

IN RE: NATIONAL FOOTBALL
LEAGUE PLAYERS' CONCUSSION
INJURY LITIGATION

MDL No. 2323

THIS DOCUMENT RELATES TO:
THE CLAIMS ADMINISTRATOR'S
REQUIREMENTS REGARDNG
COSTS ASSERTED BY BYRON
CUTHBERT

¹ Last year, the Special Masters censured Mr. Cuthbert for multiple “material misstatements in Claims submitted on behalf of Settlement Class Members,” as well as pressuring doctors and lying to the Claims Administrator during an audit. Special Masters’ Rule 27 Decision on the Report of Adverse Finding Regarding Byron Cuthbert and Associates, LLC, at 6 (June 28, 2023), https://www.nflconcussionsettlement.com/Docs/cuthbert_audit_decision_SM.pdf. Mr. Cuthbert objected to that decision, and when the District Court affirmed it, appealed to the Third Circuit. ECF Nos. 12377; 12402. Mr. Cuthbert separately filed a motion accusing the Claims Administrator and Special Masters of discrimination against him on account of his race, briefing on which remains stayed pending disposition of his Audit Appeal. ECF Nos. 12371; 12403.

ultimately came to agreements amongst themselves, filing lien dispute withdrawal forms with the Claims Administrator. Those forms asked the Claims Administrator to distribute the set aside fees in an agreed-to way, and then reimburse the reserved out-of-pocket attorney costs. Consistent with the Program's Lien Rules, any such reimbursements were to be supported with documentation establishing their bona fides.

One lien resolution related to a Claimant with a supplemental Diagnosis of Alzheimer's Disease dating from January 13, 2022 ("Claimant A").² On June 15, 2023, Mr. Cuthbert initially asserted that he was due \$37,971 costs from the Claimant's recovery. In support of that demand, Mr. Cuthbert submitted invoices for \$22,400 from Dr. Carl Billian, a neurologist who was at the time an MAF Physician, as well as \$7,000 for a neuropsychology appointment with Dr. Randall Griffith, and \$8,571 for another then-MAF neurologist, Jack Scariano. After being pressed for documentary support, Mr. Cuthbert revised Dr. Scariano's costs down to \$6,286, bringing his total request for Claimant A down to \$35,686.

Mr. Cuthbert supported Dr. Billian's fees with invoices reflecting charges on the following dates:

<u>Exam Date</u>	<u>Charge</u>	<u>Description</u>
January 13, 2022	\$11,000	"MAF Exam"
February 14, 2022	\$1,900	"MAF Follow-up treatment"
March 28, 2022	\$1,900	"MAF Follow-up treatment"
May 24, 2022	\$1,900	"MAF Follow-up treatment"
July 26, 2022	\$1,900	"MAF Follow-up treatment"
October 12, 2022	\$1,900	"MAF Follow-up treatment"
February 28, 2023	\$1,900	"MAF Follow-up treatment"
April 27, 2023	\$1,900	"MAF Follow-up treatment"
June 22, 2023	\$1,900	"MAF Follow-up treatment"
September 14, 2023	\$1,900	"MAF Follow-up treatment"

In another withdrawal form, related to a Claimant diagnosed with Level 1.5 Neurocognitive Impairment on December 21, 2021 ("Claimant B"), Mr. Cuthbert asserted costs of \$35,238.48, consisting of "\$26,9000.00 [sic]" for visits by Claimant B to Dr. Billian from "12/21/2021 through present," \$7,000 for a neuropsychology evaluation from Dr. Griffith in 2021, and \$1,338.48 for a telehealth appointment with Dr. Casey Leong in 2020.

These asserted costs raised red flags at the offices of the Claims Administrator.

² The Claimant's SPID was 100007496 and I previously described the circumstances in Special Master Decision on Alzheimer's Disease Diagnosis (Oct. 16, 2023), https://www.nflconcussionsettlement.com/Docs/alz_diagnosis_sm.pdf.

