

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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SCOTT GILCHRIST AND THE ESTATE OF  
CARLTON CHESTER "COOKIE" GILCHRIST,

*Petitioner,*

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,

*Respondents.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Should this Court resolve the split in the Circuit Courts of Appeals regarding whether, how, and under what circumstances *Daubert* must be satisfied for a class to be certified under Federal Rule of Civil Procedure 23 when challenged expert testimony is at issue, particularly in light of this Court leaving the issues open in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1048-49 (2016)?

2. Do this Court's rulings in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620, 626 (1997), and *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432-33 (2013), require the District Court, before approving the NFL head trauma settlement under Federal Rule of Civil Procedure 23, to have assessed the disputed scientific propositions justifying the settlement under the *Daubert* standard, given the existence of (a) material disputes about the credibility of those scientific propositions, (b) unrequited requests for adversarial discovery and evidentiary hearings, as well as the fact that (c) the "individual stakes are high and disparities among class members great," *Amchem*, 521 U.S. at 626?

3. Is it fundamentally wrong and an abdication of fiduciary duties to absent class members under Federal Rule of Civil Procedure 23 for the lower courts to have approved the NFL's head trauma class action settlement where there was no adversarial discovery on, and no definitive assessments about, the disputed "scientific" propositions regarding head trauma that were the basis for vastly disparate relief to class members along with a comprehensive release of claims?

**LIST OF PARTIES**

Kevin Turner, Appellee-Plaintiff  
Shawn Wooden, Appellee-Plaintiff  
Paul Raymond Turner, Appellee-Plaintiff  
National Football League, Appellee-Defendant  
NFL Properties, Appellee-Defendant  
*Amicus* Appellant Public Citizen Inc.  
*Amicus Curiae* Brain Injury Association of America  
Craig Heimburger; Dawn Heimburger, Appellants-Objectors  
Cleo Miller; Judson Flint; Elmer Underwood; Vincent Clark, Sr.; Ken Jones; Fred Smerlas; Jim Rourke; Lou Piccone; James David Wilkins, II, Appellants-Objectors  
Curtis L. Anderson, Appellant-Objector  
Darren R. Carrington, Appellant-Objector  
Raymond Armstrong; Nathaniel Newton, Jr.; Larry Brown; Kenneth Davis; Michael McGruder; Clifton L. Odom; George Teague; Drew Coleman; Dennis DeVaughn; Alvin Harper; Ernest Jones; Michael Kiselak; Jeremy Loyd; Gary Wayne Lewis; Lorenzo Lynch; Hurles Scales, Jr.; Gregory Evans; David Mims; Evan Ogelsby; Phillip E. Epps; Charles L. Haley, Sr.; Kevin Rey Smith; Darryl Gerard Lewis; Curtis Bernard Wilson; Kelvin Mack Edwards, Sr.; Dwayne Levels; Solomon Page; Tim McKyer; Larry Barnes; James Garth Jax; William B. Duff; Mary Hughes; Barbara Scheer, Appellants-Objectors  
Liyongo Patrise Alexander; Charlie Anderson; Charles E. Arbuckle; Cassandra Bailey, as Representative of the Estate of Johnny Bailey;

**LIST OF PARTIES – Continued**

Ben Bronson; Curtis Ceaser, Jr.; Larry Centers;  
Darrell Colbert; Harry Colon; Christopher Crooms;  
Jerry W. Davis; Tim Denton; Michael Dumas; Corris  
Ervin; Doak Field; Baldwin Malcolm Frank; Derrick  
Frazier; Murray E. Garrett; Clyde P. Glosson;  
Roderick W. Harris; Wilmer K. Hicks, Jr.; Patrick  
Jackson; Gary Jones; Ryan McCoy; Jerry James  
Moses, Jr.; Anthony E. Newsom; Rance Olison;  
John Owens; Robert Pollard; Derrick Pope; Glenell  
Sanders; Thomas Sanders; Dwight A. Scales; Todd  
Scott; Frankie Smith; Jermaine Smith; Tyrone Smith;  
James A. Young, Sr., Appellants-Objectors  
Scott Gilchrist, individually and on behalf of the  
Estate of Carlton Chester “Cookie” Gilchrist,  
Appellant-Objector  
Jimmie H. Jones; Ricky Ray; Jesse Solomon,  
Appellants-Objectors  
Andrew Stewart, Appellant-Objector  
Willie T. Taylor, Appellant-Objector  
Alan Faneca; Roderick “Rock” Cartwright;  
Jeff Rohrer; Sean Considine, Appellants-Objectors  
James Mayberry, Appellant-Objector

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## **OPINIONS BELOW**

Petitioner Scott Gilchrist and the Estate of Carlton Chester “Cookie” Gilchrist (“Petitioner”) prays that a writ of certiorari issue to review the judgment below.

*In re: NFL Players Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2016).

*In re: NFL Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016).



## **JURISDICTION**

This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1). The Court of Appeals entered its judgment on April 18, 2016, and denied a petition for rehearing on June 1, 2016.



## **RULE INVOLVED**

This petition involves Federal Rule of Civil Procedure 23, regarding “Class Actions”:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

\* \* \*

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

\* \* \*

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require – to protect class members and fairly conduct the action – giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment;

or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

\* \* \*

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.



(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

\* \* \*

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

\* \* \*



## STATEMENT OF THE CASE

### **A. The NFL Justified Its Head Trauma Injury Class Action Settlement as Being “Science-Driven,” Yet there Was No Underlying Adversarial Discovery Nor Any *Daubert* Inquiries into or Findings Regarding the Disputed Scientific Issues**

The District Court approved a personal injury class action settlement concerning the lifelong effects of repeated head trauma on NFL players. Lawyers for the NFL and a group of retired NFL players packaged and presented the settlement as “science-driven” and “scientifically based.” Every material aspect of the settlement flowed from this “science,” including how the complex and diverse multitude of class members’ head trauma issues would be assessed, analyzed, and valued. Indeed, as evidenced by the actuarial data showing how class members will be compensated, there are vast disparities among the class members.

Yet, the District Court failed to make definitive assessments about the “scientific” propositions at the core of the settlement, instead shunning adversarial discovery on the “science” and declining to conduct any analysis under *Daubert*. The District Court barred evidentiary inquiry into the “science” despite the fact that one of the core allegations was that the NFL had concealed and manipulated scientific research regarding the links between repeated head trauma and neurodegenerative disorders, like Chronic Traumatic Encephalopathy (“CTE”).

Thus, the District Court approved of the NFL head trauma personal injury class action settlement under Federal Rule of Civil Procedure 23 without the core issue regarding the NFL's role in the suppression and distortion of the "science" being examined or otherwise investigated.

**B. The District Court Used the Uncertainty of the So-Called State of the "Science" as a Basis for Approving the Settlement, While Simultaneously Shunning *Daubert* and Adversarial Discovery on Disputed Scientific Issues**

When asked by settlement objectors for the opportunity to conduct discovery, offer testimony and examine witnesses at the final approval hearing, the District Court denied the requests. Instead, to assess the "unclear" and "not yet comprehensively studied" science, the District Court relied exclusively on the papers and articles advanced by the parties in support of settlement approval.

This was a superficial examination of research by the District Court – research which the NFL players initially alleged was based on manipulated data. The District Court's analysis was also not supported by any adversarial discovery – indeed, there was no adversarial discovery at all in the litigation, not even adversarial discovery on the "science" itself. Nor was the District Court's analysis supported by any *Daubert*

scrutiny – there were no *Daubert* analyses done in the case.

Thus, the final approval hearing could not have afforded the District Court a genuine opportunity to rigorously inspect the validity of the “scientific” concepts justifying and structuring the settlement. Instead, the District Court quipped about how it might not even be alive to adjudicate any issues arising down the road from the settlement it was approving, and it even needed clarification on the meaning of the term “TBI,” *i.e.*, – traumatic brain injury. All told, and as manifest in its final approval order, the District Court was fully acquiescent in not requiring definitive conclusions about the settlement’s core scientific underpinning as a component of the Rule 23 analysis.

Indeed, the District Court not only signaled but embraced its lack of understanding of the “science,” acknowledging the rift in the emergent and developing theories of how the human brain is affected by head trauma throughout one’s lifetime. The District Court concluded that because there was not a scientific consensus on how and to what extent the fate of retired NFL players is correlated to head trauma, it did not need to make scientific conclusions either as pertaining to the fairness of the settlement or the Rule 23 certification factors, and specifically not under *Daubert*. The District Court also determined that *Daubert* scrutiny was not necessary to vet objections to the settlement premised on disputes in the scientific research, given that the parties advocating for settlement approval themselves agreed on the “science.”

For the District Court, “The case implicates complex scientific and medical issues not yet comprehensively studied [ . . . and] the association between repeated concussive trauma and long-term neurocognitive impairment remains unclear.” This echoed the words in support of the settlement by the retired players’ class counsel, who told the District Court, “[Y]ou have to take the science as it exists at the time you’re negotiating.”

**C. Petitioner Gilchrist Objected to the Settlement on Behalf of the Estate of His Late Father, “Cookie” Gilchrist, Who Pioneered the Advocacy at Issue**

Petitioner Scott Gilchrist is the son of former NFL player Carlton Chester “Cookie” Gilchrist, who died from CTE. CTE is a progressive degenerative disease of the brain found in athletes (and others) with a history of repeated head trauma. During his lifetime, Cookie Gilchrist was one of the early leaders among former NFL players advocating for those suffering from the effects of repeated head trauma. *See The Cookie Gilchrist Story*, summary available at <https://youtu.be/G8cKidcKOA8>; *see generally* <http://cookiegilchrist.com/>.

Petitioner timely objected to the settlement based on the fact that CTE is valued less than Amyotrophic Lateral Sclerosis (“ALS”), when CTE is a hallmark of having incurred repeated head trauma, whereas ALS may be found in people who have not incurred repeated head trauma. Petitioner also adopted the objections of

other settlement objectors who, *inter alia*, argued that the assessment, analysis, and ascribed value of the various conditions suffered by retired NFL players were fundamentally unfair and not justified by the science.

**D. Petitioner Relied on this Court’s Rulings in *Amchem*, *Comcast* and *Daubert*, as Well as the Third Circuit Court of Appeals Prior Application of the Case Law in Its *Blood Reagents* Opinion**

Petitioner filed his appeal in the Third Circuit Court of Appeals, seeking reversal of the final approval order with instructions on remand to: (1) create a factual record testing the “science” underlying the settlement through adversarial discovery proceedings; (2) make a determination about the validity of the “science” underlying the settlement pursuant to *Daubert*; and (3) reassess the settlement under Rule 23, including such factors as predominance and ascertainability. Petitioner argued that *Amchem* requires “close inspection” and “heightened attention” to the Rule 23 factors where, as here, “individual stakes are high and disparities among class members great.” 521 U.S. at 620, 626.

Petitioner argued that fulfilling *Amchem*’s standard required the District Court to undertake its Rule 23 inquiries with close attention to how, when, and the extent to which retired NFL players have manifested injuries from repeated head trauma over their lifetimes. Moreover, Petitioner argued that *Comcast*

required the District Court to undertake the Rule 23 inquiries through the lens of *Daubert*, and *Daubert*-forged conclusions were a necessary component of the District Court’s fairness assessment.

As noted by Petitioner, *In re: Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015), held that “a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*.” *Blood Reagents*, 783 F.3d at 187-189. Thus, as Petitioner argued, the Third Circuit’s own precedent compelled reversal of the head trauma settlement, because there was no *Daubert* scrutiny of the challenged, expert-based “science” undergirding the settlement’s structure and relief.

At oral argument, the Third Circuit panel had the following exchange with Petitioner’s counsel:

PETITIONER’S COUNSEL: . . . Our brief argues that we need to put the science on trial. One of the core allegations in this case is that the NFL promoted junk science. And we argue that the way that the district court approached the science didn’t correct that problem.

THE COURT: You’re saying that that should have been what, a *Daubert* hearing?



PETITIONER'S COUNSEL: Many. Yes, Your Honor. We need to put the science on trial in the light.

[Tr. at 59:3-11]

Later on, the Panel posed the question to counsel for the former players:

THE COURT: But what confidence can we have, in the absence of the kind of scientific testing that [Petitioner's counsel] was advocating for, that these diagnoses, these qualifying diagnoses, adequately cover the field for all of the concussion-related injuries that a player might have suffered?

[Tr. at 74:12-18]

### **E. The Third Circuit Dismissed Petitioner's Objection While Deeming His Argument to Have Been Waived**

The Third Circuit approved the settlement in a lengthy order. Regarding Petitioner's *Daubert* arguments based on *Daubert*, it stated:

Others claim that the expert evidence on CTE should have been analyzed under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), which established threshold standards for the admissibility of expert scientific testimony at trial. Objectors failed to present this argument to the District Court, and we deem it waived. Moreover, we have never held that

district courts considering the fairness of a class action settlement should consider the admissibility of expert evidence under *Daubert*. And at least one court of appeals has rejected the argument objectors are making because, “[i]n a fairness hearing, the judge does not resolve the parties’ factual disputes but merely ensures that the disputes are real and that the settlement fairly and reasonably resolves the parties’ differences.” *Int’l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 636-637 (6th Cir. 2007).

*In re: NFL Players Concussion Injury Litig.*, 821 F.3d 410, 442-443 (3d Cir. 2016).



## **REASONS FOR GRANTING THE PETITION**

### **A. This Court Should Resolve the Split in the Circuit Courts of Appeals Regarding Whether, How, and Under What Circumstances *Daubert* Scrutiny Is Necessary for Class Certification under Rule 23 When Challenged Expert Testimony Is at Issue**

As it stands, there is a split in the Circuit Courts of Appeals as to whether, how, and under what circumstances *Daubert* scrutiny is required for class certification under Rule 23 when based on contested expert evidence:

<b>Divergent Standards Regarding Whether, How, and Under What Circumstances <i>Daubert</i> is Required in Order to Grant Rule 23 Relief Based on Challenged Expert Testimony</b>		
<b><i>Daubert</i> Need Not Be Satisfied in the Settlement Approval Context</b>	<b>Third Circuit</b> (2016)	<p>“[W]e have never held that district courts considering the fairness of a class action settlement should consider the admissibility of expert evidence under <i>Daubert</i>.”</p> <p><i>In re: NFL Players Concussion Injury Litig.</i>, 821 F.3d at 442-443.</p>
<b><i>Daubert</i> May be Satisfied in the Settlement Approval Context Under a “Flexible” Standard</b>	<b>Sixth Circuit</b> (2007)	<p>“The <i>Daubert</i> objection suffers from the same problem, and, what is more, this screening requirement remains ‘a flexible one,’ and the objectors simply have not shown how the district courts abused their discretion in considering these financial reports.”</p> <p><i>Int’l Union, United Auto., Aerospace, and Agr. Implement Workers of Am. v. General Motors Corp.</i>, 497 F.3d 615, 636-637 (6th Cir. 2007) (internal citations omitted)</p>

<p style="text-align: center;"><b>District Courts Should Appoint their Own Experts to Review Expert-Level Questions in the Settlement Context</b></p>	<p style="text-align: center;"><b>Seventh Circuit</b> (2016)</p>	<p>“The district judge approved the settlement agreement – but with misgivings. . . . She could of course have appointed her own expert to explain the significance (or rather lack thereof) of the supplemental disclosures, see Fed. R. Evid. 706, and she should have done that given her doubts about the lawyers’ explanations.”</p> <p><i>In re: Walgreen Co. Stockholder Litig.</i>, ___ F.3d ___, 2016 WL 4207962, at *4 (7th Cir. Aug. 10, 2016)</p>
<p style="text-align: center;"><b>No Form of a <i>Daubert</i> Inquiry Is Required at the Class Certification Stage (Outside the Settlement Context)</b></p>	<p style="text-align: center;"><b>Second Circuit</b> (2013)</p>	<p>Finding no error by the District Court in failing to conduct a <i>Daubert</i> inquiry regarding challenged expert testimony because, <i>inter alia</i>, “[t]he Supreme Court has not definitively ruled on the extent to which a district court must undertake a <i>Daubert</i> analysis at the class certification stage.”</p> <p><i>In re: U.S. Foodservice Inc. Pricing Litig.</i>, 729 F.3d 108, 129-130 (2d Cir. 2013)</p>

<p><b>Whether a <i>Daubert</i> Inquiry Is Necessary Varies with the Facts of the Case (Outside the Settlement Context)</b></p>	<p><b>Seventh Circuit</b> (2012)</p>	<p>“A <i>Daubert</i> hearing is necessary . . . only if the witness’s opinion is ‘critical’ to class certification. . . . The district court should have ruled definitively on plaintiffs’ <i>Daubert</i> motion and objections before ruling on their motion for class certification.”</p> <p><i>Messner v. Northshore Univ.</i>, 669 F.3d 802, 813-814 (7th Cir. 2012)</p>
	<p><b>Eleventh Circuit</b> (2014)</p>	<p>“[B]ecause the District Court did not rely on the challenged expert evidence to resolve any other issue, there was no need to engage the <i>Daubert</i> analysis before resolving the class certification motion.”</p> <p><i>Local 703, I.B. of T. Grocery &amp; Food Emp’s Welfare Fund v. Regions Fin. Corp.</i>, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014)</p>

<p><b>Some Form of Quasi-<i>Daubert</i> or “<i>Daubert-Like</i>” Inquiry Is Necessary (Outside the Settlement Context)</b></p>	<p><b>Eighth Circuit</b> (2011)</p>	<p>“[T]he district court did not err by conducting a focused <i>Daubert</i> analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence.”</p> <p><i>In re: Zurn Pex Plumbing Prods. Liab. Litig.</i>, 644 F.3d 604, 613-614 (8th Cir. 2011)</p>
	<p><b>Eighth Circuit</b> (2015)</p>	<p>Rejecting argument “that before reaching the issue of class certification we require a full and conclusive district court inquiry under [<i>Daubert</i>].”</p> <p><i>Smith v. ConocoPhillips Pipe Line Co.</i>, 801 F.3d 921, 925 n.2 (8th Cir. 2015)</p>
	<p><b>Eleventh Circuit</b> (2011)</p>	<p>“Here the district court refused to conduct a <i>Daubert</i>-like critique of the proffered experts’s qualifications. This was error.”</p> <p><i>Sher v. Raytheon Co.</i>, 419 Fed.Appx. 887, 890-891 (11th Cir. Mar. 9, 2011)</p>

<b>A Full Daubert Analysis Is Always Necessary to Certify a Class (Outside the Settlement Context)</b>	<b>Third Circuit (2015)</b>	<p>“Expert testimony that is insufficiently reliable to satisfy the <i>Daubert</i> standard cannot prove that the Rule 23(a) prerequisites have been met in fact, nor can it establish through evidentiary proof that Rule 23(b) is satisfied.”</p> <p><i>Blood Reagents</i>, 783 F.3d at 187.</p>
	<b>Ninth Circuit (2011)</b>	<p>“[T]o the extent the district court limited its analysis of whether there was commonality to a determination of whether Plaintiffs’ evidence on that point was admissible [under <i>Daubert</i>], it did so in error.”</p> <p><i>Ellis v. Costco Wholesale Corp.</i>, 657 F.3d 970, 982 (9th Cir. 2011)</p>

The inconsistency in the Circuit Courts of Appeals is further muddled by *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1049 (2016), which upheld an award of class certification while stating that, “Petitioner, however, did not raise a challenge to respondents’ experts’ methodology under *Daubert*; and, as a result, there is no basis in the record to conclude it was legal error to admit that evidence.”

