dispute
25 resolution letter was that we then were confronted with the

1 response of the department, which was, "We don't know what it
2 is you are concerned about." And, Your Honor, quite frankly,
3 we had been meeting with them for two years about some of
4 these issues. For example, our concerns about the quality
5 management system, we had numerous meetings and numerous
6 communications about that specific provision. We did have one
7 meeting with the department and their attorneys after the
8 letter was sent. It was not a very collaborative meeting, I
9 would say, I think from both sides. But it was clear, at
10 least from our perspective, that this fundamental disagreement
11 which I think you have alluded to, which is what exactly were
12 the defendants supposed to do under this agreement, was
13 raising its head again.

14 When we were in dispute resolution the last time, Your
15 Honor, that prevented us from getting very far in our
16 mediation as well. The defendants characterize their
17 obligations under the settlement agreement to simply improve
18 the service delivery system. We believe the language of the
19 settlement agreement is very clear. They made a commitment to
20 actually develop and maintain the system that served kids
21 according to the principles. It's a fundamental disagreement
22 and it's kept us from actually dealing with the harder,
23 specific issues that we've raised throughout the several
24 years.

25 The other thing, Your Honor, is that once we went to

1 mediation, we all agreed to use the same mediator we had used
2 before because he was familiar with the issues in the case.
3 Many of those issues were raised again in our March 2009
4 letter. He advised us to prepare for him, based on the
5 request from the department's lawyers, very specific details
6 as to what we were concerned about and how we hoped to resolve
7 it. We did that on each of the issues that we raised in our
8 March letter. He came back to us and said, "I believe you are
9 too far apart on your fundamental understanding of what this
10 obligation is for us to go forward with mediation."

11 So I think both sides did the best they could given where
12 they currently were at the time. I think we still need the
13 Court's direction on what the obligations of the department
14 are if we are going to go back to mediation. I do think we
15 can make progress in mediation, but I don't think we can make
16 progress in mediation if we still have this fundamental
17 difference between what the obligation in the
18 settlement agreement is.

19 The defendants continue to look to the recitals clause of
20 the settlement agreement, which says that it's the parties'
21 intention that this agreement will result in improvements in
22 the system rather than the specific obligations in the section
23 of the settlement agreement that deal with their obligations,
24 and that has been the single most, I think, barrier to us
25 actually working through these, the more nuts-and-bolts

1 concerns.

2 THE COURT: I'm not encouraged about the use of a
3 mediator in light of what you have said.

4 Again I recall back many years ago when this was
5 discussed, and it's my recollection I expressed some concern
6 about the lack of precision as far as exactly what was
7 contemplated by the agreement, and I was assured that it would
8 come together and that details would be worked out, but
9 obviously, after all these years, they have not been worked
10 out.

11 Another solution could be the use of a special master in
12 this. You know, we are a southwest border district. We are
13 buried to the extent that we are preparing a letter to ask the
14 chief judge of the Ninth Circuit to declare Arizona a judicial
15 emergency as a result of the criminal caseload in the
16 district, and most of that falls on Tucson.

17 I do not have two or three weeks for this, and the case
18 is very important. It deserves attention. Perhaps we should
19 look to the use of a special master, who would be able
20 to arrive at exactly what the issues are in this case and then
21 to advance some recommendations to me as far as the
22 interpretation of the agreement and what has been accomplished
23 so far and what would still need to be done, and maybe that
24 would position us then to go back to mediation or possibly to
25 some settlement if you had the benefit of that.

1 What are your thoughts on that?

2 MS. RONAN: Well, Your Honor, I think if the special
3 master was charged with ultimately declaring what the
4 settlement agreement provides that the defendants' obligations
5 are, I think that would be helpful. I really do believe that
6 a mediator, one who is familiar with the issues in the case,
7 could be helpful. But if we get to the same place in
8 mediation, which is -- let me give you an example.