First, they were in the aggregate shockingly high. Of 545 resolved liens since 2018, the Claims Administrator reports that over 10% of attorneys (59) waived their costs entirely.³ The reserved expenses in the remainder averaged \$11,400 (median \$9,071). Mr. Cuthbert's asserted costs in these two lien disputes were the highest in the Program's history—the only instances where a single firm has ever identified more than \$35,000 in costs. (In one of the other five examples of costs exceeding \$30,000, Judge Strawbridge cut the sum by two-thirds.)⁴

The doctors' fees were also off-the-charts.⁵ I asked the Claims Administrator to code all neurologist costs in disputes producing over \$20,000 in fees. It believes that the \$11,000 that Mr. Cuthbert sought for Dr. Billian's January 2022 exam represents the highest requested reimbursement for a single doctor's visit on record.⁶ Neurologists diagnosing Alzheimer's Disease for the Program typically charge between \$1,000 and \$5,000; those diagnosing Level 1.5 Impairment less. The national average for a BAP neurological exam (which could diagnose Level 1.5 Impairment but not Alzheimer's) is \$1,261.72. Fees for Drs. Scariano and Griffith were also materially above norm. Mr. Cuthbert has asserted extraordinary expenses like these in other, unripe, liens.⁷

Even worse, Mr. Cuthbert identified tens of thousands of dollars in medical costs for these Claimants that post-dated their Qualifying Diagnosis: how could they be Mr. Cuthbert's reimbursable litigation expenses supporting the Diagnoses? Those bills were explicitly described as related to ongoing medical care, not answering follow-up questions from the Claims Administrator. But the Settlement does not pay for ongoing medical costs outside of the BAP. And the Claims Administrator's experts separately questioned the medical appropriateness of repeated neurologist visits, billed at \$1,900 each.

Concerned about these professed costs, the Claims Administrator asked Mr. Cuthbert to explain them. Through his counsel, Mr. Cuthbert disclosed for the first time that the sums did not represent his out-of-pocket expenses at all. They were something else entirely—the product of

³ This record incompletely describes attorney costs under the Settlement as the Claims Administrator does not review expenses in ordinary non-lien cases. There, its approach is to turn over the entire Awards to claimants' counsel (if there is one), who make their own arrangements with their clients about how to divide the sums subject to their contracts. Those arrangements are subject to the 22% fee and "reasonable costs" cap. Counsel are not contemporaneously required to certify compliance with that rule, or disclose further information about fees or costs with the Claims Administrator. (When returning fees previously subject to the holdback, the Claims Administrator required certification of adherence to the 22% cap. It did not ask for more information about costs.) This arrangement is not inevitable: the Claims Administrator could send Awards to all claimants—including represented ones—directly. The Court might also require disclosure of fees and costs to be withheld from claimants as a condition of release of funds to counsel.

⁴ See Lien Dispute re: SPID 100014304, https://www.nflconcussionsettlement.com/Docs/100014304_d.pdf (Jan. 14, 2021) (reminding attorneys that they cannot submit costs for expert legal fees and otherwise cutting costs).

⁵ Attorneys were always directed to itemize their costs, but only since the adoption of the new lien rules did they have to also file supporting documentation.

⁶ In one other dispute, the Claims Administrator identified a bill for around \$13,000 in costs, but believes that sum relates to consulting services in litigation.

⁷ See, e.g., SPID 100003421 (asserting \$11,000 in costs from Dr. Billian for one MAF examination); SPID 100008129 (asserting \$34,938.48 in costs, including \$18,600 from Dr. Billian for multiple neurology treatment visits).

third-party financing of medical evaluations. Indeed, it turns out that the medical providers' "charges" were significantly higher than what they collected, and neither Mr. Cuthbert nor his clients have paid anything to date. The Claims Administrator asked the Special Masters to provide guidance on what to do.

We asked Mr. Cuthbert to write a brief explaining his entitlement to these sums, and afforded the NFL Parties, Class Counsel, and the other attorneys involved in the lien withdrawals a chance to weigh in. Class Counsel, responding with a cogent statement, concluded that the identified sums are not attorney expenses and should not be paid to Mr. Cuthbert.

Having read the materials, I agree with Class Counsel. What Mr. Cuthbert has described as "costs" are not sums that should be allocated to him from his clients' funds under Lien Rule 8 or under the Settlement Agreement.⁸ His clients may owe some entity some amount of money for services that Drs. Billian, Leong, Griffith, and Scariano provided. But, Mr. Cuthbert, having not paid these bills, is not entitled to be repaid anything.