Accordingly, this Court should grant this petition in order to resolve the split in the Circuit Courts of Appeals concerning whether, how, and under what circumstances *Daubert* scrutiny must precede class certification under Federal Rule of Civil Procedure 23 when challenged expert testimony is at issue.

**B. Because the NFL’s Head Trauma Injury Class Action Settlement Was Certified Under a Less Stringent Standard than that Governing Economic Injury Class Actions, Class Action Fairness, Justice, and Stability Going Forward Are Irreparably Damaged**

It should not be more difficult to certify a class alleging economic harm than it is to certify a personal injury class action settlement regarding the effects of repeated head trauma. But that is the illogical standard the NFL’s personal injury head trauma class action settlement has created.

To illustrate, in *Larson v. AT&T Mobility LLC*, 687 F.3d 109 (3d Cir. 2012), the Third Circuit denied certification of a class action settlement regarding consumer cellular telephone fees, stating, “[w]ith full appreciation for the considerable efforts that have been invested in the settlement of this class action, we emphasize again the judicial duty to act as the guardian of absent class members.” *Id.* at 134. The ruling in *Larson* is consistent with the assiduous attention and scrutiny given to economic harm class actions, even after adversarial discovery. *See, e.g., In re: Payment*



*Card Interchange Fee and Merchant Discount Anti-trust Litig.*, \_\_\_ F.3d \_\_\_, 2016 WL 3563719, at \*8-\*12 (2d Cir. June 30, 2016) (rejecting certification of settlement regarding credit card fees and stating, “we scrutinize such settlements more closely” and “the benefits of litigation peace do not outweigh class members’ due process right to adequate representation”); *Walgreen Co.*, \_\_\_ F.3d \_\_\_, 2016 WL 4207962, at \*4 (rejecting certification of corporate merger settlement and stating, “The question the judge had to answer was not whether the disclosures may have mattered, but whether they *would* be *likely* to matter to a reasonable investor.”) (emphasis in the original); *Carrera v. Bayer Corp.*, 727 F.3d 300, 303-304 (3d Cir. 2013) (denying certification regarding false advertising of “Bayer’s One-A-Day WeightSmart diet supplement”); *Karhu v. Vital Pharms.*, 621 Fed.Appx. 945, 946 (11th Cir. June 9, 2015) (denying certification regarding false advertising of “Meltdown” fat loss aid).

Here on the other hand, class certification did not concern the economic interests of absent class members in goods or a few dollars – tangible assets that come and go in life. Rather, the issues concerned the complex and diverse multitude of head trauma issues experienced by NFL players throughout their lifetimes – a quality of life issue that can never be restored. Yet, as opposed to the “judicial duty” recognized in a case like *Larson* to protect absent class members from potential economic harm, the Third Circuit instead

stated, when determining the fate of tens of thousands of retired NFL players subject to the settlement, “It is a testament to the players, researchers, and advocates who have worked to expose the true human costs of a sport so many love. Though not perfect, it is fair.” *In re: NFL Players Concussion Injury Litig.*, 821 F.3d at 448.

The approval of the NFL’s personal injury head trauma class action settlement, in the absence of adversarial discovery, in the absence of *Daubert* scrutiny, and in the absence of definitive assessments about the “science” supposedly justifying the settlement, creates a two-tiered legal system. Class action litigation is, and should be, held to exacting standards of fairness and scrutiny under the elements of Rule 23. This Court should not allow the prominence of the NFL in American society to permit a double standard that irreparably undermines fairness, justice, and stability in class action jurisprudence.

**C. The Courts Below Abdicated Their Fundamental Fiduciary Duties to Absent Class Members by Approving a “Science-Driven” Personal Injury Class Action Settlement in the Absence of Adversarial Discovery, *Daubert* Inquiries, and Definitive Assessments About the “Science” at Issue**

It was irrational for the courts below to determine that the NFL personal injury head trauma class action settlement was somehow fair, adequate and reasonable

without having a definitive grasp on how, when, and the extent to which retired NFL players manifest issues resulting from repeated head trauma over their lifetimes. The settlement itself flowed from purported “science,” including how the complex and diverse multitude of class members’ head trauma issues throughout their respective and varying, tumultuous lifetimes would be assessed, valued, and analyzed. The disparities among class members is great, as exemplified by the actuarial data indicating how class members would be compensated.

The courts below had a basic, fiduciary duty to act as guardians of the class. *Larson*, 687 F.3d at 122. Because this was a personal injury settlement, under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the courts below were required to undertake a “close inspection” of Rule 23’s factors. Moreover, since there was “science” in dispute as it pertained to the Rule 23 factors, *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), required the courts below to undertake *Amchem*’s “close inspection” through the lens of *Daubert*.

By neglecting to undertake *Daubert* scrutiny of the “science” underlying the settlement, the courts below failed these mandates, abdicated their fiduciary role to absent class members, and engaged in fundamentally incomplete analyses of Rule 23’s class certification factors. Put simply: the courts below did not have a reliable basis upon which to approve the settlement.

This was quickly apparent months after the November 19, 2015 oral argument in the Third Circuit.

On March 14, 2016, the United States House of Representatives Committee on Energy and Commerce convened a roundtable discussion on concussions.<sup>1</sup> During the discussion, the NFL's senior vice president for health and safety, Jeff Miller, provided the following testimony, in response to a question by Rep. Jan Schakowsky, D-Ill.:

**Question by Rep. Jan Schakowsky, D-Ill:**

Do you think there is a link between football and degenerative brain disorders, like CTE?

**Answer by NFL executive, Jeff Miller:**

Well, certainly, Dr. McKee's research shows that a number of retired NFL players were diagnosed with CTE. So, the answer to that question is certainly yes.<sup>2</sup>

In response to this admission by the NFL, ESPN.com ran the story, "*NFL acknowledges, for first time, link between football, brain disease.*"<sup>3</sup> There was a subsequent flurry of press coverage related to the issue,<sup>4</sup> and

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<sup>1</sup> [http://espn.go.com/espn/otl/story/\\_/id/14972296/top-nfl-official-acknowledges-link-football-related-head-trauma-cte-first](http://espn.go.com/espn/otl/story/_/id/14972296/top-nfl-official-acknowledges-link-football-related-head-trauma-cte-first) (last visited Mar. 14, 2016).

<sup>2</sup> See note 1 *supra* (embedding video of testimony).

<sup>3</sup> See note 1 *supra*.

<sup>4</sup> See, e.g., NEW YORK TIMES, *N.F.L.'s Flawed Concussion Research and Ties to Tobacco Industry*, available at: [http://www.nytimes.com/2016/03/25/sports/football/nfl-concussion-research-tobacco.html?\\_r=0](http://www.nytimes.com/2016/03/25/sports/football/nfl-concussion-research-tobacco.html?_r=0) (last visited Mar. 29, 2016); NEWYORKTIMES.COM, *N.F.L. Shifts on Concussions, and Game May Never Be the Same*, available at: <http://www.nytimes.com/2016/03/16/sports/nfl-concussions-cte-football-jeff-miller.html> (last visited Mar. 29, 2016); WASHINGTONPOST.COM, *In stunning admission, NFL official affirms link between football and CTE*, available at:

the movie titled, “Concussion,” has been a box office success.<sup>5</sup>

The NFL’s March 2016 Congressional testimony and subsequent public outcry echoed Petitioner’s call for close attention to the need for adversarial discovery in the case, *Daubert* scrutiny, and definitive assessments about the “science” supposedly justifying the settlement. The courts below reviewed a settlement which was negotiated on the premise – actively fostered by the NFL – that the link between CTE and football has never been acknowledged by the NFL and subject to vigorous dispute. Indeed, even at the November 19, 2015 oral argument in this appeal, the players pushing the settlement questioned such a link:

**[COUNSEL FOR NFL PLAYERS]:** Even if CTE is linked to football, then how does that establish it’s linked to NFL football?

Tr. at p. 84. Yet in one March 2016 Congressional hearing, the NFL answered that question posed by the players pushing the settlement – that there is a link between football and diagnosed CTE – as if it was common knowledge given what the “research shows.”

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<https://www.washingtonpost.com/news/early-lead/wp/2016/03/14/in-stunning-admission-nfl-official-affirms-link-between-football-and-cte/> (last visited Mar. 29, 2016); CBSSPORTS.COM, *For first time ever, NFL admits there’s a link between CTE and football*, available at: <http://www.cbssports.com/nfl/eye-on-football/25517174/for-first-time-ever-nfl-admits-theres-a-link-between-cte-and-football> (last visited Mar. 29, 2016).

<sup>5</sup> [https://en.wikipedia.org/wiki/Concussion\\_\(2015\\_film\)](https://en.wikipedia.org/wiki/Concussion_(2015_film)).

Review by this Court will enable the establishment of guidelines for federal courts in connection with their duties to obtain a basic understanding of the class action settlements before them, particularly when it comes to personal injury class actions that depend upon scientific assumptions and principles. To be sure, this Court has mandated a “close inspection” when “individual stakes are high and disparities among class members great.” *Amchem*, 521 U.S. at 620, 626. Thus, this case will afford this Court an opportunity to provide necessary, modern-day guidance on how to implement these principles flowing from *Amchem*.

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◆

### CONCLUSION

Petitioner respectfully asks this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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("The Gilchrist Estate")*

App. 1

PRECEDENTIAL

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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Nos. 15–2206, 15–2217, 15–2230, 15–  
2234, 15–2272, 15–2273, 15–2290, 15–  
2291, 15–2292, 15–2294, 15–2304, 15–2305

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IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS CONCUSSION INJURY LITIGATION

Craig Heimburger; Dawn Heimburger,  
Appellants (15–2206)

Cleo Miller; Judson Flint; Elmer Underwood; Vincent  
Clark, Sr.; Ken Jones; Fred Smerlas; Jim Rourke;  
Lou Piccone; James David Wilkins, II,  
Appellants (15–2217)

Curtis L. Anderson,  
Appellant (15–2230)

Darren R. Carrington,  
Appellant (15–2234)



App. 2

Raymond Armstrong; Nathaniel Newton, Jr.; Larry Brown; Kenneth Davis; Michael McGruder; Clifton L. Odom; George Teague; Drew Coleman; Dennis DeVaughn; Alvin Harper; Ernest Jones; Michael Kiselak; Jeremy Loyd; Gary Wayne Lewis; Lorenzo Lynch; Hurles Scales, Jr.; Gregory Evans; David Mims; Evan Ogelsby; Phillip E. Epps; Charles L. Haley, Sr.; Kevin Rey Smith; Darryl Gerard Lewis; Curtis Bernard Wilson; Kelvin Mack Edwards, Sr.; Dwayne Levels; Solomon Page; Tim McKyer; Larry Barnes; James Garth Jax; William B. Duff; Mary Hughes; Barbara Scheer,

Appellants (15–2272)

Liyongo Patrise Alexander; Charlie Anderson; Charles E. Arbuckle; Cassandra Bailey, as Representative of the Estate of Johnny Bailey; Ben Bronson; Curtis Ceaser, Jr.; Larry Centers; Darrell Colbert; Harry Colon; Christopher Crooms; Jerry W. Davis; Tim Denton; Michael Dumas; Corris Ervin; Doak Field; Baldwin Malcolm Frank; Derrick Frazier; Murray E. Garrett; Clyde P. Glosson; Roderick W. Harris; Wilmer K. Hicks, Jr.; Patrick Jackson; Gary Jones; Ryan McCoy; Jerry James Moses, Jr.; Anthony E. Newsom; Rance Olison; John Owens; Robert Pollard; Derrick Pope; Glenell Sanders; Thomas Sanders; Dwight A. Scales; Todd Scott; Frankie Smith; Jermaine Smith; Tyrone Smith; James A. Young, Sr.,

App. 3

Appellants (15–2273)

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Jimmie H. Jones; Ricky Ray; Jesse Solomon,  
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Andrew Stewart,  
Appellant (15–2292)

Willie T. Taylor,  
Appellant (15–2294)

Alan Faneca; Roderick “Rock” Cartwright; Jeff  
Rohrer; Sean Considine,  
Appellants (15–2304)

James Mayberry,  
Appellant (15–2305)

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Appeal from the U.S. District Court for the  
Eastern District of Pennsylvania  
(D.C. Civil Action Nos. 2-12-md-02323 and  
2-14-cv-00029)  
District Judge: Honorable Anita B. Brody

App. 4

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Before: AMBRO, HARDIMAN,  
and NYGAARD, Circuit Judges

(Opinion filed: April 18, 2016)

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App. 12

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App. 15

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OPINION OF THE COURT

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AMBRO, Circuit Judge.

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## **I. INTRODUCTION**

The National Football League (“NFL”) has agreed to resolve lawsuits brought by former players who alleged that the NFL failed to inform them of and protect them from the risks of concussions in football. The District Court approved a class action settlement that covered over 20,000 retired players and released all concussion-related claims against the NFL. Objectors have appealed that decision, arguing that class certification was improper and that the settlement was unfair. But after thorough review, we conclude that the District Court was right to certify the class and approve the settlement. Thus we affirm its decision in full.

## **II. BACKGROUND**

### **A. Concussion Suits Are Brought Against the NFL**

In July 2011, 73 former professional football players sued the NFL and Riddell, Inc. in the Superior Court of California. Compl., *Maxwell v. Nat’l Football League*, No. BC465842 (Cal. Super. Ct. July 19, 2011). The retired players alleged that the NFL failed to take reasonable actions to protect them from the chronic risks of head injuries in football. The players also claimed that Riddell, a

manufacturer of sports equipment, should be liable for the defective design of helmets.

The NFL removed the case to federal court on the ground that the players' claims under state law were preempted by federal labor law. More lawsuits by retired players followed and the NFL moved under 28 U.S.C. § 1407 to consolidate the pending suits before a single judge for pretrial proceedings. In January 2012, the Judicial Panel on Multidistrict Litigation consolidated these cases before Judge Anita B. Brody in the Eastern District of Pennsylvania as a multidistrict litigation ("MDL"). *In re: Nat'l Football League Players' Concussion Injury Litig.*, 842 F. Supp. 2d 1378 (J.P.M.L. 2012). Since consolidation, 5,000 players have filed over 300 similar lawsuits against the NFL and Riddell.<sup>1</sup> Our appeal only concerns the claims against the NFL.

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<sup>1</sup> There is also a pending class action against the National Collegiate Athletic Association ("NCAA") over its handling of head injuries. In January 2016, the District Court overseeing the action preliminarily certified the class and approved a settlement subject to certain revisions. *In re: Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, No. 13-9116, 2016 WL 305380 (N.D. Ill. Jan. 26, 2016). Under the settlement, the NCAA will pay \$70 million to create a medical monitoring fund to screen current and former collegiate athletes for brain trauma.

To manage the litigation, the District Court appointed co-lead class counsel, a Steering Committee, and an Executive Committee. The Steering Committee was charged with performing or delegating all necessary pretrial tasks and the smaller Executive Committee was responsible for the overall coordination of the proceedings. The Court also ordered plaintiffs to submit a Master Administrative Long-Form Complaint and a Master Administrative Class Action Complaint to supersede the numerous then-pending complaints.

The Master Complaints tracked many of the allegations from the first lawsuits. Football puts players at risk of repetitive brain trauma and injury because they suffer concussive and sub-concussive hits during the game and at practice (sub-concussive hits fall below the threshold for a concussion but are still associated with brain damage). Plaintiffs alleged that the NFL had a duty to provide players with rules and information to protect them from the health risks—both short and long-term—of brain injury, including Alzheimer’s disease, dementia, depression, deficits in cognitive functioning, reduced processing speed, loss of memory, sleeplessness, mood swings, personality changes, and a recently identified degenerative disease called chronic traumatic encephalopathy (commonly referred to as “CTE”).

Because CTE figures prominently in this appeal, some background on this condition is in order. It was first identified in 2002 based on analysis of the brain tissue of deceased NFL players, including Mike Webster, Terry Long, Andre Waters, and Justin Strzelczyk. CTE involves the build-up of “tau protein” in the brain, a result associated with repetitive head trauma. Medical personnel have examined approximately 200 brains with CTE as of 2015, in large part because it is only diagnosable post-mortem. That diagnosis requires examining sections of a person’s brain under a microscope to see if abnormal tau proteins are present and, if so, whether they occur in the unique pattern associated with CTE. Plaintiffs alleged that CTE affects mood and behavior, causing headaches, aggression, depression, and an increased risk of suicide. They also stated that memory loss, dementia, loss of attention and concentration, and impairment of language are associated with CTE.

The theme of the allegations was that, despite the NFL’s awareness of the risks of repetitive head trauma, the League ignored, minimized, or outright suppressed information concerning the link between that trauma and cognitive damage. For example, in 1994 the NFL created the Mild Traumatic Brain Injury Committee to study the effects of head

injuries. Per the plaintiffs, the Committee was at the forefront of a disinformation campaign that disseminated “junk science” denying the link between head injuries and cognitive disorders. Based on the allegations against the NFL, plaintiffs asserted claims for negligence, medical monitoring, fraudulent concealment, fraud, negligent misrepresentation, negligent hiring, negligent retention, wrongful death and survival, civil conspiracy, and loss of consortium.