9 One of the issues we have been raising for several years
10 is the concern when a child turns 18, despite the fact that
11 they are eligible under the federal Medicaid law for
12 children's services until they are 21, the system in Arizona
13 oftentimes drops those children at 18. There have been a lot
14 of policy papers written about it, but I'm involved right
15 today with a little girl who is going to lose all of her
16 services. And when we raise that issue with them, the
17 department's lawyers say, "That's not part of the case.
18 There's nothing in the settlement agreement that says anything
19 about 18 to 21-year-olds."

20 Well, they are class members and it's a serious issue.
21 So if we could get the direction from a special master that
22 said "These are your obligations," we could move forward. But
23 I think if we continue in this gray area, it's going to be
24 very difficult.

25 THE COURT: A special master may very well, in

1 looking at that, conclude that it does end at 18, and although
2 it would be a very difficult and unfortunate situation as far
3 as what happens after the age of 18, if that's what the action
4 is and that's the class --

5 MS. RONAN: Well, Your Honor, the department doesn't
6 take the position that the services end after 18. The problem
7 is they haven't changed their system so that the services
8 continue. So it's --

9 THE COURT: Are you talking about for purposes of
10 this lawsuit?

11 MS. RONAN: Yes, Your Honor. The class of children
12 goes up to the age of 21 in this lawsuit, and the federal law
13 protects them under the Medicaid Act up until age 21, and
14 there's no dispute between the parties that they are members
15 of the class and they are entitled to the services. The
16 problem has been in implementing a system that ensures they
17 receive those services after they turn 18. We would like to
18 get to resolution of those kind of concrete issues, but we
19 have been stymied by this question of whether they have an
20 obligation to actually develop a system that serves children
21 according to the principles.

22 THE COURT: All right. Let me hear from the defense
23 regarding some of the things we've been discussing, including
24 a special master.

25 MR. HONIG: Your Honor, I think the Court is well

1 aware that we are more than open to entertaining the notion of
2 a special master. We were the ones who raised it to
3 Ms. Ronan, and Ms. Ronan is the one who said no. So we are
4 open to that. We still remain open to that.

5 With respect to Ms. Ronan's complaints, I think obviously
6 at this point addressing factual issues in the
7 settlement agreement, it's entirely premature to do so. I
8 think the issue here today is if this moves forward in dispute
9 resolution, what is the scope --

10 THE COURT: I wasn't planning on doing that. I think
11 I ended up being drawn into that.

12 MR. HONIG: Sure. I understand. I appreciate that.
13 But I think we need to figure out what's on the table for
14 dispute resolution. And this issue is very, very simple.
15 The agreement requires a clear and concise statement of
16 the issues in dispute when dispute resolution starts. It
17 began on March 6th of 2009. The issues are limited to what's
18 in that letter, period.

19 Whether those issues remain moving forward, whether it's
20 through the dispositive motions or whether it's through
21 evidence, whether from the plaintiff's side or the defense
22 side, that's an entirely separate issue that comes in later on
23 down the road. I think those issues need to be decided before
24 we discuss anyone, whether it be this Court, a court in
25 Phoenix, or a special master, stepping --

1 THE COURT: It won't be a court in Phoenix because
2 Phoenix does not have the time to address this, either. They
3 are in a very difficult situation as well.

4 MR. HONIG: Sure.

5 THE COURT: So I wouldn't even consider transferring
6 the case to Phoenix as you suggest.

7 MR. HONIG: Okay. But I think we need to decide
8 those issues. I think we need the Court's help to decide
9 what issues are on the table for dispute resolution before we
10 take the next step and discuss a special master and
11 specifically what a special master is going to do.

12 THE COURT: And I guess my view is that perhaps that
13 could be the great value of a special master, as far as having
14 the parties formulate exactly what the issues are as far as
15 what remains to be done or where the disputes are in that
16 regard.

17 MR. HONIG: But, Your Honor, that was done 19 months
18 ago. That was done in March of 2009. It's not complicated.
19 One only needs to look at the letter that the plaintiffs sent
20 on March 6th to determine what issues are in dispute.
21 Everything else in the settlement agreement goes away. If
22 there's an issue about whether a specific paragraph ties into
23 one of those four or five areas, obviously at that point it
24 becomes relevant, but as far as the specific areas of content,
25 the 18 to 21-year-olds, QM training and the other areas, those

1 remain. The rest of the settlement agreement goes away.