MR. CUTHBERT'S NEW SYSTEM FOR FUNDING MEDICAL COSTS

My understanding of Mr. Cuthbert's medical costs funding process is limited by gaps in the record, which mostly details Dr. Billian's practices, and contains internal inconsistencies.⁹ But—thanks to the Claims Administrator's able assistance in providing context—I believe the following accurately captures the relevant facts.

For the two liens in dispute—and in some other number of cases—the day they attended their MAF exam, Mr. Cuthbert arranged for his clients to sign a document titled "Assignment of Proceeds Lien for Medical Services." By that document, the relevant medical practice (such as Dr. Billian's) asserted a "vested interest in (and the right of action against anyone responsible for medical expenses) [against] the proceeds of any judgement or settlement in the lawsuit or claim which I [the Claimant] am prosecuting to recover damages for my injuries. This assignment of proceeds lien is for current medical care and its related costs, as well as any future medical care." Cuthbert Initial Costs Brief, Exhibits F, G.

The document further purported to authorize Mr. Cuthbert to "deduct immediately from the proceeds of any settlement and/or judgement, any and all amounts due and owing to [the neurologist's practice] without further authorization from me, and to forward these payments directly to [the neurologist's practice]." *Id.* Claimant B, about to be diagnosed with dementia,

⁸ On September 21, 2023, the District Court appointed me to "resolv[e] controversies between counsel relating to their counsel fees." ECF No. 12343. Under that Order, I authored, and the Court approved, new Rules Governing Attorneys' Liens. ECF No. 12348-1. Attorney Lien Rule 8 states that to recover costs, counsel must provide an "itemized list of those costs including a brief explanation of the date of the costs and their purpose."

⁹ For example, Dr. Griffith's documentation consists of a July 2021 unaddressed invoice for \$7,000 for an hour's work, stating "given to Jenny 7/17/21" for "Forensic Eval", with no evaluation date listed. Dr. Billian's invoices for Claimant A include three charges dated April 27, 2023, June 22, 2023, and September 14, 2023, that do not appear to be reflected in the costs asserted by Mr. Cuthbert. Dr. Billian's invoices for Claimant B include one charge dated September 14, 2023, that does not appear to be reflected in the costs asserted by Mr. Cuthbert.

signed that document on December 21, 2021. Cuthbert Initial Costs Brief, Exhibit F. Mr. Cuthbert counter-signed the document, which required any withheld monies to be paid out Mr. Cuthbert's trust account, on April 13, 2022. *Id.* Claimant A, about to be diagnosed with Alzheimer's Disease after having previously been diagnosed with dementia, and Mr. Cuthbert signed the same form on January 10, 2022 and April 13, 2022, respectively. Cuthbert Initial Costs Brief, Exhibit G.

The medical practices next sold the right to recover against their patient to two funding companies—GreenLink and Marrick—while providing an “invoice” describing their fees. The funding companies by that document seemed to gain a right to collect against the patients. Mr. Cuthbert describes the sales price as Dr. Billian's “cash price,” i.e., the price that he would charge a patient without medical insurance. By all accounts, both Claimants had medical insurance. There is no other record evidence about Dr. Billian's (or any other doctors') usual billing practices.

According to Mr. Cuthbert, his clients remained responsible to pay the providers' fees, though not at the amount the doctors collected from the funders but rather at the (inflated) amount that they'd indicated as “charged” to the patients. The gap between those figures was significant. For example, Dr. Billian's records reflect an actual payment of \$5,280 from the funder for his examination of Claimant A, leaving \$5,720 in padding that created an \$11,000 all-in “charge” the funder now assessed the Claimant. (To be clear, \$5,280 would already be an abnormally high neurologist bill for the Program, and it now was marked up by over 100%.) And for Claimant B, Dr. Billian pocketed a tidy \$4,900 for his exam, out of a \$9,800 charge the funder recorded on its books and now seeks to collect. Dr. Scariano also apparently participated in this system. There is a \$6,286 invoice from him to Greenlink regarding Claimant A, with an obscure notation, “Prepayment invoice,” for a MAF evaluation dated August 27, 2021.¹⁰