After plaintiffs filed the Master Complaints, the NFL moved to dismiss, arguing that federal labor law preempted the state law claims. Indeed, § 301 of the Labor Management Relations Act preempts state law claims that are “substantially dependent” on the terms of a labor agreement. *Int’l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 852–53 (1987). The NFL claimed that resolution of plaintiffs’ claims depended upon the interpretation of Collective Bargaining Agreements (“CBAs”) in place between the retired players and the NFL.<sup>2</sup> If the CBAs do

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<sup>2</sup> After the NFL removed some of the early concussion-related lawsuits from state courts, several district courts accepted this preemption argument as a basis for denying requests to remand the cases. *See, e.g., Smith v. Nat’l Football League Players Ass’n*, No. 14–1559, 2014 WL 6776306, at \*9 (E.D. Mo. Dec. 2, 2014); *Duerson v. Nat’l Football League, Inc.*, No. 12–2513, 2012 WL 1658353, at \*6 (N.D. Ill. May 11, 2012); *but see Green v. Arizona Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1030 (E.D. Mo. 2014) (finding that concussion-

preempt plaintiffs' claims, they must arbitrate those claims per mandatory arbitration provisions in the CBAs. Plaintiffs responded that their negligence and fraud claims would not require federal courts to interpret the CBAs and in any event the CBAs did not cover all retired players.

### **B. The Parties Reach a Settlement**

On July 8, 2013, while the NFL's motion to dismiss was pending, the District Court ordered the parties to mediate and appointed a mediator. On August 29, 2013, after two months of negotiations and more than twelve full days of formal mediation, the parties agreed to a settlement in principle and signed a term sheet. It provided \$765 million to fund medical exams and offer compensation for player injuries. The proposed settlement would resolve the claims of all retired players against the NFL related to head injuries.

In January 2014, after more negotiations, class counsel filed in the District Court a class action complaint and sought preliminary class certification and preliminary approval of the settlement. The Court denied the motion because it had doubts that the capped fund for paying claims would be

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related claims did not depend on interpretation of CBAs and granting motion to remand).

sufficient. *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 715 (E.D. Pa. 2014). It appointed a Special Master to assist with making financial forecasts and, five months later, the parties reached a revised settlement that uncapped the fund for compensating retired players.

Class counsel filed a second motion for preliminary class certification and preliminary approval in June 2014. The District Court granted the motion, preliminarily approved the settlement, conditionally certified the class, approved classwide notice, and scheduled a final fairness hearing. *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191 (E.D. Pa. 2014). Seven players petitioned for interlocutory review. *See* Fed. R. Civ. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.”). In September 2014, we denied the petition, later explaining over a dissent that we lacked jurisdiction because the District Court’s order preliminarily certifying the class was not an “order granting or denying class-action certification.” *In re Nat'l Football League Players' Concussion Injury Litig.*, 775 F.3d 570, 571–72 (3d Cir. 2014).

Following preliminary certification, potential class members had 90 days to object or opt out of the settlement. Class counsel then moved for final class certification and settlement approval. On November 19, 2014, the District Court held a day-long fairness hearing and heard argument from class counsel, the NFL, and several objectors who voiced concerns against the settlement. After the hearing, the Court proposed several changes to benefit class members. The parties agreed to the proposed changes and submitted an amended settlement in February 2015. On April 22, 2015, the Court granted the motion for class certification and final approval of the amended settlement, that grant explained in a 123–page opinion. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015). Objectors filed 12 separate appeals that were consolidated into this single appeal before us now.

### **C. The Proposed Settlement**

The settlement has three components: (1) an uncapped Monetary Award Fund that provides compensation for retired players who submit proof of certain diagnoses; (2) a \$75 million Baseline Assessment Program that provides eligible retired players with free baseline assessment examinations of their objective neurological functioning; and (3) a



\$10 million Education Fund to instruct football players about injury prevention.

1. *Monetary Award Fund*

Under the settlement, retired players or their beneficiaries are compensated for developing one of several neurocognitive and neuromuscular impairments or “Qualifying Diagnoses.” By “retired players,” we mean players who retired from playing NFL football before the preliminary approval of the class settlement on July 7, 2014. The settlement recognizes six Qualifying Diagnoses: (1) Level 1.5 Neurocognitive Impairment; (2) Level 2 Neurocognitive Impairment;<sup>3</sup> (3) Alzheimer’s Disease; (4) Parkinson’s Disease; (5) Amyotrophic Lateral Sclerosis (“ALS”); and (6) Death with CTE provided the player died before final approval of the settlement on April 22, 2015. A retired player does not need to show that his time in the NFL caused the onset of the Qualifying Diagnosis.

A Qualifying Diagnosis entitles a retired player to a maximum monetary award:

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<sup>3</sup> Levels 1.5 and 2 Neurocognitive Impairment require a decline in cognitive function and a loss of functional capabilities, such as the ability to hold a job, and correspond with clinical definitions of mild and moderate dementia.

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<b>Qualifying Diagnosis</b>	<b>Maximum Award</b>
Level 1.5 Neurocognitive Impairment	\$1.5 Million
Level 2 Neurocognitive Impairment	\$3 Million
Parkinson's Disease	\$3.5 Million
Alzheimer's Disease	\$3.5 Million
Death with CTE	\$4 Million
ALS	\$5 Million

This award is subject to several offsets, that is, awards decrease: (1) as the age at which a retired player is diagnosed increases; (2) if the retired player played fewer than five eligible seasons; (3) if the player did not have a baseline assessment examination; and (4) if the player suffered a severe traumatic brain injury or stroke unrelated to NFL play.

To collect from the Fund, a class member must register with the claims administrator within 180 days of receiving notice that the settlement has been approved. This deadline can be excused for good cause. The class member then must submit a claims package to the administrator no later than two years after the date of the Qualifying Diagnosis or within two years after the supplemental notice is posted on the settlement website, whichever is later. This

deadline can be excused for substantial hardship. The claims package must include a certification by the diagnosing physician and supporting medical records. The claims administrator will notify the class member within 60 days if he is entitled to an award. The class member, class counsel, and the NFL have the right to appeal an award determination. To do so, a class member must submit a \$1,000 fee, which is refunded if the appeal is successful and can be waived for financial hardship. A fee is not required for the NFL and class counsel to appeal, though the NFL must act in good faith when appealing award determinations.

The Monetary Award Fund is uncapped and will remain in place for 65 years. Every retired player who timely registers and qualifies during the lifespan of the settlement will receive an award. If, after receiving an initial award, a retired player receives a more serious Qualifying Diagnosis, he may receive a supplemental award.

## 2. *Baseline Assessment Program*

Any retired player who has played at least half of an eligible season can receive a baseline assessment examination. It consists of a neurological examination performed by credentialed and licensed physicians selected by a court-appointed

administrator. Qualified providers may diagnose retired players with Level 1, 1.5, or 2 Neurocognitive Impairment. The results of the examinations can also be compared with any future tests to determine whether a retired player's cognitive abilities have deteriorated.

Baseline Assessment Program funds will also provide Baseline Assessment Program Supplemental Benefits. Retired players diagnosed with Level 1 Neurocognitive Impairment—evidencing some objective decline in cognitive function but not yet early dementia—are eligible to receive medical benefits, including further testing, treatment, counseling, and pharmaceutical coverage.

The Baseline Assessment Program lasts for 10 years. All retired players who seek and are eligible for a baseline assessment examination receive one notwithstanding the \$75 million cap. Every eligible retired player age 43 or over must take a baseline assessment examination within two years of the Program's start-up. Every eligible retired player younger than age 43 must do so before the end of the program or by his 45th birthday, whichever comes first.

### 3. *Education Fund*

The Education Fund is a \$10 million fund to promote safety and injury prevention in football. The purpose is to promote safety-related initiatives in youth football and educate retired players about their medical and disability benefits under the CBA. Class counsel and the NFL, with input from the retired players, will propose specific educational initiatives for the District Court's approval.

4. *The Proposed Class*

All living NFL football players who retired from playing professional football before July 7, 2014, as well as their representative claimants and derivative claimants, comprise the proposed class. Representative claimants are those duly authorized by law to assert the claims of deceased, legally incapacitated, or incompetent retired players. Derivative claimants are those, such as parents, spouses, or dependent children, who have some legal right to the income of retired players. Even though the proposed class consists of more than just retired players, we use the terms "class members" and "retired players" interchangeably.

The proposed class contains two subclasses based on a retired players' injuries as of the preliminary approval date. Subclass 1 consists of retired players who were not diagnosed with a

Qualifying Diagnosis prior to July 7, 2014, and their representative and derivative claimants. Put another way, subclass 1 includes retired players who have no currently known injuries that would be compensated under the settlement. Subclass 2 consists of retired players who were diagnosed with a Qualifying Diagnosis prior to July 7, 2014, and their representative claimants and derivative claimants. Translated, subclass 2 includes retired players who are currently injured and will receive an immediate monetary award under the settlement. The NFL estimates that the total population of retired players is 21,070. Of this, 28% are expected to be diagnosed with a compensable disease. The remaining 72% are not expected to develop a compensable disease during their lifetime.

Class members release all claims and actions against the NFL “arising out of, or relating to, head, brain and/or cognitive injury, as well as any injuries arising out of, or relating to, concussions and/or sub-concussive events,” including claims relating to CTE. The releases do not compromise the benefits that retired players are entitled to receive under the CBAs, nor do they compromise their retirement benefits, disability benefits, and health insurance.

Of the over 20,000 estimated class members (the NFL states that the number exceeds 21,000),

234 initially asked to opt out from the settlement and 205 class members joined 83 written objections submitted to the District Court. Before the fairness hearing, 26 of the 234 opt-outs sought readmission to the class. After the District Court granted final approval, another 6 opt-outs sought readmission. This leaves 202 current opt-outs, of which class counsel notes only 169 were timely filed.

### **III. JURISDICTION & STANDARD OF REVIEW**

The District Court had jurisdiction over this class action settlement under 28 U.S.C. § 1332(d)(2).<sup>4</sup> We have appellate jurisdiction to review its final order approving the settlement and certifying the class under 28 U.S.C. § 1291.

We review the decision to certify a class and approve a classwide settlement for abuse of discretion. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 185 n. 1 (3d Cir. 2015); *In re Cendant Corp.*

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<sup>4</sup> One objector argues that the District Court failed to determine whether it had subject matter jurisdiction over the class action because it never decided the NFL's motion to dismiss. But the NFL's motion to dismiss would have no effect on subject matter jurisdiction because the plaintiffs properly alleged jurisdiction based on the diversity of the parties and the amount in controversy. 28 U.S.C. § 1332(d)(2). There was thus no error in declining to decide the motion to dismiss.

*Litig.*, 264 F.3d 201, 231 (3d Cir. 2001). It exists “if the district court’s decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.” *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008) (internal quotation omitted).

This appeal principally presents two questions—whether the District Court abused its discretion (1) in certifying the class of retired NFL players and (2) in concluding that the terms of the settlement were fair, reasonable, and adequate. Objectors (95 in all) have filed 11 separate briefs totaling some 500 pages addressing these questions. We address each of these arguments, but refer to objectors collectively throughout our opinion rather than cross-referencing particular objectors with particular arguments.

#### **IV. CLASS CERTIFICATION**

Rule 23(a) lays out four threshold requirements for certification of a class action: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a). “The parties seeking class certification bear the burden of establishing by a preponderance of the evidence that the requirements of Rule 23(a) have been met.” *In re Cmty. Bank of N. Virginia Mortg.*



*Lending Practices Litig.*, 795 F.3d 380, 391 (3d Cir. 2015). If that occurs, we consider whether the class meets the requirements of one of three categories of class actions in Rule 23(b). This is a Rule 23(b)(3) class action under which we consider whether (1) common questions predominate over any questions affecting only individual class members (predominance) and (2) class resolution is superior to other available methods to decide the controversy (superiority). Fed. R. Civ. P. 23(b)(3).

#### **A. Numerosity**

Rule 23(a)(1) requires that a class be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). There is no magic number of class members needed for a suit to proceed as a class action. We have set a rough guidepost in our precedents, however, and stated that numerosity is generally satisfied if there are more than 40 class members. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012) (citing *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir.2001)). The District Court found that a class of 20,000 retired players would be sufficient for numerosity. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 371. No objector challenges this finding on appeal.

## **B. Commonality**

“A putative class satisfies Rule 23(a)’s commonality requirement if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.” *Rodriguez v. Nat’l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013) (internal quotation marks omitted). “Their claims must depend upon a common contention ... that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2545 (2011). Meeting this requirement is easy enough: “[W]e have acknowledged commonality to be present even when not all members of the plaintiff class suffered an actual injury, when class members did not have identical claims, and, most dramatically, when some members’ claims were arguably not even viable.” *In re Cmty. Bank*, 795 F.3d at 397 (internal citations omitted).

The District Court concluded that “critical factual questions” were common to all class members, including “whether the NFL Parties knew and suppressed information about the risks of concussive hits, as well as causation questions about whether concussive hits increase the likelihood that

[r]etired [p]layers will develop conditions that lead to Qualifying Diagnoses.” *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 371. It also found common legal questions, including the “nature and extent of any duty owed to [r]etired [p]layers by the NFL Parties, and whether [labor] preemption, workers’ compensation, or some affirmative defense would bar their claims.” *Id.*

Some objectors argue that commonality was lacking. Citing the Supreme Court’s decision in *Wal-Mart*, they contend that the retired players do not share common issues of fact or law because they were injured in different ways and over different periods of time. For example, the claims of a lineman who played fifteen seasons in the NFL, so goes the argument, will share little in common with those of a back-up quarterback who played two seasons.

These objections miss the mark. In *Wal-Mart*, the Supreme Court held that commonality was lacking when a putative class of 1.5 million female employees alleged sex discrimination by their local supervisors. 131 S.Ct. at 2547. The local supervisors had discretion in making employment decisions and the class of female employees faced different managers making different employment decisions (some presumably nondiscriminatory). *Id.* The proposed class thus could not identify common

questions capable of classwide resolution. *Id.* at 2553–55.

The concerns in *Wal-Mart* do not apply here because the NFL Parties allegedly injured retired players through the same course of conduct. *See In re Cmty. Bank*, 795 F.3d at 399 (“Unlike the *Wal-Mart* plaintiffs, the Plaintiffs in this case have alleged that the class was subjected to the same kind of illegal conduct by the same entities, and that class members were harmed in the same way, albeit to potentially different extents.”). Even if players’ particular injuries are unique, their negligence and fraud claims still depend on the same common questions regarding the NFL’s conduct. For example, when did the NFL know about the risks of concussion? What did it do to protect players? Did the League conceal the risks of head injuries? These questions are common to the class and capable of classwide resolution.

### **C. Typicality**

Rule 23(a)(3) requires that the class representatives’ claims be “typical of the claims ... of the class.” Fed. R. Civ. P. 23(a)(3). This “ensures the interests of the class and the class representatives are aligned ‘so that the latter will work to benefit the entire class through the pursuit of their own goals.’”

*Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182–83 (3d Cir. 2001) (quoting *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 141 (3d Cir. 1998)). We also have set a “low threshold” for typicality. *Id.* at 183. “ ‘Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories’ or where the claim arises from the same practice or course of conduct.” *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994)) (alteration omitted).

The class representatives, Shawn Wooden and Kevin Turner, were named in the class action complaint and were selected by class counsel.<sup>5</sup> Wooden is a retired player with no Qualifying Diagnosis. Like other retired players without a current diagnosis, he sought a baseline assessment examination to determine whether he had shown signs of cognitive decline and, in the unfortunate event that he developed one of the Qualifying Diagnoses, he would seek a monetary award. Turner

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<sup>5</sup> In September 2013, one month after the parties signed the settlement term sheet, the initial subclass representative for players with no currently known injuries, Corey Swinson, passed away. One month later, Wooden took Swinson’s place.

was a retired player living with ALS.<sup>6</sup> Like other retired players with currently known injuries, he sought a monetary award. The District Court concluded that the claims of Wooden and Turner were “typical of those they represent.” *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 372. We agree.

Some objectors argue that the claims of the class representatives are not typical because of factual differences between the representatives and other class members, including the number of seasons played and injuries caused by head trauma. But class members need not “share identical claims,” and “cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims.” *Baby Neal*, 43 F.3d at 56, 58. What matters is that Wooden and Turner seek recovery under the same legal theories for the same wrongful conduct as the subclasses they represent. Even if the class representatives’ injuries

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<sup>6</sup> We note that Kevin Turner passed away on March 24, 2016. Class counsel has moved to substitute as a party Turner’s father, Paul Raymond Turner, a motion we will grant. *See* Fed. R. App. P. 43(a)(1). For purposes of deciding this appeal, it is unnecessary to substitute a new class member as subclass representative and we shall continue to refer to Kevin Turner as the subclass representative in this opinion.

are unique to their time in football, the NFL's alleged fraudulent concealment of the risks of head injuries is the same.

#### **D. Adequacy of Representation**

Rule 23(a)(4) requires class representatives to “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). It tests the qualifications of class counsel and the class representatives. It also aims to root out conflicts of interest within the class to ensure that all class members are fairly represented in the negotiations. Several objectors challenge the District Court’s adequacy-of-representation finding, but we conclude that it was not an abuse of discretion.

##### *1. Class Counsel*

When examining settlement classes, we “have emphasized the special need to assure that class counsel: (1) possessed adequate experience; (2) vigorously prosecuted the action; and (3) acted at arm’s length from the defendant.” *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) (“*GM Trucks*”). Rule 23(g) also sets out a non-exhaustive list of factors for courts to consider when appointing class counsel. They include counsel’s work in the pending class

action, experience in handling class actions or other complex litigation, knowledge of the applicable law, and the resources available for representing the class. Fed. R. Civ. P. 23(g).

When class counsel and the NFL began mediation, there was only one proposed class of all retired players. Class counsel, in consultation with members of the Steering Committee and the Executive Committee, decided early in the negotiations that creating two separate subclasses “would best serve all [c]lass [m]embers’ interests and meet with Due Process.” To that end, class counsel designated lawyers from the Steering Committee to serve as subclass counsel.

In its final certification and approval order, the District Court found that class counsel and subclass counsel were experienced in litigating mass torts and personal injury actions, vigorously prosecuted the action at arm’s length from the NFL, and were able to extract substantial concessions in the process. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 373. The Court thus concluded that class counsel adequately protected the interests of the class. *Id.* No objectors challenge the experience or qualifications of class and subclass counsel. They do make two related arguments regarding the adequacy of the subclass



representation, though neither convinces us that the District Court abused its discretion.

Objectors first assert that the procedure for selecting subclass counsel did not ensure adequate representation because subclass counsel came from the team of lawyers already negotiating with the NFL. We agree that class counsel could have gone to the District Court and asked it to appoint counsel from the outside. Yet objectors point us to no precedent requiring such a procedure. Moreover, the District Court assured itself that counsel were adequate representatives. They were selected early in the negotiations, had already been approved by the District Court to serve on the Steering Committee, and were by all accounts active participants in the settlement negotiations. In these circumstances, the District Court did not abuse its discretion in accepting subclass counsel as adequate representatives.