2 THE COURT: Do you agree with that?

3 MS. RONAN: Your Honor, the March 6th letter
4 specifically states that the defendants have not met their
5 obligations under paragraph I believe it's 15, which is the
6 obligation to develop a system that delivers services
7 according to the principles.

8 I absolutely agree that we are bound by the parameters of
9 the issues we raised in dispute, but the fundamental issue
10 that we raised in dispute is whether they have developed a
11 system that serves these children, and that is their
12 obligation under the agreement and that's where the
13 disagreement is. They disagree that that's their obligation.
14 It's not a matter that we didn't set it out. It's
15 specifically set out in the March letter. They don't agree
16 that they have an obligation under the settlement agreement to
17 develop the system.

18 MR. HONIG: I disagree with that.

19 THE COURT: You see, this is exactly why --

20 MR. HONIG: I --

21 THE COURT: Counsel, just a minute. It's exactly why
22 we are not making any progress, because you tell me there's no
23 dispute, everything can be looked to in the letter and that's
24 a bright-line guide to what has to be considered in this, and
25 yet you don't even agree what's in the letter or what the

1 letter means or what the scope of the letter is.

2 MR. HONIG: Your Honor, I think the Court can
3 probably look at the letter and decide what content areas the
4 plaintiffs raised and make a ruling consistent with the
5 letter. That's all we're asking for.

6 THE COURT: It depends on whether I give an expansive
7 or restrictive interpretation to what is in the letter.

8 MR. HONIG: Right.

9 THE COURT: Because you argue for the one and
10 plaintiffs argue for a much broader approach.

11 MR. HONIG: Right.

12 THE COURT: Which anything that is implicated in the
13 letter would be an issue.

14 MR. HONIG: That's correct. Medicaid is not in the
15 letter, Your Honor. And the next sentence that follows
16 Ms. Ronan's recitation of "We basically said everything in the
17 settlement agreement is in dispute," it says, "The major
18 failings are described below." And it lists the four specific
19 categories. It lists substance abuse, 18 to 21, training, and
20 high-needs children. That's it. That's all it has. There's
21 nothing in there about Medicaid. That's it. It's those four
22 areas that are in dispute.

23 I'm not arguing about whether or not the plaintiffs can
24 prove that, whether we have complied with the
25 settlement agreement in those areas. I don't think that's

1 the issue here today. I think the issue is the scope of what
2 the plaintiffs have presented in dispute resolution. I think
3 it's clear that what happened was this was submitted in March,
4 and then as time went by, in the six, seven, eight months
5 until the motion to enforce the settlement agreement got
6 filed -- filed, excuse me, the plaintiffs expanded the scope
7 of the issues in dispute.

8 THE COURT: Okay. Let's assume hypothetically that
9 you are correct and that those are the narrow areas. What is
10 there that I need to determine then before the matter goes to
11 a special master on those issues?

12 MR. HONIG: I think I would ask consistent with what
13 Ms. Ronan and what the Court suggested earlier. I think that
14 we would be in a much better position at that point to
15 mediate. And even if we use a more aggressive mediator, the
16 defendants are interested in trying to resolve this thing
17 amicably, but we were obviously so diametrically opposed when
18 we mediated this the last time that it was a foregone
19 conclusion that it wouldn't be successful.

20 THE COURT: Okay. Let me hear from the plaintiff
21 regarding what the defense has said about these four areas
22 setting out where the disputes are.

23 Is that the extent of the dispute?

24 MS. RONAN: I don't know, Your Honor. I have the
25 March 6th letter in front of me, and on the third page it has

1 a heading that is in all bold, capital letters which says,
2 "ISSUES IN DISPUTE," and it lists them. The very first issue
3 is that the defendants have failed to meet their core
4 obligations under the settlement agreement to develop a Title
5 19 -- which is the section of the Social Security Act
6 that applies to Medicaid that delivers services according to
7 the principles.