Apart from Dr. Billian's Assignment of Proceeds, the record lacks evidence memorializing contractual arrangements between the medical providers and the funders, the providers and Mr. Cuthbert, Mr. Cuthbert and the funders, or the Claimants and the funders.¹¹ Despite the Special Masters' express invitation to explain further, Mr. Cuthbert did not clarify his role in setting up these transactions. I read his submissions to represent that his Firm collects no compensation, in any form, at any time, for arranging this financing.¹²

¹⁰ There is also an invoice from Dr. Leong for a January 20, 2021 visit stating “Guarantor: [Claimant B]” and “Plan: Byron Cuthbert.” I do not know what to make of those documents except that in context they indicate that these visits were funded like those for Drs. Billian and Griffith, and it seems clear that Mr. Cuthbert did not advance these unusually high medical expenses.

¹¹ In conversations with the Claims Administrator, funder Greenlink suggested that there might be a document reflecting an agreement between the Claimants and the funder. Mr. Cuthbert did not submit that document in response to the Special Master's call for explanatory briefing.

¹² Mr. Cuthbert's Initial Brief states:

Per the lien documents, the SCMs are instructing the attorney to pay the lien expenses. The attorney was not a party to the sale of the lien, which was an agreement between the medical service provider and the funding company. *The attorney is not profiting from the set aside of the expenses*, and the attorney's only duty as consented to by the SCMs is to pay the expenses invoiced on behalf of them and be reimbursed by the Claims Administrator through the set aside for the expenses.

Mr. Cuthbert argues that his clients consented to these mesne assignments. Cuthbert's Initial Brief, at 4. The Assignment of Proceeds for Medical Services does not mention the possibility of reassignment, nor does it describe Dr. Billian's charged or real fees. Mr. Cuthbert says he told the Claimants "in attorney-client privilege[d] communications" that "liens and funding companies may be utilized in the process and interest may be incurred in obtaining opinions from medical experts." *Id.* at 7. And he asserts in his Reply that his clients "clarified and consented" to his practice by counter-signing his closing letter to them that (inaccurately) listed those sums as his expenses.

Next, the funding companies "provided notice" to Mr. Cuthbert of their purchases of their lien (at the marked-up price). As Mr. Cuthbert designed this process, the notice was formal, and could not have been a surprise. Marrick's notice provides:

Dear Byron Cuthbert,

We understand that you are the attorney for the above listed patient in connection with a liability claim arising from their personal injuries. Enclosed with this letter is a Notice of Medical Lien Assignment and Medical Bill Payment Agreement entered into with your client.

This requires you to withhold from the proceeds of any settlement, judgment, or other collection of damages or compensation ('Proceeds') by or on behalf of your client a sum sufficient to satisfy the lien on the Proceeds. Before making payment or disbursing any proceeds, please contact us for the most current balance, as additional treatment from the medical provider would increase the balance due.

Because the medical provider has assigned all rights of collection to us, payments made to the medical provider will not reduce or satisfy the amount owed on the lien. Marrick has partnered with ANB Bank.

You are also hereby put on notice that ANB Bank has a security interest in and lien on (i) the medical account and lien evidenced by the Notice of Medical Lien Assignment and Medical Bill Payment Agreement entered into with your client, and (ii) any Proceeds received in connection therewith.

Cuthbert's Initial Brief, Exhibits H, I (paragraph breaks added).

Cuthbert Initial Costs Brief at 9 (emphasis added). If Mr. Cuthbert signed the lien assignments and arranged for them, the second sentence makes no sense. I rely on the representation that Mr. Cuthbert is not "profiting from the set aside" to mean that he receives no pecuniary benefit (apart from avoiding advancing funds) in any form from the funders. Mr. Cuthbert should correct the record if I am mistaken.

Finally (according to Mr. Cuthbert), he submitted the medical offices' invoices to the Claims Administrator in response to our rule that reimbursable attorney costs must be attended by documentation that they had been, in fact, expended.¹³

But the story of these fees isn't all told. The Special Masters asked the Claims Administrator to contact both Marrick and GreenLink. Both made clear to the Claims Administrator that they would be willing to, and typically do, negotiate the amount attorneys or debtors pay (*i.e.*, the nominal "charges" are not what the funder usually collects). Marrick disclosed that it has arranged to purchase invoices under circumstances like these for around 80 Settlement Program players, most of which were tied to one lawyer. The funders obviously can't know if Mr. Cuthbert remits the savings to his clients after he negotiates the bill.