Objectors next press that the subclass counsel for future claimants, Arnold Levin, was not an adequate representative, as he represented nine players who alleged current symptoms in two lawsuits against the NFL. Levin disclosed to the District Court in an application for the Steering Committee that he has agreed to fees in these cases on a one-third contingency basis. Objectors argue to

us that Levin’s representation of these players created a conflict with his duties to represent the subclass of retired players with no Qualifying Diagnoses. Yet objectors failed to raise this contention in the District Court and did not meaningfully assert it on appeal until their reply brief.<sup>7</sup> If they had raised concerns over Levin’s representation of other players, we have no doubt the District Court could ably have addressed this argument. This is part of the reason why we do not normally consider arguments not raised in the District Court—even in class actions—and deem them waived. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 261 (3d Cir. 2009) (“Absent exceptional circumstances, this Court will not consider issues raised for the first time on appeal.”) (quoting *Del. Nation v. Pennsylvania*, 446 F.3d 410, 416 (3d Cir. 2006)).

That said, some courts have relaxed the standards for waiver in class actions. *See, e.g., In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 714 (7th

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<sup>7</sup> Alongside the reply brief, objectors also filed a motion asking that we take judicial notice of complaints filed by retired players where Levin was counsel of record. The motion for judicial notice is unnecessary. The complaints were part of the MDL proceeding and were accessible on the MDL docket. Even if not in the joint appendix, they are part of the record on appeal. *See* Fed. R. App. P. 10 (record on appeal includes papers filed in the District Court).

Cir. 2015) (“Class members were not obliged, on penalty of waiver, to search on their own for a conflict of interest on the part of a class representative.”). We agree that the usual waiver rules should not be applied mechanically in class actions. We have an independent obligation to protect the interests of the class, and in many instances class members are far removed from the litigation and lack the information and incentive to object. *See GM Trucks*, 55 F.3d at 784 (“[T]he court plays the important role of protector of the absentees’ interests, in a sort of fiduciary capacity, by approving appropriate representative plaintiffs and class counsel.”). Accordingly, we retain discretion to consider arguments that go to the heart of the class settlement’s adequacy and fairness. Out of caution, we decline to apply the penalty of waiver in this instance.

Turning to the merits, we do not see how representation by Levin created a conflict of interest. He disclosed his representation of the players to the District Court, and it was still satisfied that he was an adequate representative. Beyond this, there is no evidence in the record before us that the players named in the complaints have a current Qualifying Diagnosis. Rather, they simply allege current symptoms that are not themselves Qualifying Diagnoses, including memory loss, headaches, mood

swings, and sensitivity to light. Many players without a current Qualifying Diagnosis presumably have similar symptoms. Accordingly, this is not a situation where subclass counsel has clients in both subclasses and there is a risk of a conflict.

## 2. *Class Representatives*

A class representative must represent a class capably and diligently. “[A] minimal degree of knowledge” about the litigation is adequate. *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) (internal quotation marks omitted). The District Court found that the class representatives ably discharged their duties by closely following the litigation, authorizing the filing of the Class Action Complaint, and approving the final settlement. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 375.

Some objectors argue that the Court abused its discretion in approving Wooden as representative for the subclass of players with no Qualifying Diagnoses because he did not claim the risk of developing CTE. This is incorrect. In the Class Action Complaint Wooden alleged that he is “at increased risk of latent brain injuries caused by ... repeated traumatic head impacts.” *Id.* (citing Master Administrative Class Action Complaint ¶ 7). This allegation covers the risk

of CTE, which is associated with repeated head impacts. Moreover, what matters more than the words Wooden used to describe his current health are the interests he would have in representing the subclass. Given what we know about CTE, Wooden, and all retired NFL players for that matter, are at risk of developing the disease and would have an interest in compensation for CTE in the settlement.<sup>8</sup>

### 3. *Conflicts of Interest*

“The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). The “linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class.” *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012). But not all intra-class conflicts are created equal. If they concern “specific issues in controversy,” they are called “fundamental.” *Id.* at 184 (quoting *Newberg on Class Actions* § 3:26 (4th ed.2002)). This hits the heart of Rule 23(a)(4) and will defeat a finding of adequacy. *Id.*

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<sup>8</sup> Objectors also argue in passing that the other subclass representative, Turner, failed to allege a risk of CTE. This argument fails for the same reason that it failed with respect to Wooden—all players are at risk of CTE.

A recurring fundamental conflict is the divide between present and future injury plaintiffs identified in *Amchem*. Counsel in that case sought to approve a class settlement and certify a nationwide class of persons—numbering between 250,000 and 2,000,000—who shared an unfortunate fact in common: they were all exposed to asbestos-containing products manufactured by 20 companies. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). The class settlement purported to resolve the claims of persons who had already sustained injuries as a result of asbestos exposure (those with present injuries) and those who had been exposed to asbestos but had not yet developed any injury (those with future injuries, if any injury at all). The District Court approved the settlement and certified the class, but we reversed because, among other things, conflicts of interest within the class precluded a finding of adequacy. Judge Becker explained that the “most salient” conflict of interest was between those with present and future injuries:

As rational actors, those who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of

claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Finally, because of the difficulty in forecasting what their futures hold, they would probably desire a delayed opt out....

In contrast, those who are currently injured would rationally want to maximize current payouts. Furthermore, currently injured plaintiffs would care little about inflation-protection. The delayed opt out desired by futures plaintiffs would also be of little interest to the presently injured; indeed, their interests are against such an opt out as the more

people locked into the settlement, the more likely it is to survive. In sum, presently injured class representatives cannot adequately represent the futures plaintiffs' interests and vice versa.

*Id.* at 630–31 (internal footnote omitted). The Supreme Court affirmed on this point and agreed that “the interests of those within the single class are not aligned.” *Amchem*, 521 U.S. at 626.

To overcome a conflict of interest within a proposed class, there must be “structural protections to assure that differently situated plaintiffs negotiate for their own unique interests.” *Georgine*, 83 F.3d at 631. A common structural protection is the creation of discrete subclasses, each with its own independent representation. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) (“[A] class divided between holders of present and future claims ... requires division into homogenous subclasses ... with separate representation to eliminate conflicting interests of counsel.”).<sup>9</sup>

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<sup>9</sup> Amicus Public Citizen, Inc. argues that the District Court should have created additional subclasses to represent each of the five Qualifying Diagnoses, the mood and behavior symptoms associated with CTE, and spouses of retired players with consortium claims. We agree with the District Court that additional subclasses were unnecessary and risked slowing or



The District Court found no fundamental conflict of interest in this class. *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 376. It explained the incentives of class members were aligned because they “allegedly were injured by the same scheme: the NFL ... negligently and fraudulently de-emphasized the medical effects of concussions to keep [r]etired [p]layers in games.” *Id.* Moreover, the two subclasses of players guarded against any *Amchem* conflict of interest. *Id.* Turner, the representative for those with current injuries, “is interested in immediately obtaining the greatest possible compensation for his injuries and symptoms.” *Id.* Wooden, the representative for those who may develop injuries that manifest in the future, “is interested in monitoring his symptoms, guaranteeing that generous compensation will be available far into the future, and ensuring an agreement that keeps pace with scientific advances ...[while] compensat[ing] as many conditions as possible.” *Id.* The District Court also cited other structural protections, including uncapped and inflation-adjusted monetary awards, the guarantee of a baseline assessment examination, and the presence of a mediator and special master. *Id.* at 376–77.

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even halting the settlement negotiations. *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 379.

The Court's analysis was on point. Some objectors argue that this class action suffers from a conflict of interest between present and future injury plaintiffs. But simply put, this case is not *Amchem*. The most important distinction is that class counsel here took *Amchem* into account by using the subclass structure to protect the sometimes divergent interests of the retired players. The subclasses were represented in the negotiations by separate class representatives with separate counsel, and, as discussed, each was an adequate representative. This alone is a significant structural protection for the class that weighs in favor of finding adequacy.

Moreover, the terms of the settlement reflect that the interests of current and future claimants were represented in the negotiations. The Monetary Award Fund will start paying out claims immediately, providing relief to those currently living with injuries. The Fund is uncapped and inflation-adjusted, protecting the interests of those who worry about developing injuries in the future. The NFL and class counsel must meet every ten years and confer in good faith about "prospective modifications to the definitions of Qualifying Diagnoses and/or the protocols for making Qualifying Diagnoses, in light of generally accepted advances in medical science." This allows the settlement to keep pace with changing science regarding the existing

Qualifying Diagnoses. As observed in *Georgine*, these are the sorts of settlement terms that rational actors from both subclasses would be interested in when negotiating the resolution of their claims.

Finally, one of the principal concerns driving *Amchem*'s strict analysis of adequacy of representation was the worry that persons with a nebulous risk of developing injuries would have little or no reason to protect their rights and interests in the settlement. We have evidence that in this case the concern is misplaced because many retired players with no currently compensable injuries have already taken significant steps to protect their rights and interests. Of the 5,000 players who sued the NFL in the MDL proceedings, class counsel estimated that 3,900 have no current Qualifying Diagnosis. These 3,900 players are represented, in turn, by approximately 300 lawyers. And with so many sets of eyes reviewing the terms of the settlement, the overwhelming majority of retired players elected to stay in the class and benefit from the settlement. We thus have little problem saying that their interests were adequately represented.

Objectors further claim that the settlement's treatment of CTE demonstrates a fundamental conflict of interest between present and future injury class members. Under the settlement, retired players

who died before final approval of the settlement and received a post-mortem CTE diagnosis are entitled to an award. For any player who died after final approval, a post-mortem CTE diagnosis is not compensable. Objectors cite this difference in recovery as evidence that the subclass of players with a Qualifying Diagnosis may have bargained away the CTE claims of other players. *GM Trucks*, 55 F.3d at 797 (“[A] settlement that offers considerably more value to one class of plaintiffs than to another may be trading the claims of the latter group away in order to enrich the former group.”).

This argument misunderstands the role of the monetary award for CTE. As the District Court noted in discussing the fairness of the settlement, the monetary award “serves as a proxy for Qualifying Diagnoses deceased [r]etired [p]layers could have received while living.” *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 401–02 (emphasis in original). Retired players who were living with symptoms associated with one of the other Qualifying Diagnoses, but died before approval of the settlement, may not have had sufficient notice of the need to be diagnosed. To provide some compensation to these players, the parties created an award for the post-mortem diagnosis of CTE. The NFL’s own estimate is that 46 players out of a class

exceeding at least 20,000 will fall into this category and will receive an average award, after offsets, of \$1,910,000. The monetary award for CTE is thus an attempt to compensate deceased players who would otherwise be unable to get the benefits available to the class going forward. It is not evidence of a debilitating conflict of interest in the class settlement.<sup>10</sup>

### **E. Predominance**

Turning to the additional requirements for certifying a class action under Rule 23(b)(3), the class may be maintained if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). Predominance “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem*, 521 U.S. at 623. “We have previously noted that the Rule 23(b)(3) predominance requirement, which is far more demanding,

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<sup>10</sup> Some objectors claim that the District Court erred in denying their motion to intervene in May 2014. In the class-action context, potential interveners must overcome a presumption of adequate representation and “must ordinarily demonstrate adversity of interest, collusion, or nonfeasance on the part of a party to the suit.” *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 315 (3d Cir. 2005). Objectors have not overcome the presumption in this case because, as just explained, the class representatives and class counsel were adequate.

incorporates the Rule 23(a) commonality requirement.” *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004) (citing *In re LifeUSA Holding, Inc.*, 242 F.3d 136, 144 (3d Cir. 2001)). We are nonetheless “more inclined to find the predominance test met in the settlement context.” *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 304 n. 29 (3d Cir. 2011) (en banc) (internal quotation marks and alteration omitted).

The District Court found that this class action presented predominate factual questions regarding the NFL’s knowledge and conduct as well as common scientific questions regarding causation. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 380–81. The negligence claims “depend on establishing that the NFL ... knew of the dangers of concussive hits, yet failed to modify the rules of NFL Football to mitigate them, or even to warn [r]etired [p]layers that they were risking serious cognitive injury by continuing to play.” *Id.* at 380. The fraud claims “suggest a similarly far-reaching scheme, alleging that the ... MTBI Committee repeatedly obfuscated the link between football play and head trauma.” *Id.* We agree with the District Court that predominance is satisfied in this case.

Objectors argue that damage claims in a mass-tort class action such as this are too individualized to

satisfy the requirements of predominance. They cite to *Amchem* where, as we have discussed, a nationwide class of persons exposed to asbestos could not meet the predominance requirement. 521 U.S. at 624. But *Amchem* itself warned that it does not mean that a mass tort case will never clear the hurdle of predominance. *Id.* at 625 (“Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement.”). Moreover, this class of retired NFL players does not present the same obstacles for predominance as the *Amchem* class of hundreds of thousands (maybe millions) of persons exposed to asbestos.

#### **F. Superiority**

Rule 23(b)(3)’s superiority requirement “asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.” *Warfarin*, 391 F.3d at 533–34 (internal quotation marks omitted). We consider the class members’ interests in individually controlling litigation, the extent and nature of any litigation, the desirability or undesirability of concentrating the litigation, and the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)–(D). The District Court found superiority satisfied because “the [s]ettlement avoids

thousands of duplicative lawsuits and enables fast processing of a multitude of claims.” *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 382.

No objectors challenge this conclusion, and we have no disagreements with the District Court’s analysis. At the time the settlement was reached, 5,000 players had filed over 300 lawsuits in the MDL. Assuming the retired players’ claims survived the NFL’s motions to dismiss, the resolution of so many individual lawsuits would have presented serious challenges for the District Court. Given our experience with similar MDLs, we expect the proceedings would result in years of costly litigation and multiple appeals, all the while delaying any potential recovery for retired players coping with serious health challenges.

## **V. CLASS NOTICE**

When the District Court preliminarily certified the class and approved the settlement in July 2014, it directed that notice be given to all potential class members. Notice “is designed to summarize the litigation and the settlement and to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation.” *Prudential*, 148



F.3d at 327 (internal quotation marks omitted). “Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class.” *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013).

In our case, the notice informed retired players that a settlement was reached and explained what relief the players might be eligible for. The notice also outlined the rights of players to object to the settlement and potentially opt out. If a retired player chose to opt out, he would not benefit from the settlement but would not release his claims against the NFL. Approximately 1% of retired players filed objections to the settlement and another 1% elected to opt out.<sup>11</sup>

For a class certified under Rule 23(b)(3), “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can

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<sup>11</sup> Some argue that the District Court abused its discretion in striking as untimely certain objections to the settlement. But these actions were within the Court’s broad discretion to manage the proceedings in a class action. *Hydrogen Peroxide*, 552 F.3d at 310.

be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). In addition to the requirements of Rule 23, due process further requires that notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The District Court found that the content of the class notice and its distribution to the class satisfied Rule 23 and due process. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 383. One objector argues that the notice materials were inadequate because they insufficiently disclosed that monetary awards for players are subject to reduction on account of applicable Medicare and Medicaid liens against a player’s assets. But the Long-Form Notice did discuss possible reductions based on “[a]ny legally enforceable liens on the award.” *Id.* at 384 n. 43 (internal quotation marks omitted). The Court found this language sufficient because the notice alerts class members to the possibility of lien reduction and refers them to the settlement where this topic is discussed in detail. *Id.* We agree.

## **VI. CLASS SETTLEMENT**

A class action cannot be settled without court approval based on a determination that the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). The inquiry into the settlement's fairness under Rule 23(e) "protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." *Amchem*, 521 U.S. at 623 (internal quotation marks omitted).

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Prudential*, 148 F.3d at 299 (internal quotation marks omitted). It "bear[s] the important responsibility of protecting absent class members, 'which is executed by the court's assuring that the settlement represents adequate compensation for the release of the class claims.'" *In re Pet Food Prods.*, 629 F.3d 333, 349 (3d Cir. 2010) (quoting *GM Trucks*, 55 F.3d at 805). In cases of settlement classes, where district courts are certifying a class and approving a settlement in tandem, they should be "even 'more scrupulous than usual' when examining the fairness of the proposed settlement." *Warfarin*, 391 F.3d at 534 (quoting *GM Trucks*, 55 F.3d at 805).

**A. Presumption of Fairness**

We apply an initial presumption of fairness in reviewing a class settlement when: “(1) the negotiations occurred at arms length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.” *Cendant*, 264 F.3d at 232 n. 18. The District Court found each of these elements satisfied and applied the presumption. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 387–88. Objectors argue that the presumption should not have applied at all because class counsel did not conduct formal discovery into the fraud and negligence claims against the NFL before reaching the settlement. We conclude that the Court did not abuse its discretion in finding class counsel’s informal discovery to be sufficient.

By the time of the settlement, class counsel had undertaken significant informal discovery. For instance, they had obtained a comprehensive database of the claims and symptoms of retired players and had enlisted the assistance of medical experts. They also had a grasp of the legal hurdles that the retired players would need to clear in order to succeed on their fraud and negligence claims, in particular the potentially dispositive issue of federal

labor law preemption. Thus, in negotiations with the NFL class counsel “were aware of the strengths and weaknesses of their case.” *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 387. To the extent objectors ask us to require formal discovery before presuming that a settlement is fair, we decline the invitation. In some cases, informal discovery will be enough for class counsel to assess the value of the class’ claims and negotiate a settlement that provides fair compensation. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 267 (E.D. Pa. 2012) (applying presumption in part because, “although no formal discovery was conducted..., [class counsel] conducted informal discovery, including, *inter alia*, independently investigating the merits”).

## **B. Girsh & Prudential Factors**

In *Girsh v. Jepson*, we noted nine factors to be considered when determining the fairness of a proposed settlement:

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the risks of establishing liability;
- (5) the

risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

521 F.2d 153, 157 (3d Cir. 1975) (internal quotation marks and ellipses omitted). “The settling parties bear the burden of proving that the *Girsh* factors weigh in favor of approval of the settlement.” *In re Pet Food Prods.*, 629 F.3d at 350. A district court’s findings under the *Girsh* test are those of fact. Unless clearly erroneous, they are upheld. *Id.*

Later, in *Prudential Insurance* we held that, because of a “sea-change in the nature of class actions,” it might be useful to expand the *Girsh* factors to include several permissive and non-exhaustive factors:

the maturity of the underlying substantive issues, as measured by experience in adjudicating individual

actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

148 F.3d at 323. “Unlike the *Girsh* factors, each of which the district court must consider before approving a class settlement, the *Prudential* considerations are just that, prudential.” *In re Baby Prods.*, 708 F.3d at 174.