8 So I'm at a loss to understand -- I actually agree with
9 Mr. Honig that if we were to take this letter in its entirety
10 and try to work through it, we would be okay. We could get to
11 the issues. But the first two issues listed, No. 1 and No. 2,
12 he's just told you aren't in the letter. That's our problem.

13 THE COURT: Counsel.

14 MR. HONIG: Your Honor, that's not quite what I said.
15 I think issue No. 2 can be summarized as being quality
16 management. I think quality management is contained in the
17 settlement agreement. The scope of it is an issue. That's
18 something to deal with later, but quality management is
19 an issue; high-needs children is an issue; substance abuse; 18
20 to 21; and training. Excuse me. There were five areas
21 instead of four. I apologize for that.

22 The first paragraph, delivering services according to the
23 JK principles, is obviously in the settlement agreement and it
24 says, "Major failings are described below." It's those five
25 areas. I don't know how you expand it beyond those five

1 areas.

2 THE COURT: What are your thoughts regarding what
3 defense counsel mentioned about perhaps a more aggressive
4 mediator, a different mediator that the parties perhaps
5 nominate and the Court selects from or the parties stipulate
6 to, since you wouldn't know who I would end up picking and you
7 might feel more comfortable with someone that you both
8 stipulate to? What are your thoughts on that?

9 MS. RONAN: Your Honor, I think it would be a good
10 idea to have a mediator try to resolve these issues. I think
11 it would be very important, though, that this question of what
12 the fundamental obligation is under the agreement be one of
13 the issues the mediator is required to work through, because
14 I've been with this case, Your Honor, almost as long as you
15 have and I really fundamentally believe that is the sticking
16 point, and we can get this resolved if a mediator is asked
17 specifically to resolve this question that's between the
18 parties.

19 MR. HONIG: Your Honor, I think I'm in agreement with
20 Ms. Ronan. I think that if we present this issue to the
21 mediator, both sides can present their positions and maybe the
22 mediator can bring us together and reach some sort of an
23 accord on whatever issues might remain beyond these four or
24 five issues that are in the letter below.

25 THE COURT: Returning to a point that you made

1 earlier, which is that more would still need to be done before
2 it goes to a mediator, what else needs to be done?

3 MR. HONIG: I think one of the central issues that we
4 are here today for, Your Honor, is for the Court's
5 interpretation of what are the issues in dispute, whether it's
6 limited to those five or whether the Court has a more broad
7 understanding of what the issues in dispute are.

8 If the Court wants to refer those to a mediator, we can
9 certainly get an objective perspective from a mediator on
10 the issues and try and work those out for ourself, and maybe
11 there's a chance we can come to some sort of a stipulation on
12 what the issues in dispute are. It sounds like we were a lot
13 closer than I thought we were before we came here today from
14 Ms. Ronan.

15 THE COURT: Well, plaintiff does not seem to dispute
16 that those five areas are the areas in dispute. The dispute
17 is exactly what those five areas encompass. With that in
18 mind, would it be helpful to refer this to a mediator?

19 MS. RONAN: Your Honor, if I could --

20 THE COURT: Yes.

21 MS. RONAN: -- just correct the record. There are
22 six areas in dispute listed in the March 6th letter.

23 And, yes, I think if that was the direction of the Court,
24 to refer this to a mediator to resolve the issues raised in
25 the March 6th letter, identifying as one of the

1 fundamental issues that is identified in the letter and
2 continues to be an issue in dispute is what's the core
3 obligation in the agreement, then I think we could get it
4 resolved.

5 THE COURT: Did you have anything to add?

6 MR. HONIG: No, Your Honor. I think I agree with
7 Ms. Ronan.

8 THE COURT: Without looking too much further down the
9 highway, I think both sides are on notice that if we are
10 unable to resolve this matter through the mediator, that a
11 special master will probably be the next step in this.

12 What I would propose to do is, after this hearing, to
13 come up with some language which would indicate that the areas
14 in dispute, which have progressively gone from four to five to
15 six, six areas of dispute as described by plaintiff in the
16 March 6th letter, be referred to a mediator and requesting and
17 setting a deadline for the parties to either nominate or
18 submit a stipulation as to a particular mediator. After that
19 has been received, the matter would be referred for further
20 mediation with that particular individual, and we'll see what
21 happens after that.