COSTS ARE COSTS, NOT DEBTS OWED BY ANOTHER

Attorney Lien Rule 8 provides that as a part of the lien dispute process, the current Claimant's IRPA must file a "statement of costs from the current attorney for the SCM, if represented, with an itemized list of those costs including a brief explanation of the date of the costs and their purpose." That rule follows from Judge Brody's decision concluding that "fees to IRPAs will be capped at 22% *plus reasonable costs* unless the terms of a contingent fee contract reflect a rate lower than the 22% fee cap, in which case the lower fee will apply."¹⁴

Within the lien resolution system, the Special Masters have required substantiation for "reasonable costs" to be reimbursed:

In addition to completing Section II and III of this Form, the Attorney Lienholder must provide a copy of his or her retainer agreement signed by the SCM along with detailed information about each specific cost and the dollar amount of such costs if the attorney is seeking reimbursement of costs in addition to fees. For all costs exceeding \$50 in value, attorneys must submit proof *that the asserted costs have been paid on behalf of the SCM* (*i.e.*, paid receipts, invoices, etc.).¹⁵

Today's Opinion resolves a narrow issue: are medical providers' fees assigned at a marked-up rate to third-party funders, which Mr. Cuthbert seeks to recover seemingly on those funders' behalf, attorney "costs" under Lien Rule 8? They are self-evidently not: Mr. Cuthbert has not paid them as litigation-related reasonable expenses. Indeed, he hasn't advanced them at all, nor does he owe them. Definitionally, they aren't costs that "have been paid" by the attorney. Given that straight-forward understanding of the word "costs," I do not reach the subsequent question: would these sums have been *reasonable* had Mr. Cuthbert paid them.

¹³ Rules Governing Attorneys' Liens, ECF No. 12348-1.

¹⁴ ECF No. 9862 at 9 (emphasis added).

¹⁵ Attorneys' Lien Assertion Form (Notice of Attorneys' Lien) at 2, https://www.nflconcussionsettlement.com/Docs/attorneys_lien_assertion_form.pdf (emphasis added).

At the end of the chain of assignments starting in each of the medical offices described above is an asserted debt owed by the Claimant to *someone* stepping into a doctor's shoes. But that someone is not Mr. Cuthbert. As Mr. Cuthbert stated in his briefing, "the SCM/Players [not BCA] are liable for the full costs of the bill as provided in the lien agreement and the funding company invoices." Cuthbert's Initial Costs Brief, at 10. BCA is Mr. Cuthbert's firm. The Program does not pay attorneys directly for debts they feel their clients owe to third parties, for the simple reason that client debts are not attorney costs. Therefore, Mr. Cuthbert cannot legitimately demand these sums from the Program's trust account. They belong, for now, to his clients.

The Lien Rules define when and how the Settlement Program directly pays—as "reimbursements"—attorneys their costs following lien disputes. Attorneys cannot write their own private regulations or idiosyncratic definitions and enforce them against the Court. The Settlement prohibits true assignments.¹⁶ It pays third-party funders directly in limited circumstances.¹⁷ Contrary to Mr. Cuthbert's arguments in Reply, that does not mean that the Settlement Program, by paying a particular sum to a claimant, has made any determination about whether he can ultimately keep that money. Questions about the enforceability of debts owed by claimants are not the Program's concern once Settlement Awards are in their hands.¹⁸ As Class Counsel wrote in its brief:

It is axiomatic that for someone to be entitled to 'reimbursement', they must have first incurred a cost (i.e. paid money out-of-pocket). Based on the explanation provided in Mr. Cuthbert's brief, it does not appear that Byron Cuthbert & Associates LLP ('BCA') paid any money out-of-pocket to the examining doctors with respect to the costs of their medical examinations of the Settlement Class Members at issue. Therefore, BCA would not be entitled to any 'reimbursement.'

Mr. Cuthbert makes three arguments to avoid the natural understanding that "costs" means "sums he has paid" and not "sums his clients owe."