The District Court in our case went through the *Girsh* factors and the relevant *Prudential* factors

in great detail before concluding that the terms of the settlement were fair, reasonable, and adequate. *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 388–96. Objectors try to challenge the District Court's analysis in several ways, but none convinces us.

1. *Complexity, Expense, and Likely Duration of the Litigation*

“The first factor ‘captures the probable costs, in both time and money, of continued litigation.’” *Warfarin*, 391 F.3d at 535–36 (quoting *Cendant*, 264 F.3d at 233). The District Court concluded that the probable costs of continued litigation in the MDL were significant and that this factor weighed in favor of approving the settlement. *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 388–89. Some objectors assert that the District Court overestimated the costs of continued litigation because the negligence and fraud claims were “straightforward.” This is not the case. Over 5,000 retired NFL players in the MDL alleged a multi-decade fraud by the NFL, and litigating these claims would have been an enormous undertaking. The discovery needed to prove the NFL's fraudulent concealment of the risks of concussions was extensive. The District Court would then resolve many issues of causation and medical science.



Finally, if the cases did not settle or were not dismissed, individual suits would be remanded to district courts throughout the country for trial. We agree with the District Court that the expense of this process weighs strongly in the settlement's favor.

2. *Reaction of the Class to the Settlement*

“The second *Girsh* factor ‘attempts to gauge whether members of the class support the settlement.’” *Warfarin*, 391 F.3d at 536 (quoting *Prudential*, 148 F.3d at 318). As noted, the case began with a class of approximately 20,000 retired players, of which 5,000 are currently represented by counsel in the MDL proceedings. Notice of the settlement reached an estimated 90% of those players through direct mail and secondary publications (in addition to the extensive national media coverage of this case). As of 10 days before the fairness hearing, more than 5,200 class members had signed up to receive additional information about the settlement and the settlement website had more than 64,000 unique visitors. With all this attention, only approximately 1% of class members objected and approximately 1% of class members opted out. We agree with the District Court that these figures weigh in favor of settlement approval. *In re Nat'l*

*Football League Players' Concussion Injury Litig.*,  
307 F.R.D. at 389.

Some note that the percentage of objectors was even lower in *GM Trucks*, a case where we declined to approve a settlement. There, “[o]f approximately 5.7 million class members, 6,450 owners objected and 5,203 opted out.” *GM Trucks*, 55 F.3d at 813 n. 32. But in *GM* we looked past the low objection rate because there were “other indications that the class reaction to the suit was quite negative,” including our concern that the passive victims of a product defect lacked “adequate interest and information to voice objections.” *Id.* at 813. Those concerns are not present here. By the time of the settlement, many of the retired players in this class already had counsel and had sued the NFL, suggesting that their claims were valuable enough to pursue in court and that the players were informed enough to evaluate the settlement.<sup>12</sup>

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<sup>12</sup> Others argue that we cannot rely on the reaction of the class because the class notice was “problematic.” They claim that the notice may have misled class members about compensation for those with a post-mortem CTE diagnosis. But the District Court explained that the class notice was clear that only some cases of CTE would be compensated. *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 383–84.

3. *Stage of the Proceedings and Amount of Discovery Completed*

“The third *Girsh* factor ‘captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating.’” *Warfarin*, 391 F.3d at 537 (quoting *Cendant*, 264 F.3d at 235).

The District Court concluded that class counsel adequately evaluated the merits of the preemption and causation issues through informal discovery, and, after ten months of settlement negotiations, the stage of the proceedings weighed in favor of settlement approval. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 390. Objectors claim that the lack of formal discovery in this matter should have weighed more heavily against settlement. As with the presumption of fairness, formal discovery is not a requirement for the third *Girsh* factor. What matters is not the amount or type of discovery class counsel pursued, but whether they had developed enough information about the case to appreciate sufficiently the value of the claims. Moreover, requiring parties to conduct formal discovery before reaching a proposed class settlement would take a valuable bargaining chip—

the costs of formal discovery itself—off the table during negotiations. This could deter the early settlement of disputes.

4. *Risks of Establishing Liability and Damages*

“The fourth and fifth *Girsh* factors survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement.” *Prudential*, 148 F.3d at 319. We concur with the District Court that this factor weighed in favor of settlement because class members “face[d] stiff challenges surmounting the issues of preemption and causation.” *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 391.

To start, if the NFL were to prevail in its motion to dismiss on the issue of federal labor law preemption, “many, if not all,” of the class members’ claims would be dismissed. *Id.* Objectors claim the District Court misjudged the risks of establishing liability and damages on this front. They argue that the NFL’s preemption defense would not apply to all class members because there were no CBAs in effect before 1968 and between 1987 and 1993. But even if there were a small subset of players unaffected by

the preemption defense, the defense still had the capability of denying relief to the majority of class members and this weighs in favor of approving the settlement.

As for causation, the District Court noted that retired players would need to show both general causation (that repetitive head trauma is capable of causing ALS, Alzheimer's, and the like), and specific causation (that the brain trauma suffered by a particular player in fact caused his specific impairments). *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 393. With general causation, the Court found that even though "[a] consensus is emerging that repetitive mild brain injury is associated with the Qualifying Diagnoses," the "available research is not nearly robust enough to discount the risks" of litigation. *Id.* And specific causation would be even more troublesome because a player would need to distinguish the effect of hits he took during his NFL career from the effect of those he received in high school football, college football, or other contact sports. Objectors argue that the District Court put too little faith in the ability of the class to show causation because the NFL has admitted that concussions can lead to long-term problems and formal discovery could disclose that it fraudulently concealed the risks of concussions. But neither of these points is particularly helpful for

overcoming the general and specific causation hurdles the District Court identified.

5. *Risks of Maintaining Class Action Through Trial*

The District Court found that the likelihood of obtaining and keeping a class certification if the action were to proceed to trial weighed in favor of approving the settlement, but it deserved only minimal consideration. *Id.* at 394. This was correct. In a settlement class, this factor becomes essentially “toothless” because “a district court need not inquire whether the case, if tried, would present intractable management problems[,] ... for the proposal is that there be no trial.” *Prudential*, 148 F.3d at 321 (quoting *Amchem*, 521 U.S. at 620).

6. *Ability of Defendants to Withstand a Greater Judgment*

The seventh *Girsh* factor is most relevant when the defendant’s professed inability to pay is used to justify the amount of the settlement. In the case of the NFL, the District Court found this factor neutral because the NFL did not cite potential financial instability as justification for the settlement’s size. *In re Nat’l Football League Players’*

*Concussion Injury Litig.*, 307 F.R.D. at 394. In fact, it agreed to uncap the Monetary Award Fund and is thus duty bound to pay every compensable claim.

Some objectors complain that the settlement, which may cost the NFL \$1 billion over its lifetime, represents a “fraction of one year’s revenues.” Even so, that does not change the analysis of this *Girsh* factor. Indeed, “in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the ... settlement.” *Sullivan*, 667 F.3d at 323 (quoting *Weber v. Gov’t Empl. Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J.2009)).

7. *Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and All Attendant Risks of Litigation*

In evaluating the eighth and ninth *Girsh* factors, we ask “whether the settlement represents a good value for a weak case or a poor value for a strong case.” *Warfarin*, 391 F.3d at 538. “The factors test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case

went to trial.” *Id.* “[T]he present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.” *Prudential*, 148 F.3d at 322 (quotation omitted).

If the retired players were successful in their fraud and negligence claims, they would likely be entitled to substantial damages awards. But we must take seriously the litigation risks inherent in pressing forward with the case. The NFL’s pending motion to dismiss and other available affirmative defenses could have left retired players to pursue claims in arbitration or with no recovery at all. Hence we agree with the District Court that the settlement represents a fair deal for the class when compared with a risk-adjusted estimate of the value of plaintiffs’ claims. *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. at 395.

Objectors claim that the District Court should have taken into account the costs to class members of the registration and claims administration process because they decrease the “real value” for the class. But these costs are not relevant to the eighth and ninth *Girsh* factors. And in any event the Court assured itself that the claims process was “reasonable in light of the substantial monetary



awards ... and imposes no more requirements than necessary.” *Id.* at 396.<sup>13</sup>

#### 8. *Prudential Factors*

The District Court found that the relevant *Prudential* factors also weighed in favor of approving the settlement. *Id.* at 395–96. No objectors engage with the Court’s findings on this front. But briefly, we agree that class counsel was able to assess the probable outcome of this case, class members had the opportunity to opt out, and the claims process is reasonable. The provision of attorneys’ fees was a neutral factor because class counsel has not yet moved for a fee award.

#### C. **Settlement’s Treatment of CTE**

Objectors raise other arguments about the fairness of the settlement that do not necessarily fall neatly within one of the *Girsh* factors. The most common of those arguments is that the exclusion of CTE as a Qualifying Diagnosis for future claimants is unfair. Objectors note that CTE, the “industrial disease of football,” was at the center of the first concussion lawsuits and argue that claims for CTE

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<sup>13</sup> The argument that the settlement’s failure to compensate CTE makes it a poor value for the class we discuss separately below.

compensation are released by the settlement in return for nothing. The District Court carefully considered this argument before deciding that the settlement's treatment of CTE was reasonable. It made detailed factual findings about the state of medical science regarding CTE—findings that we review for clear error—in support of this conclusion.

The Court first determined that “[t]he study of CTE is nascent, and the symptoms of the disease, if any, are unknown.” *Id.* at 397. Surveying the available medical literature, it found that researchers have not “reliably determined which events make a person more likely to develop CTE” and “have not determined what symptoms individuals with CTE typically suffer from while they are alive.” *Id.* at 398. At the time of the Court's decision, only about 200 brains with CTE had been examined, and the only way currently to diagnose CTE is a post-mortem examination of the subject's brain. *Id.*

Citing studies by Dr. Ann McKee and Dr. Robert Stern, objectors argued that CTE progresses in four stages. In Stages I and II, the disease affects mood and behavior while leaving a retired player's cognitive functions largely intact. Headaches, aggression, depression, explosive outbursts, and suicidal thoughts are common. Later in life, as a

retired player progresses to Stages III and IV, severe memory loss, dementia, loss of attention and concentration, and impairment of language begin to occur. The District Court explained, however, that these studies suffer from several limitations and cannot generate “[p]redictive, generalizable conclusions” about CTE. *Id.* at 399. The studies suffered from a selection bias because they only examined patients with a history of repetitive head injury. They had to rely on reports by family members to reconstruct the symptoms patients showed before death. And they did not take into account other potential risk factors for developing CTE, including a high Body Mass Index (“BMI”), lifestyle change, age, chronic pain, or substance abuse. *Id.* at 398–99.

With this science in mind, the Court next determined that certain symptoms associated with CTE, such as memory loss, executive dysfunction, and difficulty with concentration, are compensated by the existing Qualifying Diagnoses. *Id.* And many persons diagnosed with CTE after death suffered from conditions in life that are compensated, including ALS, Alzheimer’s disease, and Parkinson’s disease. Relying on expert evidence, the Court estimated that “at least 89% of the former NFL players” who were examined in CTE studies would have been compensated under the settlement. *Id.*

To be sure, the mood and behavioral symptoms associated with CTE (aggression, depression, and suicidal thoughts) are not compensated, but this result was reasonable. Mood and behavioral symptoms are common in the general population and have multifactor causation and many other risk factors. *Id.* at 401. Retired players tend to have many of these risk factors, such as sleep apnea, a history of drug and alcohol abuse, a high BMI, chronic pain, and major lifestyle changes. *Id.* Class members would thus “face more difficulty proving that NFL Football caused these mood and behavioral symptoms than they would proving that it caused other symptoms associated with Qualifying Diagnoses.” *Id.*

The District Court also reviewed the monetary award for post-mortem diagnoses of CTE. It found “[s]ound reasons” for limiting the award to players who died before final approval of the settlement. *Id.* As we have summarized elsewhere, this compensation for deceased players is a proxy for Qualifying Diagnoses a retired player could have received while living. After final approval, players “should be well aware of the [s]ettlement and the need to obtain Qualifying Diagnoses,” and “there no longer is a need for Death with CTE to serve as a proxy for Qualifying Diagnoses.” *Id.* at 402.

Finally, the Court addressed the potential development of scientific and medical knowledge of CTE. Objectors argued that the settlement's treatment of CTE was unreasonable in light of the expected developments in CTE research. But even if a diagnosis of CTE during life will be available in the next five or ten years, "the longitudinal epidemiological studies necessary to build a robust clinical profile will still take a considerable amount of time." *Id.* The Court also noted that the settlement has some mechanism for keeping pace with science, in that the parties must meet and confer every ten years in good faith about possible modifications to the definitions of Qualifying Diagnoses. *Id.* at 403.

Objectors have not shown any of the District Court's findings to be clearly erroneous, which exists when, "although there is evidence to support [the finding], the reviewing court, based on the entire evidence, concludes with firm conviction that a mistake has been made." *GM Trucks*, 55 F.3d at 783. Objectors argue that the Court overlooked certain expert evidence, but the record does not support this contention. They also complain that it failed to weigh the credibility of the different experts when the objectors' experts were not paid for their services. We do not see how the Court could have made a proper credibility determination on the basis of written

declarations alone, and, in any event, we have never required those determinations when considering the fairness of a settlement.

Others claim that the expert evidence on CTE should have been analyzed under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which established threshold standards for the admissibility of expert scientific testimony at trial. Objectors failed to present this argument to the District Court, and we deem it waived. *In re Ins. Brokerage*, 579 F.3d at 261. Moreover, we have never held that district courts considering the fairness of a class action settlement should consider the admissibility of expert evidence under *Daubert*. And at least one court of appeals has rejected the argument objectors are making because, “[i]n a fairness hearing, the judge does not resolve the parties’ factual disputes but merely ensures that the disputes are real and that the settlement fairly and reasonably resolves the parties’ differences.” *Int’l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 636–37 (6th Cir. 2007).

Finding no clear errors in the District Court’s findings on CTE, we are also convinced that the Court was well within its discretion in concluding that the settlement’s treatment of this condition was

reasonable. Most importantly, objectors are not correct when they assert that CTE claims are released by the settlement in return for “nothing.” A primary purpose of the settlement is to provide insurance for living players who develop certain neurocognitive or neuromuscular impairments linked to repetitive head trauma (in addition to the benefits provided by the Baseline Assessment Program). Given what we know about CTE, many of the symptoms associated with the disease will be covered by this insurance. And compensation for players who are coping with these symptoms now is surely preferable to waiting until they die to pay their estates for a CTE diagnosis. Moreover, we agree with the District Court that it would be an uphill battle to compensate for the mood and behavioral symptoms thought to be associated with CTE.

Before concluding, we address developments during the pendency of this appeal. In a March 2016 roundtable discussion on concussions organized by the House Energy & Commerce Subcommittee on Oversight & Investigations, the NFL’s Executive Vice President cited the research of Dr. McKee and agreed that there was a link between football and degenerative brain disorders like CTE. The NFL’s statement is an important development because it is the first time, as far as we can tell, that the NFL has publicly acknowledged a connection between football

and CTE. On the other hand, the NFL is now conceding something already known. The sheer number of deceased players with a post-mortem diagnosis of CTE supports the unavoidable conclusion that there is a relationship, if not a causal connection, between a life in football and CTE.

Objectors cite the NFL's concession as further evidence that this settlement should be rejected. They argue that the NFL has now admitted there is a link between football and CTE, yet refused to compensate the disease. Again, we note that the settlement does compensate many of the impairments associated with CTE, though it does not compensate CTE as a diagnosis (with the exception of players who died before final approval of the settlement). Moreover, even if the NFL has finally come around to the view that there is a link between CTE and football, many more questions must be answered before we could say that the failure to compensate the diagnosis was unreasonable. For example, we still cannot reliably determine the prevalence, symptoms, or risk factors of CTE. The NFL's recent acknowledgment may very well advance the public discussion of the risks of contact sports, but it did not advance the science. Accordingly, the NFL's statement is not a ground for reversal of the settlement's approval.



In the end, this settlement was the bargain struck by the parties, negotiating amid the fog of litigation. If we were drawing up a settlement ourselves, we may want different terms or more compensation for a certain condition. But our role as judges is to review the settlement reached by the parties for its fairness, adequacy, and reasonableness. And when exercising that role, we must “guard against demanding too large a settlement based on [our] view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.” *GM Trucks*, 55 F.3d at 806. This settlement will provide significant and immediate relief to retired players living with the lasting scars of an NFL career, including those suffering from some of the symptoms associated with CTE. We must hesitate before rejecting that bargain based on an unsupported hope that sending the parties back to the negotiating table would lead to a better deal. Accordingly, we conclude that the settlement’s treatment of CTE does not render the agreement fundamentally unfair.<sup>14</sup>

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<sup>14</sup> We address a few remaining objections to the District Court’s fairness inquiry. Some claim that the offsets in the settlement that reduce a player’s monetary award were unreasonable. The Court explained why each offset had scientific support and we are content to say that objectors have not shown its findings to be clearly in error or its conclusions an abuse of discretion. *In re Nat’l Football League Players’*

## VII. ATTORNEYS' FEES

Class counsel and the NFL did not negotiate the issue of fees until after the initial term sheet was signed. After negotiations, the NFL agreed not to contest any award of attorneys' fees and costs up to \$112.5 million. Any fee award will be separate from the NFL's obligations under the settlement to pay monetary awards to the retired players. Class counsel may also petition the District Court to set aside 5% of each monetary award to administer the settlement. The petition for a fee award will be submitted to the Court at a later date. Objectors will then be able to present arguments as to why the requested award is improper, and the Court will have discretion to modify the award in whatever way it sees fit. Even though the issue of attorneys' fees remains undecided, some object that the settlement's treatment of fees is a reason for reversal.

### A. Deferral of Fee Petition

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*Concussion Injury Litig.*, 307 F.R.D. at 407–11. Others argue that the settlement should have used the definition of “eligible season” set forth in the NFL retirement plan. We concur with the District Court that the definition of eligible season in the settlement was reasonable because it is a proxy for the number of head injuries. *Id.* at 410.

Objectors first argue that the District Court abused its discretion in approving the procedure for attorneys' fees. As noted, class counsel will request a fee award after the class action is certified and the class settlement is approved. Objectors claim that the "attorney-fee-deferral procedure" violated Federal Rule of Civil Procedure Rule 23(h) and deprived class members of due process. We note at the outset that objectors failed to present most of the elements of this argument to the Court at the final fairness hearing. The closest anyone came was when amicus Public Citizen, Inc. claimed that the absence of a fee petition "prevents a complete evaluation of the fairness of the settlement at this point." In response, the Court noted that interested parties would have an opportunity to object to the fee petition when filed and that the separation of settlement approval from fee approval was an "accepted approach." *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 396.