22 Okay. Let me address a few other matters with you. I
23 have already mentioned the fact that I do not think it's
24 appropriate to transfer the venue to Phoenix in this case.

25 I did want to discuss attorneys' fees, and the cap that

1 had previously been imposed has expired. Since the costs are
2 being paid by the defense and because of budget
3 considerations, the defense may find it helpful to know
4 exactly what the likely cost is going to be. I think we need
5 to consider whether to, for a finite period of time, expand
6 the cap that was previously imposed or look to a different cap
7 or some other formulation as far as attorneys' fees.

8 Does either party want to be heard?

9 MS. RONAN: I think we would be okay with working
10 through another capitated agreement.

11 MR. HONIG: I think that's something Ms. Ronan and I
12 and Mr. Steen could probably discuss and maybe present back to
13 the Court, if necessary.

14 THE COURT: Well, I think it should be addressed one
15 way or the other so that there is at least some idea as far as
16 what the fees are, and again this is very important
17 litigation. I think the payments have totaled almost \$800,000
18 to date.

19 MR. HONIG: More than that, Your Honor.

20 THE COURT: Okay. Well, that's the calculations from
21 what appears in the materials that I have, and previously I
22 think the cap was \$58,000 per quarter.

23 MR. HONIG: It was \$58,000 for monitoring, and it was
24 uncapped for dispute resolution.

25 MS. RONAN: I think, Your Honor, are you suggesting

1 that we try to come up with a capitated agreement that would
2 include whatever the mediation and dispute resolution process
3 is?

4 THE COURT: Yes. Yes.

5 MS. RONAN: I'm sure we can talk through that.

6 MR. HONIG: I'm sure we can put our heads together
7 and come up with something.

8 THE COURT: All right. And again I don't want to
9 look too far down the road again as far as the possibility of
10 a special master. If we get to that, I think that it probably
11 would be important for there to be at least some division
12 regarding the payment of the special master, even if it was a
13 disproportionate amount, such as 25 percent from the plaintiff
14 and 75 percent from the defense.

15 All right. What else did we need to discuss at this
16 time?

17 MS. RONAN: I don't believe there's anything else,
18 Your Honor.

19 MR. HONIG: I think the only issue is, which we don't
20 need to address today, obviously, is the potential expiration
21 of the settlement agreement, which I know the Court probably
22 isn't inclined to enforce. But I think our goal would be,
23 with the Court's approval, to hopefully get this mediation or
24 at least start mediation before the end of January.

25 THE COURT: I would hope as soon as possible.

1 MR. HONIG: Right. Okay.

2 MS. RONAN: Thank you for bringing that up, because
3 by the terms of the agreement, the Court's jurisdiction
4 expires in February of next year, so that would only be about
5 two months from now.

6 MR. HONIG: Maybe after we agree on a mediator and
7 start the process, we could have a status conference with the
8 Court at the end of January --

9 MS. RONAN: To extend the --

10 MR. HONIG: -- to at least preserve the issue for
11 whatever the status is at that point in time.

12 THE COURT: That would be fine; or if the parties,
13 after considering everything, stipulate to a specific
14 extension of the agreement, I would certainly consider that,
15 of course.

16 MR. HONIG: Thank you, Your Honor.

17 THE COURT: All right. Was there anything else we
18 needed to address?

19 MR. HONIG: No, Your Honor.

20 THE COURT: All right. Thank you.

21 We'll stand at recess.

22 (Court recessed at 2:19 p.m.)

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C E R T I F I C A T E

I, Aaron H. LaDuke, do hereby certify that I reported the foregoing proceedings to the best of my skill and ability, and that the same was transcribed by me via computer-aided transcription, and that the foregoing pages of typewritten matter are a true, correct and complete transcript of all the proceedings had, as set forth in the title page hereto.

Dated this 30th day of December, 2010.

s/Aaron H. LaDuke
Aaron H. LaDuke, RMR, CRR
Official Court Reporter