First, he says that his clients knew and consented to his right to obtain Settlement proceeds directly to pay medical invoices through payments to third-party funders. Even if true, it is irrelevant. Claimants cannot agree to change the Program's payment rules to create a novel definition of the word costs, and they cannot assign their claims. They can, however, do what they like with their Awards once they've received them.

In all events, the case for consent is considerably weaker than Mr. Cuthbert makes it out to be. Mr. Cuthbert relies in part on his retainer agreement:

¹⁶ Amended Class Action Settlement §30.1.

¹⁷ Rules Governing Payment of Claims Involving Third-Party Funders (Mar. 19, 2020), https://www.nflconcussionsettlement.com/Docs/rules_governing_payment_of_claims.pdf.

¹⁸ See *In re Nat'l Football League Players' Concussion Injury Litig.*, 923 F.3d 96 (3d Cir. 2019) (holding that the District Court does not have the authority to void cash-advance agreements, contracts between class members and third-party funders, in their entirety); *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 22-2381, 2023 BL 384563 (3d Cir. 2023) (noting the District Court's authority to determine how to distribute funds through the Settlement).

CASE EXPENSES & AUTHORIZATION. Byron Cuthbert & Associates, LLC will not ask Client for expense money during the handling of the case. Case costs and expenses will be advanced by Byron Cuthbert & Associates, LLC. Examples of typical expenses include court filing fees, investigation, auto mileage, photocopies, court reporters, medical records, interest on any money Byron Cuthbert & Associates, LLC borrows for expenses, expert witness fees, air fare, etc.

If a recovery is obtained, Byron Cuthbert & Associates, LLC will be reimbursed for these expenses from the total recovery. It may be necessary for Byron Cuthbert & Associates, LLC to hire outside groups or lawyers to assist with medical lien resolution, bankruptcy issues, or estate work. These costs will be charged as a case expense.

Doc. 325433 at 28.

Mr. Cuthbert suggests that this provision on “interest” shows that the clients knew (and agreed) to paying him interest on his expenses. But, (i) these doctor bills are not Mr. Cuthbert’s “expenses”, as they were not “advanced” by him; (ii) there is no evidence at all that the Clients were told that an upcharge of 100% (now allegedly due a year later) should be considered “interest” or that Mr. Cuthbert described his or the funders’ interest rate; (iii) if the upcharge counts as interest, it’s not interest on Mr. Cuthbert’s expenses; and (iv) the post-Diagnosis regular “follow-up” visit expenses could not have generated the recovery and can’t be chargeable under this provision at all.¹⁹

Mr. Cuthbert also points out that Assignment of Proceeds document tells the client that Mr. Cuthbert could “deduct immediately from the proceeds of any settlement and/or judgement, any and all amounts due and owing to [the neurologist’s practice] without further authorization from me, and to forward these payments directly to [the neurologist’s practice].” But that document does not mention further assignment or any obligation to third-party funders. Mr. Cuthbert states in his brief that he explained this whole process orally. His clients did not file an affidavit confirming their understanding. (I’ll highlight that the clients were at the time of the relevant assignment and are now subject to debilitating cognitive disease.)

And finally, I am not sure that the Claimants could have understood what Mr. Cuthbert says they did because Mr. Cuthbert filed a document for each client in their portal that denied that the Claimant “entered into any loan, assignment, or attempted assignment with any third-party entities relating to [their] monetary claim.” SPID 100007496, Doc. 293642; SPID 100000313,

¹⁹ In Reply, Mr. Cuthbert writes that he didn’t mean that he was proceeding “solely” based on the “interest language.” Rather, “BCA just wanted to point out that there is interest language in the contingency Agreement. As provided in the footnote in the initial brief, the medical expenses bill price were fully transferable to the funding companies and interest is not involved in the transaction.” Charitably, this could mean that Mr. Cuthbert has abandoned his argument that his Retainer Agreement permits recovery of marked-up costs. But the “solely” language cuts in the other direction. In all events, I reject as implausible any interpretation of Mr. Cuthbert’s retainer agreement that would permit him to recover as expenses monies he has not paid.

Doc. 287755. I cannot square that binding certification with what Mr. Cuthbert now claims his clients consented to. Perhaps it was a twice-repeated filing error.

Moving past consent, Mr. Cuthbert points to language in the lien rules permitting invoices to serve as proof of expense. Having submitted medical office invoices, he thinks he has satisfied the letter of the rule and payment must follow.