As discussed elsewhere, the standards for waiver may be relaxed somewhat in the class action context because we have an independent obligation to protect the rights of absent class members. Applying this principle, we will reach the objections concerning attorneys' fees because, if the objections are persuasive, class members were denied a meaningful chance to object or opt out from the

settlement. Our review, however, confirms that the procedure for awarding fees in this settlement was neither an unlawful procedure nor an obstacle to approval. We have no doubt that, at the specified time, class counsel's fee petition will be subject to careful review by the District Court and objectors will present challenges to the fee petition if warranted.

To start, the practice of deferring consideration of a fee award is not so irregular. We have seen the same arrangement in the settlement of a products liability class action related to diet drugs. *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 534–35 (3d Cir.2009) (settlement approved in 2002, interim and final fee awards approved in 2009). Other courts have also used the same procedure. *E.g., In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, 910 F. Supp. 2d 891, 918 (E.D.La.2012), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir.2014); *see also Newberg on Class Actions* § 14:5 (5th ed.) (“In some situations, the court will give final approval to a class action settlement and leave fees and costs for a later determination.”).

Moreover, the separation of a fee award from final approval of the settlement does not violate Rule 23(h), which allows a court to award reasonable

attorneys' fees and costs in a certified class action subject to certain requirements. Nowhere does the provision require that class counsel move for its fee award at the same time that it moves for final approval of the settlement. Under the Rule, a fee petition must be made by motion served on all parties and, when the motion is made by class counsel, notice must be "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1). Class members may then object and the court may hold a hearing. Fed. R. Civ. P. 23(h)(2)–(3). And the court "must find the facts and state its legal conclusions" and "may refer issues related to the amount of the award to a special master." Fed. R. Civ. P. 23(h)(3)–(4). So long as these conditions are met, the procedure for awarding attorneys' fees that the District Court approved in this case will not run afoul of subsection (h).

Objectors point us to the Advisory Committee Notes to Rule 23, which seem to contemplate combining class notice of the fee petition with notice of the terms of the settlement. Fed. R. Civ. P. 23(h)(1), 2003 advisory committee's note ("For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the

proposed settlement that is required by Rule 23(e).”) & (“In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel’s fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e).”); *see also Newberg on Class Actions* § 8.24 (5th ed.) (Rule 23 envisions “linking together settlement notice and objections with fee notices and objections”). But even if we were willing to read the Advisory Committee’s suggestion that fee petitions be filed alongside the settlement as a requirement, “it is the Rule itself, not the Advisory Committee’s description of it, that governs.” *Dukes*, 131 S.Ct. at 2559.

Objectors also cite as support two cases from other circuits that found a violation of Rule 23(h). *See Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014), *cert. denied sub nom. Nicaj v. Shoe Carnival, Inc.*, 135 S. Ct. 1429 (2015); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010). They are not, however, as helpful as objectors might think. In those cases, the district courts denied class members the opportunity to object to the particulars of counsel’s fee request because counsel were not required to file a fee petition until after the deadline for class members to object expired. By the time they were served with

notice of the fee petition, it was too late for them to object. We have little trouble agreeing that Rule 23(h) is violated in those circumstances. But in our case the fee petition has not yet been filed, the District Court has not set a deadline for objections to the fee petition, and the issue of whether class members will have an opportunity to object is hypothetical. Accordingly, we decline to hold that Rule 23(h) mandates the simultaneous notice of a class action settlement and notice of the fee petition.

The final argument raised by objectors on this point is that the decision to delay ruling on the fee award deprived class members of due process. As we discussed in evaluating classwide notice, constitutional due process requires that notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane*, 339 U.S. at 314. Put another way, the notice of a class settlement “should contain sufficient information to enable class members to make informed decisions on whether they should take steps.” *In re Baby Prods.*, 708 F.3d at 180.

The class notice here was sufficient to comply with due process. The notice advised that the NFL would pay attorneys’ fees from a separate fund and

not object to an award up to \$112.5 million and that the District Court would consider fees after final approval and afford retired players an opportunity to object. From this, class members knew from where the fees for class counsel were coming (a separate fund), what the NFL's position on fees would be (no objection up to \$112.5 million), and could ballpark the size of class counsel's eventual fee request (a betting person would say it will be close to \$112.5 million). Even if the class members were missing certain information—for example, the number of hours class counsel worked and the terms of any contingency fee arrangements class counsel have with particular retired players—they still had enough information to make an informed decision about whether to object to or opt out from the settlement.

To be sure, we are sympathetic to concerns that others have raised over the practice of delaying consideration of a fee motion. As one treatise put it,

[a] primary concern about class action settlements is that unmonitored class counsel may have incentives to sell out the class's interests in return for a large fee. To assess whether such a sell-out has occurred, class members need information *both* about the content of



the settlement and about the scope of the fee. In this sense, fee notice not only may accompany settlement notice; it likely *should* accompany settlement notice.

*Newberg on Class Actions* § 8:22 (5th ed.) (emphases in original). Delaying the fee petition denies class members information about what their counsel did in negotiating the settlement. And, all else being equal, the more information available the better. Moreover, class members may have less incentive to object to the fee award at a later time because approval of the settlement will have already occurred. But the procedure is not necessarily a violation of Rule 23(h), and in this instance it did not violate due process.

## **B. Clear Sailing Provision**

Objectors next challenge the provision in the settlement agreement that the NFL would not object to a fee award up to \$112.5 million. This is often referred to as a “clear sailing provision” (probably because the implication is that the fee request stands a much better chance of court approval if the defendant is not objecting). The concern with a clear sailing provision is collusion. The defendant is indifferent to the allocation of its liability between the class and counsel; all that matters is the total

liability. To forgo the opportunity to object to the fee award, the defendant will presumably want something in return because it is giving up the chance to reduce its overall liability. We thus might fear that class counsel has given away something of value to the class in return for the defendant's agreement not to contest a fee request below a certain level.

Despite these concerns, “numerous cases ... have approved agreements containing such clear-sailing clauses.” *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 138 (E.D. La. 2013). We join our sister circuits in declining to hold that clear sailing provisions are *per se* bars to settlement approval while nonetheless emphasizing that they deserve careful scrutiny in any class action settlement. *See In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015); *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 426 (6th Cir. 2012); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011); *Blessing v. Sirius XM Radio Inc.*, 507 F. App'x. 1, 4 (2d Cir. 2012); *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). A district court faced with such a provision in a class action settlement should review the process and substance of the settlement and satisfy itself that the agreement does not indicate collusion or otherwise pose a problem.

The District Court here found the clear sailing provision unobjectionable. It emphasized that the issue of fees was not discussed until after the principal terms of the settlement were agreed to, the fee award will not diminish class recovery, and the agreed amount is just over 10% of the estimated class recovery. *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 374–75. We discern no abuse of discretion. There is simply no evidence in the negotiation process or the final terms of the settlement that class counsel bargained away the claims of retired players in return for their own fees.

## VIII. CONCLUSION

It is the nature of a settlement that some will be dissatisfied with the ultimate result. Our case is no different, and we do not doubt that objectors are well-intentioned in making thoughtful arguments against certification of the class and approval of this settlement. They aim to ensure that the claims of retired players are not given up in exchange for anything less than a generous settlement agreement negotiated by very able representatives. But they risk making the perfect the enemy of the good. This settlement will provide nearly \$1 billion in value to the class of retired players. It is a testament to the

players, researchers, and advocates who have worked to expose the true human costs of a sport so many love. Though not perfect, it is fair.

In sum, we affirm because we are satisfied that the District Court ably exercised its discretion in certifying the class and approving the settlement.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

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2:12-md-02323-AB  
MDL No. 2323

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IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

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April 22, 2015

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Hon. Anita B. Brody

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## MEMORANDUM

Plaintiffs Kevin Turner and Shawn Wooden, through their Co-Lead Class Counsel, Class Counsel, and Subclass Counsel, and Defendants National Football League (“NFL”) and NFL Properties LLC (collectively, the “NFL Parties”) have negotiated and agreed to a Class Action Settlement (the “Settlement”) that will resolve all claims against the NFL Parties in this multidistrict litigation.

On November 12, 2014, Class Plaintiffs moved for class certification and final approval of the Settlement.<sup>1</sup> Pursuant to Federal Rule of Civil Procedure 23, I certify the Settlement Class and Subclasses, find that the Settlement is fair, reasonable, and adequate, and approve the Settlement in its entirety. Therefore, I will grant the motion for class certification and final approval of the Settlement.

### **I. Background and Procedural History**

#### **A. Initial Lawsuits and Consolidation**

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<sup>1</sup> The Settlement was initially filed on June 25, 2014, and amended on February 13, 2015. *See* Parties’ Joint Amendment, Ex. A. As used in this Memorandum, the term Settlement refers to the amended version, except when the history of the initial filing is discussed.

On July 19, 2011, 73 former professional football players filed suit in the Superior Court of California, Los Angeles County, against the NFL Parties. *See* Compl., *Maxwell v. Nat'l Football League*, No. BC465842 (Cal. Super. Ct. July 19, 2011). They alleged that the NFL Parties failed to take reasonable actions to protect players from the chronic risks created by concussive and sub-concussive head injuries and fraudulently concealed those risks from players. Three substantially similar lawsuits followed in quick succession. *See* Compl., *Pear v. Nat'l Football League*, No. LC094453 (Cal. Super. Ct. Aug. 3, 2011); Compl., *Barnes v. Nat'l Football League*, No. BV468483 (Cal. Super. Ct. Aug. 26, 2011); *see also Easterling v. Nat'l Football League*, No. 11-5209, ECF No. 1 (E.D. Pa. Aug. 17, 2011). In response, the Judicial Panel on Multidistrict Litigation consolidated these cases before this Court as a multidistrict litigation (“MDL”), pursuant to 28 U.S.C. § 1407. *See* MDL Panel Transfer Order, ECF No. 1.

Since consolidation, about 5,000 players (“MDL Plaintiffs”) have filed over 300 substantially similar lawsuits against the NFL Parties,<sup>2</sup> all of

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<sup>2</sup> Many MDL Plaintiffs also brought suit against Riddell, Inc., All American Sports Corporation, Riddell Sports Group, Inc., Easton-Bell Sports Inc., Easton-Bell Sports, LLC, EB

which have been transferred to this Court. To effectively manage these actions, I appointed Christopher Seeger and Sol Weiss as Co-Lead Class Counsel, and appointed individuals to a Plaintiffs' Executive Committee and a Steering Committee. *See* Case Mgmt. Order No. 2 at 1–2, ECF No. 64; Case Mgmt. Order No. 3 at 1, ECF No. 72 (appointing Sol Weiss as additional Co-Lead Class Counsel and appointing additional members of the Steering Committee). I ordered Co-Lead Class Counsel to submit both a Master Administrative Long-Form Complaint and a Master Administrative Class Action Complaint, which were filed on June 7, 2012. *See* Case Mgmt. Order No. 4 at 1–3, ECF. No. 98. Subsequently, Co-Lead Class Counsel filed an Amended Master Administrative Long-Form Complaint. This Amended Complaint, along with the Master Administrative Class Action Complaint (collectively, the “Complaints”), became the operative pleadings of this MDL. *See* Master Administrative Class Action Compl., ECF No. 84; Am. Master Administrative Long-Form Compl., ECF No. 2642 (“Am. MAC”).

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Sports Corp., and RBG Holdings Corp. (collectively, the “Riddell Defendants”). The Judicial Panel on Multidistrict Litigation also transferred claims against the Riddell Defendants into this MDL. The Riddell Defendants, however, are not parties to the Settlement.

In the Complaints, MDL Plaintiffs allege that the NFL Parties had a “duty to provide players with rules and information that protect [players] as much as possible from short-term and long-term health risks,” including from the risks of repetitive mild traumatic brain injury (“TBI”).<sup>3</sup> Am. MAC ¶ 6, 8. They claim “the NFL held itself out as the guardian and authority on the issue of player safety,” yet failed to properly investigate, warn of, and revise league rules to minimize the risk of concussive and sub-concussive hits in NFL Football games. *See id.* ¶¶ 6, 43, 86. MDL Plaintiffs allege that the NFL Parties fostered a culture surrounding football that glorified violence and a gladiator mentality, encouraging NFL players to play despite head injuries.

MDL Plaintiffs also allege that, as concern about head injuries in contact sports grew in the medical community, “the NFL voluntarily inserted itself into the private and public discussion” regarding these dangers. *Id.* ¶ 150. In 1994, the NFL Parties created a Mild Traumatic Brain Injury Committee (“MTBI Committee”) to study the effects

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<sup>3</sup> The scientific community recognizes three categories of TBI: mild, moderate, and severe. *See* Decl. of Dr. Kristine Yaffe ¶ 41, ECF No. 6422–36. NFL Football allegedly puts players at risk of repetitive mild TBI, including concussions. Am. MAC. ¶ 2; Decl. of Dr. Christopher Giza ¶ 12, ECF No. 6423–18 (noting “concussion overlaps significantly” with mild TBI).

of concussive and sub-concussive injuries on their players. Through the MTBI Committee, the NFL Parties allegedly obfuscated the connection between NFL Football and long-term brain injury, despite knowing “for decades” that such a connection exists. *Id.* ¶¶ 108, 243. The MTBI Committee also allegedly pressured those who criticized its conclusions to retract or otherwise distance themselves from their findings. MDL Plaintiffs claim that, “[b]efore June of 2010, the NFL made material misrepresentations to its players, former players, the United States Congress, and the public at large that there was no scientifically proven link between repetitive traumatic head impacts and later-in-life cognitive/brain injury.” *Id.* ¶ 308.

MDL Plaintiffs allege that head injuries lead to a host of debilitating conditions, including Alzheimer’s Disease, dementia, depression, deficits in cognitive functioning, reduced processing speed, attention and reasoning, loss of memory, sleeplessness, mood swings, and personality changes. MDL Plaintiffs also allege that the repetitive head trauma sustained while playing football causes a gradual build-up of tau protein in the brain, resulting in Chronic Traumatic Encephalopathy (“CTE”). CTE allegedly causes an increased risk of suicide, and many symptoms often associated with Alzheimer’s Disease and dementia, as well as with

mood disorders such as depression and loss of emotional control.

The Complaints assert fourteen claims against the NFL Parties, which can be generally grouped into negligence claims and fraud claims.<sup>4</sup> MDL Plaintiffs seek declaratory relief, medical monitoring, and damages. *See* Am. MAC at Prayer for Relief.

### **B. Motions to Dismiss Based on Preemption**

Before allowing the litigation to proceed to its merits, I determined that a significant threshold legal issue had to be addressed: whether MDL Plaintiffs' negligence and fraud claims are preempted by the Collective Bargaining Agreements ("CBAs") between the Retired Players and the 32 Member Clubs that make up the National Football League. I was aware that in a number of analogous cases, courts ruled that state law claims brought against the NFL and associated parties implicated provisions of the CBAs. Accordingly, § 301 of the Labor

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<sup>4</sup> Specifically, the Complaints assert claims against the NFL Parties for declaratory relief, medical monitoring, wrongful death and survival actions, fraudulent concealment, fraud, negligent misrepresentation, negligence (three separate counts), loss of consortium, negligent hiring, negligent retention, and civil conspiracy. Am MAC. ¶¶ 246–382, 422–25, Prayer for Relief.

Management Relations Act (“LMRA”), 29 U.S.C. § 185(a), preempted those state law claims. A preemption ruling in this MDL would necessarily require MDL Plaintiffs to resolve their claims through arbitration rather than in federal court because the CBAs contain mandatory arbitration provisions. Because of the importance of this issue, I stayed discovery and granted the request of the NFL Parties to file motions to dismiss on the preemption argument only. *See* Case Mgmt. Order No. 2 at 2 (noting that preemption was to be considered on an expedited basis); Case Mgmt. Order No. 4 at 3–4; Tr. of Organizational Courtroom Conference, Apr. 25, 2012 at 28:14–16 (staying discovery); Order, Aug. 21, 2012, ECF No. 3384.

On August 30, 2012, the NFL Parties moved to dismiss both Complaints. *See* Defs.’ Mot. to Dismiss Am. MAC, ECF No. 3589; Defs.’ Mot. to Dismiss Master Administrative Class Action Complaint, ECF No. 3590. The NFL Parties argue that MDL Plaintiffs’ claims necessarily implicate provisions of the CBAs that address player safety. Specifically, they argue that the CBAs control or implicate the duties of the NFL Parties and individual Member Clubs to treat player injuries, make return-to-play decisions, inform players of medical risks associated with continuing to play, and promulgate rule changes to enhance player safety. *See* Mot. to



Dismiss Am. MAC at 12–18. If the NFL Parties are correct, then § 301 of the LMRA requires MDL Plaintiffs to arbitrate their claims because they agreed in the CBAs to resolve their disputes before an arbitrator, not in federal court.

The parties completed briefing on the motions to dismiss on January 28, 2013, and I heard oral argument on April 9, 2013. The NFL Parties’ motions to dismiss remain pending.

**C. Settlement Negotiations and Preliminary Approval**

On July 8, 2013, I ordered the Parties to participate in mediation with the hope that a negotiated, mutually beneficial settlement could be reached. Pending their negotiations, I agreed to withhold my ruling on the motions to dismiss that might have sent the litigation to arbitration. *See* Order, July 8, 2013, ECF No. 5128. I appointed retired United States District Court Judge Layn Phillips as mediator to help the Parties explore settlement. *Id.*

A genuine dialogue between zealous and well-prepared adversaries transpired. Judge Phillips reports that the Parties engaged in “arm’s-length, hard-fought negotiations.” Decl. of Layn R. Phillips ¶

5, ECF No. 6073–4 (“Phillips Decl.”). During this time, the Parties met for more than “twelve full days” of formal mediation. *See id.* ¶¶ 5–6; Decl. of Christopher Seeger ¶ 31, ECF No. 6423–3 (“Seeger Decl.”). “The negotiations were intense, vigorous, and sometimes quite contentious.” Supplemental Decl. of Layn R. Phillips ¶ 4, ECF No. 6423–6 (“Phillips Supp. Decl.”).

The Parties came prepared for these discussions. The Parties had already retained well-qualified medical experts to help determine the merits of the case. These experts advised the Parties on difficult questions such as the type of head trauma associated with NFL Football and the long term health effects of trauma on Retired Players. *See* Phillips Decl. ¶ 8; Seeger Decl. ¶ 32; Decl. of Arnold Levin ¶¶ 14–15, ECF No. 6423–10 (“Levin Decl.”); Decl. of Dianne Nast ¶¶ 13–14 (“Nast Decl.”); Decl. of Dr. Scott Millis ¶ 11, ECF No. 6422–34 (noting he “assisted the NFL Parties during their negotiations” regarding the Test Battery and other Settlement provisions) (“Dr. Millis Decl.”); Decl. of Dr. John Kelip ¶ 16, ECF No. 6423–20 (noting he has consulted with Class Counsel on scientific issues since the summer of 2013) (“Dr. Kelip Decl.”). Judge Phillips met with the Parties’ experts and observed the valuable services they provided. *See* Phillips Decl. ¶ 8.

In addition to experts, the Parties had access to considerable information about the Retired Players, including from the short form complaints filed with the Court. The NFL Parties' records provided the Parties with biographical information about the vast majority of the former players, including the number of seasons played. *See* Material Provided by Counsel to Pls., Report of the Analysis Research Planning Corp. to Special Master Perry Golkin at 13–15, ECF No. 6167 (“Class Counsel’s Actuarial Materials”); Material Provided by Counsel to the NFL, Report of the Segal Group to Special Master Perry Golkin ¶ 16, ECF No. 6168 (“NFL Parties’ Actuarial Materials”). Co-Lead Class Counsel also created and maintained a comprehensive database of the symptoms of MDL Plaintiffs. As a result, the Parties had information about the current cognitive impairment of over 1,500 Retired Players. *See* NFL Parties’ Actuarial Materials ¶ 16; Seeger Decl. ¶ 20.

The mediation efforts were successful. On August 29, 2013, after two months of near continuous negotiations, the Parties signed a term sheet setting forth the “principal terms of a settlement.” *See* Order, Aug. 29, 2013, ECF No. 5235. The term sheet included \$765 million to fund medical exams and provide compensation for player injuries. *Id.* Given the Parties’ progress in reaching a

settlement, I continued to withhold decision on the NFL Parties' motions to dismiss on preemption grounds. *Id.*

The Parties negotiated further, and over the next four months established the specific terms of the Settlement. On January 6, 2014, Class Counsel,<sup>5</sup> with Kevin Turner and Shawn Wooden as Class Representatives, filed the complaint in *Turner v. Nat'l Football League*, No. 14–0029, ECF No. 1 (E.D. Pa. Jan. 6, 2014) (the “Class Action Complaint”).<sup>6</sup> In that action, Class Counsel sought preliminary class certification and preliminary approval of their proposed settlement. *See* Mot. for Prelim Approval, Jan. 6, 2014, ECF No. 5634.

Though I commended the Parties for their efforts, I denied the motion for preliminary class certification and preliminary approval of the Settlement without prejudice. *See* Order Den. Mot.

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<sup>5</sup> Class Counsel includes Co-Lead Class Counsel Christopher Seeger and Sol Weiss, Subclass Counsel Arnold Levin and Dianne Nast, as well as Gene Locks and Steven Marks. *See* Settlement § 2.1(r).

<sup>6</sup> *Turner* was originally marked as a related action to this MDL. On June 25, 2014, “in the interest of justice and to promote judicial economy and avoid duplication,” I ordered that “[a]ll motion practice and other filings related to or based on *Turner v. NFL*, shall be filed only on [this] MDL docket....” *Turner*, ECF No. 20.

for Prelim. Approval, ECF No. 5658. I was primarily concerned that the capped fund would exhaust before the 65-year life of the Settlement; I feared that “not all Retired Players who ultimately receive[d] a Qualifying Diagnosis or their related claimants will be paid.” Mem. Op. at 10, ECF No. 5657. I was also concerned that the deal released claims against the National College Athletic Association (“NCAA”) and other collegiate, amateur, and youth football organizations. *Id.* at 10 n.6. To address my concerns, I ordered the Parties to share the actuarial data and analyses performed by their economic experts<sup>7</sup> with Special Master Perry Golkin.<sup>8</sup>

Five more months of arm’s-length, hard fought negotiations followed. Special Master Golkin oversaw these negotiations, during which the Parties revisited many provisions of the Settlement. *See* Seeger Decl. ¶ 61.

These negotiations proved fruitful. The Parties ultimately reached a revised settlement. The revised

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<sup>7</sup> The Parties have since disclosed this information, and it is publicly available. *See* Class Counsel’s Actuarial Materials; NFL Parties’ Actuarial Materials.

<sup>8</sup> I appointed Special Master Golkin on December 16, 2013 in light of the “expected financial complexity of the proposed settlement.” *See* Order Appointing Special Master at 1, ECF No. 5607. As always, I am grateful to Mr. Golkin for his forthright and astute advice.

deal retained the same basic structure as the original, and included large maximum awards for Qualifying Diagnoses subject to a series of offsets, a separate fund to allow for baseline assessment examinations for Retired Players, and a fund dedicated to educating former players and promoting safety and injury prevention for football players of all ages. Crucially, this revised deal uncapped the fund to compensate Retired Players with Qualifying Diagnoses; the NFL Parties agreed to pay all valid claims over the duration of the settlement regardless of the total cost. The NFL Parties also agreed to narrow the scope of the Releases. In exchange for these concessions, the NFL Parties received heightened anti-fraud provisions to ensure that funds were only disbursed to deserving claimants. On June 25, 2014, Class Counsel filed a motion for preliminary class certification and preliminary approval of the Settlement. *See* Mot. for Prelim. Approval, June 25, 2014, ECF No. 6073.

On July 7, 2014 (“Preliminary Approval Date”), after making a preliminary determination on class certification for the purpose of issuing notice of settlement,<sup>9</sup> I granted the motion for preliminary

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<sup>9</sup> Despite language in the Preliminary Approval Order and accompanying Memorandum that the Class had been “conditionally” certified, I reserved class certification analysis until after the Fairness Hearing to allow for full development of

class certification and preliminary approval of the Settlement. *See* Order Granting Prelim. Approval, ECF No. 6084. As discussed more fully *infra* Section I.E, on February 13, 2015, the Parties amended the Settlement, making it more favorable to the Class. *See* Parties' Joint Amendment, ECF No. 6481.

#### **D. The Settlement**

The Class consists of “[a]ll living NFL Football Players who, prior to the date of Preliminary Approval ... retired ... from playing professional football with the NFL,” as well as their Representative and Derivative Claimants. *See* Settlement §§ 1.1, 2.1(ffff). Representative Claimants are those duly authorized by law to assert the claims of deceased, legally incapacitated, or incompetent Retired Players. *See id.* § 2.1(eeee). Derivative Claimants are those, such as parents, spouses, or dependent children, who have some legal right to the income of Retired Players. *See id.* § 2.1(ee).

The Settlement sorts Class Members into one of two subclasses based on Retired Players' injuries as of the Preliminary Approval Date. Subclass 2 consists of:

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the record. *See In re Nat'l Football Players Concussion Injury Litig.*, 775 F.3d 570, 584–87 (3d Cir. 2014).

Retired NFL Football Players who were diagnosed with a Qualifying Diagnosis prior to the date of the Preliminary Approval and Class Certification Order and their Representative Claimants and Derivative Claimants, and the Representative Claimants of deceased Retired NFL Football Players who were diagnosed with a Qualifying Diagnosis prior to death or who died prior to the date of the Preliminary Approval and Class Certification Order and who received a postmortem diagnosis of CTE.

*Id.* § 1.2(b).

Subclass 1 consists of the remainder:

Retired NFL Football Players who were not diagnosed with a Qualifying Diagnosis prior to the date of the Preliminary Approval and Class Certification Order and their Representative Claimants and Derivative Claimants.

*Id.* § 1.2(a).

The Settlement has three primary components. An uncapped Monetary Award Fund (“MAF”), overseen by a Claims Administrator,



provides compensation for Retired Players who submit sufficient proof of Qualifying Diagnoses. A \$75 million Baseline Assessment Program (“BAP”) provides eligible Retired Players<sup>10</sup> with free baseline assessment examinations of their objective neurological functioning. BAP funds will also be used to provide BAP Supplemental Benefits, including counseling and prescription drug benefits, to those who are impaired but have not deteriorated to the point of receiving a Qualifying Diagnosis. Third, an Education Fund will educate Class Members regarding the NFL Parties’ existing CBA Medical

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<sup>10</sup> Only Retired Players may receive Qualifying Diagnoses or baseline assessment examinations because they are the only Class Members who played NFL Football. Because Representative Claimants assume the legal rights of the Retired Players they represent, the Settlement treats them similarly to Retired Players for the purposes of calculating, submitting, and receiving Monetary Awards.

Derivative Claimants are Class Members because of their relationship with a Retired Player, not because they stand in the shoes of a Retired Player. As a result, the Derivative Claimant Awards work somewhat differently. Derivative Claimants are eligible to receive up to 1% of a Retired Player’s Monetary Award. Unlike a Representative Claimant, a Derivative Claimant must wait until a Retired Player files for a Monetary Award, and then file a Derivative Claim Package seeking a portion of that Award. *See* Settlement § 7.2. In most other respects, Derivative Claimants are treated similarly to Representative Claimants.

Because a Retired Player is essential to every claim, for ease of reference I generally describe the requirements Retired Players must satisfy to receive benefits of the Settlement.

and Disability Benefits programs, and promote safety and injury prevention for football players of all ages, including youth football players. I will appoint Wendell Pritchett and Jo-Ann Verrier jointly as Special Master responsible for overseeing, implementing, and administering the entire Settlement. *See id.* § 10.1.

*i. Monetary Award Fund*

The Monetary Award Fund is an uncapped, inflation-adjusted fund that provides cash awards for Retired Players who receive Qualifying Diagnoses. By cost, the MAF constitutes the majority of the Settlement.<sup>11</sup>

The Settlement creates six Qualifying Diagnoses: Level 1.5 Neurocognitive Impairment, Level 2 Neurocognitive Impairment, Alzheimer's Disease, Parkinson's Disease, Amyotrophic Lateral Sclerosis ("ALS"), and Death with CTE.

Levels 1.5 and 2 Neurocognitive Impairment are defined by the Settlement. They require both a decline in cognitive function and a loss of functional capabilities, such as the ability to hold a job or

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<sup>11</sup> The MAF accounted for roughly 90% of the original settlement. *See* Mem. Op. at 4–5, ECF No. 5657. Uncapped, this percentage may grow.

perform household chores. *See generally id.* Ex. 1. These diagnoses correspond with commonly accepted clinical definitions of mild<sup>12</sup> and moderate dementia, respectively.<sup>13</sup>

The Settlement adopts the definitions of Alzheimer’s Disease, Parkinson’s Disease, and ALS found in the World Health Organization’s International Classification of Diseases. *Id.* Diagnoses of Alzheimer’s Disease or Parkinson’s Disease may alternatively meet the definitions provided by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM–5”). *Id.* Death with CTE requires a post-mortem diagnosis of CTE made by a board-certified neuropathologist. *Id.*

After the Effective Date of the Settlement, only pre-approved Qualified MAF Physicians and Qualified BAP Providers may render Qualifying Diagnoses. *See id.* §§ 5.7(a)(i), 6.3(b), 6.5(a), Ex. 1. The Claims Administrator and BAP Administrator will select these specialists, subject to the written approval of Co-Lead Class Counsel and the NFL Parties. *See id.* §§ 5.7(a)(i), 6.5(a). The Settlement

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<sup>12</sup> As stated on the record at the Fairness Hearing, for the purposes of the Settlement, the terms mild dementia and early dementia are synonymous. *See Am. Fairness Hr’g Tr.* at 13:11–25, ECF No. 6463.

<sup>13</sup> *See infra* Section V.B.i.

will also honor Qualifying Diagnoses made before the Effective Date by appropriately credentialed medical professionals. *See id.* §§ 6.3(c)–6.3(e).

Both Qualified MAF Physicians and Qualified BAP Providers may render Qualifying Diagnoses of Levels 1.5 and 2 Neurocognitive Impairment, but only Qualified MAF Physicians may render Qualifying Diagnoses of Alzheimer’s Disease, Parkinson’s Disease, and ALS. *Id.* § 6.3(b). A Retired Player may only receive a Qualifying Diagnosis of Death with CTE if he died before the Final Approval Date of the Settlement. *Id.* Ex. 1.

A Qualifying Diagnosis entitles a Retired Player to a substantial maximum award, subject to mitigating offsets. The Settlement waives all causation requirements for Qualifying Diagnoses. A Retired Player is *not* required to show that playing in the NFL caused his injury or show actual damages. The maximum awards are as follows:

<b>Qualifying Diagnosis</b>	<b>Maximum Award</b>
Level 1.5 Neurocognitive Impairment	\$1.5 Million
Level 2 Neurocognitive Impairment	\$3 Million
Parkinson’s Disease	\$3.5 Million

Alzheimer's Disease	\$3.5 Million
Death with CTE	\$4 Million
ALS	\$5 Million

If a Retired Player's condition worsens to the point that he receives an additional Qualifying Diagnosis meriting a higher award, he is entitled to a Supplemental Monetary Award to make up the difference. *See id.* § 6.8.

A Retired Player's Monetary Award is subject to a series of incremental offsets. The older a Retired Player is at the time he receives a Qualifying Diagnosis, the smaller his award will be.<sup>14</sup> *Id.* Ex. 3. A Retired Player who played fewer than five Eligible Seasons in the NFL will see his award decreased as well.<sup>15</sup> *See id.* § 6.7(b). A Retired Player who has not yet received a Qualifying Diagnosis will be subject to an offset if he fails to participate in the BAP.<sup>16</sup> *See id.*

Some medical conditions also trigger more substantial offsets in Monetary Awards. A Retired Player who suffers a Stroke or a severe TBI outside

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<sup>14</sup> *See infra* Section V.C.i.

<sup>15</sup> *See infra* Section V.C.iv.

<sup>16</sup> *See infra* Section V.C.v.

of NFL Football will receive a significantly smaller award. *See id.*<sup>17</sup> However, a Retired Player subject to these offsets will have the opportunity to challenge whether his Stroke or severe TBI is related to his Qualifying Diagnosis. *See id.* § 6.7(d).

Finally, any Monetary Award will be reduced by the extent necessary to satisfy any applicable and legally enforceable government liens. *See id.* § 11.3(c)(iv). Federal and state law allow the Medicare and Medicaid programs to recoup any health insurance payments made to an insured if a third party is found responsible for the underlying injury.<sup>18</sup> Pursuant to the Settlement, a Lien Resolution Administrator will identify and resolve these liens and reimbursement claims on behalf of Class Members. *See id.* § 11.1. Class Members are already required by law to repay these obligations, but will likely do so at a discount because the Lien Resolution Administrator will be able to negotiate on a class-wide basis. *See* Aff. of Matthew Garretson ¶¶ 23–29, ECF No. 6423–4 (noting success of similar programs in the *Vioxx*, *Avandia*, *Zyprexa*, and

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<sup>17</sup> *See infra* Sections V.C.ii and V.C.iii.

<sup>18</sup> Because significant penalties exist for noncompliance with these requirements, virtually all defendants in mass tort personal injury settlements, including the NFL Parties, require that liens be satisfied as a condition of any cash payout. *See* Affidavit of Matthew Garretson ¶ 23, ECF No. 6423–4.

*Deepwater Horizon* settlements) (“Garretson Aff.”). The lien resolution process represents a substantial benefit for Class Members.

Because the MAF is uncapped, every Class Member who timely registers and qualifies for a Monetary or Derivative Claimant Award will receive an award. Additionally, every eligible Representative Claimant of a deceased Retired Player who died on or after January 1, 2006 will receive a Monetary Award. However, any eligible Representative Claimant of a deceased Retired Player who died prior to January 1, 2006 will receive a Monetary Award only if he can show that his wrongful death or survival claim would not be barred by the statute of limitations under applicable state law. *See* Settlement § 6.2(b).

*ii. Claims Process*

To collect from the MAF or participate in the BAP, a Class Member must register with the Claims Administrator within 180 days of receiving notice that the Settlement has been approved and is in effect. *See id.* §§ 4.2(c), 14.1(d). A Class Member must provide basic biographical and contact information and, in the case of a Representative or Derivative Claimant, identify the Retired Player whose injuries form the basis of the claim. *See id.* § 4.2(b). If a Class Member can demonstrate good cause, then he may

receive an extension to the 180-day registration period. *See id.* § 4.2(c).

A Claim Package “must be submitted to the Claims Administrator no later than two (2) years after the date of the Qualifying Diagnosis or within two (2) years after the Settlement Class Supplemental Notice is posted on the Settlement Website, whichever is later.” *Id.* § 8.3(a)(i). Failure to comply with the applicable Claim Package submission deadline will preclude a Class Member from receiving an award, unless he can show substantial hardship. *See id.* The Claim Package must include a certification by the physician who diagnosed the Retired Player, medical records supporting that diagnosis, and proof that the Retired Player played in the NFL.<sup>19</sup> *See id.* § 8.2(a). The Claims Administrator, after providing the Class Member with an opportunity to cure an incomplete or insufficient Claim Package, must notify the Class Member within 60 days whether he is entitled to an award. *Id.* § 9.1(b).

Class Members, Co-Lead Class Counsel, and the NFL Parties have the right to appeal a Monetary Award determination, a right they must exercise in

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<sup>19</sup> If a Retired Player lacks these records, the NFL Parties have a good faith obligation to provide any records in their possession. *See id.* § 9.1(a).



good faith. *See id.* §§ 9.5, 9.6(a). To appeal, a Class Member must submit a \$1,000 fee, which will be refunded if his appeal is successful. *Id.* § 9.6(a). The Claims Administrator may waive the fee if the Class Member can show financial hardship. *Id.* § 9.6(a)(i). Appellants have five single-spaced pages to prove their case by clear and convincing evidence. *Id.* § 9.7(a). The Court is the ultimate arbiter of any appeal, and may consult an Appeals Advisory Board for medical advice. *See id.* § 9.8.

The Claims Administrator must, and Co-Lead Class Counsel and the NFL Parties may, audit approved Monetary Awards to prevent fraud. *See id.* §§ 10.3(a), 10.3(c). The Claims Administrator must complete a monthly audit of 10% of the Monetary Awards and Derivative Claimant Awards approved in the preceding month. *See id.* § 10.3(c). Co-Lead Class Counsel and the NFL Parties have the right to audit as many claims as they wish, but must do so at their expense and in good faith. *See id.* § 10.3(a).