It is true that other attorneys have submitted invoices for services and gotten reimbursed. But that payment always depended on a determination that they actually paid the invoice. That result follows from the text of the Attorneys' Lien Resolution Form: "For all costs exceeding \$50 in value, attorneys must submit proof *that the asserted costs have been paid on behalf of the SCM* (i.e., paid receipts, invoices, etc.)"²⁰ An invoice recognizing an unpaid debt—that Mr. Cuthbert does not owe—does not qualify.

The Settlement Program has consistently facilitated the repayment of IRPAs' reasonable costs expended in pursuit of recoveries by allocating to counsel portions of Claimants' Awards. Mr. Cuthbert wants the Settlement to play a different role—seizing claimants' recoveries and turning them over to their attorneys based on the clients' asserted debts, without any formal adjudication as to the debts' merits, and without any necessary connection to the Qualifying Diagnoses themselves. This appears to be an attempt to arbitrage around the rules that prohibit true assignment. As Class Counsel explains:

[It] is unclear to Class Counsel as to whether Elite Neurology's 'Assignment of Proceeds Lien for Medical Services' signed by the Settlement Class Members and Mr. Cuthbert is prohibited under the terms of Section 30.1 ('No Assignment of Claims') of the Settlement Agreement. If it is, then under the terms of the Settlement Agreement, it is '... void, invalid, and of no force and effect and the Claims Administrator shall not recognize any such action.'

What is clear is that the third-party funders cannot by contract give themselves a right to collect against the Settlement fund directly. I reject Mr. Cuthbert's invitation to rewrite the Program rules, and the plain meaning of the word "costs," to avoid that straightforward prohibition.

The result is that whatever rights these medical offices retain to be paid, passed along to funders through "assignments" signed by their cognitively impaired patients around the time of the exam, will have to be worked out after the Program disburses the full Settlement awards to the Retired Players.²¹ If the Claimants do not then comply with the funders' demands, they may face

²⁰ Attorneys' Lien Assertion Form (Notice of Attorneys' Lien) at 2, https://www.nflconcussionsettlement.com/Docs/attorneys_lien_assertion_form.pdf (emphasis added).

²¹ The third-party funders might have tried to file a lien with the Program before the Award notice issued. But what kind? The Funders do not have a judgment lien, a tax lien or a child-support lien. They have not agreed to the third-party funding protocol. *See generally* Rules Governing Payment of Claims Involving Third-Party Funders (Mar. 19, 2020), https://www.nflconcussionsettlement.com/Docs/rules_governing_payment_of_claims.pdf. One possibility would be filing asserted rights with the medical lien administrator, though that entity normally resolves

legal action. And I expect that they'll have the opportunity to raise whatever defenses they deem appropriate, whether sounding in unconscionability, fraud, misrepresentation, incapacity, undue influence, violation of lending laws, malpractice or public policy. Mr. Cuthbert states that he has a legal duty to facilitate payment, which would perhaps add some complication to those proceedings. That is not the Program's affair. All I conclude today is this: Mr. Cuthbert's asserted costs are really his client's ostensible debts. He has submitted no proof that he has advanced *any* of these expenses. I deny his demand to divert the identified portions of Claimants' Awards to him.

It's worth emphasizing that Mr. Cuthbert *could* have advanced his clients' medical bills, and sought reimbursement. This has been the practice of essentially every other IRPA. The question then would be if those expenses were reasonably incurred under *McKenzie Constr., Inc. v. Maynard*.²² On April 5, 2018, Judge Brody applied that case to presumptively cap the fees that IRPAs can recover from their clients' Awards in the Settlement Program.²³ In making that decision, Judge Brody wrote:

In assessing the reasonableness of contingent fees, the Third Circuit directs courts to consider the "circumstances existing at the time the arrangement is entered into, . . . the quality of the work performed, the results obtained, and whether the attorney's efforts substantially contributed to the result." *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987) [*McKenzie II*]. Importantly, a court must consider whether subsequent events have rendered an agreement—that may have been fair at the time of contracting—unfair at the time of enforcement. *Id.*²⁴

The Court concluded that "fees to IRPAs will be capped at 22% *plus reasonable costs*..."²⁵ In applying that rule, Judge Strawbridge cut IRPA fees, whether under *McKenzie* itself or the Court's "supervisory power over the members of its bar."²⁶ And he slashed costs when they were unreasonably high, did not directly support the Diagnoses or better characterized as legal work.²⁷

government and private insurer liens. Of course, no liens can be resolved through the program for post-Diagnosis care, just as the lien administrator does not deal with payments for injuries that are not covered by the Settlement. (The lienholders would be left on the same footing as all other potential creditors, for resolution outside of the Program.) See Guide to Liens in the Settlement Program, https://www.nflconcussionsettlement.com/Docs/guide_to_liens.pdf; see also *Frequently Asked Questions: FAQ #276* (How does a lienholder notify the Settlement Program of a Medical Lien?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>. If the funders had filed the pre-Diagnosis charges as Medical Liens, the Lien Administrator would have to develop some process to decide whether to recognize and resolve them. In so doing, it would have to determine if the funders' asserted liens were impermissible and void assignments, and also if they duplicate charges already covered by Medicare or other private insurance. Claimant A has a \$93,759.68 Medicare Lien which would have priority if it covered the same neurologist office visits. Claimant B faces a \$498,737 lien from Medicare Parts A-B, Medicaid, and two private insurance liens.

²² 823 F.2d 43 (3d Cir. 1987).

²³ ECF No. 9862.

²⁴ *Id.* at 6-7.

²⁵ ECF No. 9862 at 9 (emphasis added).

²⁶ ECF No. 12328 at 29 (citing *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1109 (3d Cir. 1979)).

²⁷ See e.g., Lien Dispute re: SPID 100014304, https://www.nflconcussionsettlement.com/Docs/100014304_d.pdf (Jan. 14, 2021).

Had Mr. Cuthbert paid the invoices, I would have applied this caselaw and practice to determine if his advanced expenses were *reasonable*. I do not today evaluate the reasonableness of a reimbursement for \$9,000 to \$11,000 for a neurologist exam, or \$7,000 for a neuropsychologist's exam, when (i) the providers did not actually collect that price; and (ii) almost all other attorneys in the program have advanced medical charges at less than half that price. I do not analyze if an attorney can charge his or her client through a markup of a providers' ordinary costs (perhaps framed as interest).²⁸ And I leave for another day whether the underlying payments to the medical providers themselves, representing an excess "cash" charge to clients who had medical insurance, were reasonable or ethical. These issues are not ripe.

CONCLUSION

I direct the Claims Administrator to pay Claimant A \$37,971 and Claimant B \$35,238.48 directly. That \$73,209.48 was wrongly withheld, at Mr. Cuthbert's direction, from their Settlement Awards. Mr. Cuthbert has not advanced those sums as expenses, and he cannot recoup them as costs. What happens next is between the Settlement Class Members and their creditors.

Mr. Cuthbert's briefing repeatedly threatens that the funders may sue the Program's Administrators, and the Special Masters, for tortious interference with contract if the Claims Administrator does not enforce the funders' purported assignments by writing Mr. Cuthbert a check for his clients' money. He advocates for the funders with zeal.

To ensure that these entities know what is being threatened in their name, and to bring additional visibility to this area of the Settlement's practice, I have filed this opinion on the MDL docket. I further direct the Claims Administrator to send a copy of this Opinion directly to GreenLink Solutions and Marrick Medical, and to put a copy of it on the Settlement Portal.²⁹

Date: June 24, 2024



David A. Hoffman, Special Master

²⁸ See Pa. Rules of Professional Conduct 1.5, 1.8.

²⁹ Mr. Cuthbert may file an objection to these conclusions with the District Court. If he does, the Claims Administrator, following its normal practice, shall not process the withdrawal (fees or costs) until the objection is resolved. Under the terms of the September 21, 2023, order appointing me to "resolv[e] controversies between counsel relating to their counsel fees," ECF No. 12343, I am to file Reports and Recommendations when I resolve disputes between counsel. This is not a Report and Recommendation, because counsel are not disputing a fee. It is, rather, an opinion implementing rules the Special Masters drafted and which were approved by the District Court, and further effecting the Special Masters' charge to oversee the Settlement's administration. Under FRCP 53(f), objections would receive *de novo* review.