*iii. Baseline Assessment Program*

The BAP is a \$75 million fund that provides Retired Players with an opportunity to be tested for cognitive decline. Any Retired Player who has played at least half of an Eligible Season can receive a baseline assessment examination, even if he has not

yet developed any adverse symptoms nor received a Qualifying Diagnosis. *See id.* § 5.1. A baseline assessment examination consists of a standardized neuropsychological examination and a basic neurological examination.<sup>20</sup> Appropriately credentialed physicians selected by a court-appointed BAP Administrator will provide these examinations at no cost to Retired Players. *See id.* § 5.6(a)(i).

Baseline assessment examinations serve several functions. Exams may produce a Qualifying Diagnosis. Qualified BAP Providers may diagnose Retired Players with Level 1, 1.5, or 2 Neurocognitive Impairment; the latter two are Qualifying Diagnoses that entitle a Retired Player to a Monetary Award.<sup>21</sup> *id.* Ex. 1. The results of BAP examinations can also be compared with any future tests to determine whether a Retired Player's cognitive abilities have deteriorated.

Finally, a baseline assessment examination may entitle a Retired Player to BAP Supplemental Benefits. Retired Players diagnosed with Level 1

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<sup>20</sup> For an in-depth discussion of the contents of a baseline assessment examination, *see infra* Section V.D.ii.

<sup>21</sup> The BAP is not designed to test for Alzheimer's Disease, Parkinson's Disease, or ALS. Retired Players may not be diagnosed with these Qualifying Diagnoses during a baseline assessment examination.

Neurocognitive Impairment—evidencing some objective decline in cognitive function, but not yet rising to the level of early dementia—are eligible to receive medical benefits, including further testing, treatment, counseling, and pharmaceutical coverage. *See id.* §§ 5.2, 5.11, Ex. 1.

The BAP lasts for ten years. *Id.* § 5.5. Every eligible Retired Player age 43 or over must take a baseline assessment examination within two years of the BAP's commencement. *Id.* § 5.3. Every eligible Retired Player younger than age 43 must do so before the end of the program or by his 45th birthday, whichever comes first. *Id.*

*iv. Education Fund*

The Education Fund is a \$10 million fund to promote safety and injury prevention for football players of all ages, including youth football players. The fund will also educate Retired Players about their NFL CBA Medical and Disability Benefits. Co-Lead Class Counsel and the NFL Parties, with input from Retired Players, will propose specific initiatives for the Court's approval. *See id.* § 12.1.

*v. Releases of Claims*

In exchange for the benefits described above, Class Members release and dismiss with prejudice all claims and actions against the Released Parties “arising out of, or relating to, head, brain and/or cognitive injury, as well as any injuries arising out of, or relating to, concussions and/or sub-concussive events,” including claims relating to CTE. *Id.* Art. XVIII. Class Members also covenant not to sue the Released Parties. *Id.* All claims that “were, are or could have been asserted in the Class Action Complaint” are also released. *Id.*

Class Members, however, remain free to pursue a number of claims for their injuries even after the Settlement takes effect. Claims against the Riddell Defendants, who are not parties to this Settlement, remain pending. The Releases similarly have no effect on claims against the NCAA or other collegiate, amateur, or youth football organizations.

Additionally, the Releases do not compromise the benefits that Retired Players are entitled to under their CBAs with individual Member Clubs. These NFL CBA Medical and Disability Benefits provide significant additional compensation. For example, the “88 Plan” reimburses or pays for up to \$100,000 of medical expenses per year for qualifying Retired Players with dementia, ALS, and Parkinson’s Disease. *See* Decl. of Dennis Curran ¶¶

5–7, ECF No. 6422–32 (“Curran Decl.”). Retired Players also retain access to a Neuro–Cognitive Disability Benefit, which provides compensation for those who have mild or moderate neurocognitive impairment. *See id.* ¶¶ 8–9. General retirement benefits, disability benefits, and health insurance programs are also left unaffected. *See id.* ¶¶ 11–17.

*vi. Attorneys’ Fees*

During their initial negotiations, the Parties did not discuss fees until after the key terms of the Settlement—including the total size of the original capped fund—were publicly announced on the docket. *See* ECF No. 5235; Phillips Supp. Decl. ¶ 19.

The NFL Parties have agreed not to contest any award of attorneys’ fees and costs equal to or below \$112.5 million. Any fee award will be separate from, and in addition to, the NFL Parties’ other obligations under the Settlement. *See* Settlement § 21.1. Class Counsel have not yet moved for any fee award. I will determine an appropriate fee award at a later date.

The Settlement also provides that Co–Lead Class Counsel may petition the Court to set aside up to 5% of each Monetary and Derivative Claimant Award to administer the Settlement. This request is

subject to court approval, and any petition must include the amount of any set aside and its proposed use. *Id.*

### **E. Reactions to the Settlement and Resulting Amendments**

The order granting preliminary approval afforded Class Members 90 days to review the Settlement, object, and opt out. *See* Order Granting Prelim. Approval ¶ 4. Ultimately, 208 Class Members submitted requests to exclude themselves<sup>22</sup> from the Settlement, and a total of 205 Objectors filed 83 written objections.<sup>23</sup> These figures each represent approximately one percent of Retired Players. *See* Class Counsel's Actuarial Materials at 13–14; NFL Parties' Actuarial Materials ¶ 16 (estimating over 20,000 Retired Players). Retired Players, as opposed to their Representative or

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<sup>22</sup> *See* Eighth Opt-Out Report of Claims Administrator ¶ 2, ECF No. 6507. As of the Fairness Hearing, there were 234 timely and untimely opt-out requests. Since then, 26 Class Members have revoked these requests and have been allowed back into the Settlement. *Compare id. with* First Opt-Out Report of Claims Administrator ¶ 3, ECF No. 6340.

<sup>23</sup> All objections are publicly available on this MDL's docket. A list of Objectors can be found at Appendix A of the NFL Parties' Memorandum of Law in Support of Final Approval, ECF No. 6422, and Exhibit 12 of Class Plaintiffs' Motion for Final Approval and Class Certification, ECF No. 6423–14.

Derivative Claimants, submitted the vast majority of the objections and opt-out requests. *See* Eighth Opt-Out Report of Claims Administrator ¶ 2, ECF No. 6507. I also accepted *amicus curiae* submissions from two groups. *See* Submission of Brain Injury Association of America, Decl. of Drs. Brent Masel & Gregory O'Shanick, ECF No. 6180-2 (“Drs. Masel & O'Shanick Decl.”); Mem. of Public Citizen, ECF. No. 6214-1; Supp. Mem. of Public Citizen, ECF. No. 6451-1.

On November 12, 2014, Class Plaintiffs moved for class certification and final approval of the Settlement. *See* Class Plaintiffs' Mot. for Final Approval and Class Certification, ECF No. 6423. On November 19, 2014, I held a day-long final Fairness Hearing on the merits of the Settlement. *See* Am. Fairness Hr'g Tr., ECF No. 6463. Because many of the objections raised duplicative issues, I asked Objectors represented by attorneys to coordinate their presentations to streamline the Fairness Hearing.<sup>24</sup> Every Class Member who submitted a timely objection, and who was not represented by an attorney, was given an opportunity to speak at the Fairness Hearing. *See* Notice, Nov. 4, 2014, ECF No. 6344; Notice of Fairness Hr'g Schedule, ECF No. 6428.

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<sup>24</sup> *See* Notice, Nov. 4, 2014, ECF No. 6344. At my request, attorney Steven Molo and his firm undertook this task.

Though participants discussed a host of issues, much of the Fairness Hearing focused on the scientific underpinnings of CTE. In support of their positions, the Parties, Objectors, and Amici collectively submitted briefs, hundreds of pages of exhibits, dozens of scientific articles, and 22 expert declarations.

After reviewing the moving papers, the objections, and the arguments made at the Fairness Hearing, I proposed several changes to the Settlement that would benefit Class Members. *See* Order, Feb. 2, 2015, ECF No. 6479. Specifically, I requested that:

- Retired Players receive credit for time they spent playing in overseas NFL affiliate leagues;<sup>25</sup>
- All Retired Players who seek and are eligible for a baseline assessment examination receive one, notwithstanding the \$75 million cap;
- The NFL Parties compensate Qualifying Diagnoses of Death with CTE up until the Final Approval Date;

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<sup>25</sup> These include the World League of American Football, NFL Europe League, and NFL Europa League (collectively, “NFL Europe”).



- The Parties relax certain procedural requirements in the claims process in extenuating circumstances.
- *Id.* On February 13, 2015, Class Counsel and the NFL Parties agreed with my proposed changes in their entirety, and submitted the amended Settlement described *supra* Section I.D. *See* Parties' Joint Amendment.

## **II. Class Certification**

For a class action to have preclusive effect and bind absent class members, a class must first be certified. Rule 23(a) of the Federal Rules of Civil Procedure lays out four threshold requirements for certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Because this is a Rule 23(b)(3) class, two additional requirements must be met: (1) common questions must predominate over any questions affecting only individual members, and (2) class resolution must be superior to other available methods to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3).

Class certification “demand[s] undiluted, even heightened, attention in the settlement context.” *Amchem*, 521 U.S. at 620; *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797–99 (3d Cir. 1995) (hereinafter “*GM Trucks*”). However, the existence of a settlement means that “certain Rule 23 considerations ... are not applicable.” *Rodriguez v. Nat’l City Bank*, 726 F.3d 372, 378 (3d Cir. 2013). For example, because a settlement obviates the need for trial, concerns regarding the manageability of a Rule 23(b)(3) class disappear. *See Amchem*, 521 U.S. at 619; *see also Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (en banc) (noting that “concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class”); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004) (“[C]oncerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant....” (citing *Amchem*, 521 U.S. at 620)).

The proposed Class and Subclasses meet the Rule 23(a) and 23(b)(3) requirements and warrant certification.

#### **A. Numerosity**

Rule 23(a)(1) requires that a class be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Thousands of Retired Players have filed suit against the NFL Parties in this MDL. The Parties estimate that there are over 20,000 Retired Players in the Class, as well as additional Representative Claimants and Derivative Claimants. *See* Class Counsel’s Actuarial Materials at 3; NFL Parties’ Actuarial Materials ¶ 16. The numerosity requirement of Rule 23(a) is satisfied. *See, e.g., Stewart v. Abraham*, 275 F.3d 220, 227–28 (3d Cir. 2001) (noting requirement typically satisfied by more than 40 plaintiffs).

## **B. Commonality**

Rule 23(a)(2) requires that class members’ claims share common questions of law or common questions of fact. The standard is not stringent; only one common question is required. *See Rodriguez*, 726 F.3d at 382 (concluding the bar commonality sets “is not a high one”); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 310 (3d Cir. 1998) (factor satisfied “if the named plaintiffs share at least one question of fact or law” with the prospective class (internal quotation marks omitted)). To satisfy commonality, class claims “must depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that

determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

Commonality is satisfied here. The critical factual questions in this case are common to all Class Members. These include whether the NFL Parties knew and suppressed information about the risks of concussive hits, as well as causation questions about whether concussive hits increase the likelihood that Retired Players will develop conditions that lead to Qualifying Diagnoses. Class Members also face a host of common legal questions, such as the nature and extent of any duty owed to Retired Players by the NFL Parties, and whether LMRA preemption, workers’ compensation, or some affirmative defense would bar their claims.

Citing *Wal-Mart*, Objectors contend that commonality is not satisfied because each Retired Player was injured “in unique and disparate ways.”<sup>26</sup> Heimburger Obj. at 13, ECF No. 6230. While it is

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<sup>26</sup> Section V addresses the majority of the objections. Where relevant however, specific objections to class certification, Class Notice, and the application of the factors enunciated in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975) and *In re Prudential Insurance Co. of America Sales Practice Litigation*, 148 F.3d 283 (3d Cir. 1998) are discussed in Sections II, III, and IV, respectively.

true that no two Retired Players' concussion history or symptoms are identical, commonality still exists. Common legal and factual questions are at the heart of this case. Essential questions include whether the CBAs mandate compulsory arbitration, and whether the NFL Parties used the MTBI Committee to fraudulently refute the dangers of head injuries. No Class Member could prevail without proving the NFL Parties' misconduct.

The common issues in this case satisfy the Supreme Court's concerns in *Wal-Mart*. In *Wal-Mart*, a putative class of female employees argued they were systematically denied promotions and pay raises because of their gender. The Court found no commonality because Wal-Mart had no formal policy regarding either promotions or pay raises; each decision was left to a local manager's discretion. *Wal-Mart*, 131 S. Ct. at 2554. Thus, the determination that one manager's decision was sexist would not affect the determination of whether another manager's decision in a different store was sexist as well. *Id.* By contrast, the NFL Parties allegedly injured Retired Players through the same common course of conduct: refusing to alter league rules to make the game safer, failing to warn of the dangers of head injuries, and establishing the MTBI Committee. *See Sullivan*, 667 F.3d at 299.

The commonality requirement is satisfied.

### **C. Typicality**

Rule 23(a)(3) requires that the class representatives' claims be "typical of the claims ... of the class." Fed. R. Civ. P. 23(a)(3). "The typicality requirement is designed to align the interests of the class and the class representatives...." *Prudential*, 148 F.3d at 311.

The Third Circuit has "set a low threshold for satisfying" the typicality requirement. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183 (3d Cir. 2001). "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct." *Prudential*, 148 F.3d at 311 (quoting *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994)); *see also Warfarin*, 391 F.3d at 532 (holding district court did not abuse its discretion in finding the typicality requirement was satisfied where the claims of the representative plaintiffs arose "from the same alleged wrongful conduct ... [and] the same general legal theories")

The Class Representatives have claims typical of those they represent. Shawn Wooden, the Representative of Subclass 1, is a Retired Player who has not been diagnosed with a Qualifying Diagnosis. Like many other Class Members, he seeks a baseline assessment examination to determine whether he has any neurocognitive impairment resulting from his years of playing NFL Football. If he ultimately develops a Qualifying Diagnosis, he will seek a Monetary Award. Kevin Turner, the Representative of Subclass 2, is a Retired Player who has been diagnosed with ALS. Similar to other Class Members who have already received Qualifying Diagnoses, he seeks compensation from the NFL Parties for his injuries.

Wooden and Turner seek recovery pursuant to the same legal theories as the absent Class Members. They claim the NFL Parties should have known of, or intentionally concealed, the risks of head injuries in NFL Football. The claims of all Class Members, Wooden and Turner included, derive from the same wrongful course of conduct: the NFL Parties' decision to promote and structure NFL Football in a way that increased concussive impacts.

Some Objectors argue that Wooden's and Turner's claims are not typical because they did not play in NFL Europe, and they both had long careers

in the NFL while others' careers were relatively brief. Objectors point to Retired Player Craig Heimburger as an example that typicality is lacking because Heimburger had a relatively short career and neither Representative suffers from Heimburger's specific symptoms. *See* Heimburger Obj. at 3, 12.

The factual differences among Retired Players do not defeat typicality. Class members need not "share identical claims." *Baby Neal*, 43 F.3d at 56. "[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Id.* at 58. Heimburger's short form complaint demonstrates that his damages stem from the same source as Wooden's and Turner's damages: "repetitive, traumatic sub-concussive and/or concussive head impacts during NFL games and/or practices." Heimburger Short Form Compl. at 2, ECF No. 1938. Like Wooden, Heimburger seeks medical monitoring. *Id.* at 5. Like Wooden's and Turner's injuries, Heimburger's injuries sound in negligence and fraud. *Id.* The remaining differences between Heimburger and the Class Representatives are immaterial to the typicality analysis.



The typicality requirement is satisfied.

#### **D. Adequacy of Representation**

Rule 23(a)(4) requires class representatives to “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). It tests both the qualifications of class counsel and the class representatives to represent a class. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977) (requiring both “representatives and their attorneys [to] competently, responsibly and vigorously prosecute the suit”), *abrogated on unrelated grounds by In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 325 n.25 (3d Cir. 2010). It also seeks to uncover conflicts of interest between class representatives and the class they represent. *See Warfarin*, 391 F.3d at 532.

##### *i. Adequacy of Class Counsel*

When examining settlement classes, courts “have emphasized the special need to assure that class counsel: (1) possessed adequate experience; (2) vigorously prosecuted the action; and (3) acted at arm’s length from the defendant.”<sup>27</sup> *GM Trucks*, 55 F.3d at 801.

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<sup>27</sup> In 2003, Congress amended Rule 23 to include subdivision 23(g), which provides a non-exhaustive list of factors for a court to consider when scrutinizing the adequacy of

No Objector challenges the expertise of Class Counsel. Co-Lead Class Counsel Christopher Seeger has spent decades litigating mass torts, class actions, and multidistrict litigations. He has served as plaintiffs' lead counsel, or as a member of the plaintiffs' executive committee or steering committee in over twenty cases. *See* Seeger Decl. ¶¶ 2–4. Co-Lead Class Counsel Sol Weiss, Subclass Counsel Arnold Levin and Dianne Nast, and Class Counsel Gene Locks and Steven Marks possess similar credentials. *See In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2000 WL 1222042, at \*44 (E.D. Pa. Aug. 28, 2000) (“Each of the Class Counsel [Arnold Levin, Sol Weiss, Gene Locks and others] are experienced in the conduct of class litigation, mass tort litigation and complex personal injury litigation....”); Seeger Decl. ¶ 27 (noting that Steven Marks and Sol Weiss are “attorneys with decades of

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class counsel's representation. *See* Fed. R. Civ. P. 23(g). The addition was meant to transfer the analysis of class counsel's representation from Rule 23(a)(4), where it had little textual support, to Rule 23(g). *See* Newberg on Class Actions § 3:80 (5th ed.). Rule 23(g) “builds on” the existing 23(a)(4) jurisprudence instead of “introducing an entirely new element into the class certification process.” *See* Fed. R. Civ. P. 23(g) advisory committee's notes (2003 amendments). Accordingly, the Third Circuit continues to apply the factors *GM Trucks* relied on prior to the addition of Rule 23(g). *See In re Cmty. Bank of N.Va.*, 622 F.3d 275, 304–05 (3d Cir. 2010); *In re Cmty. Bank of N.Va.*, 418 F.3d 277, 307 (3d Cir. 2005). Class Counsel's representation of the Class satisfies both Rule 23(g) and 23(a)(4).

class action and MDL litigation experience”); Levin Decl. ¶ 2 (noting leadership positions in over 100 class actions, mass torts, and complex personal injury suits); Nast Decl. ¶ 2 (noting leadership positions in over 48 complex cases).

Class Counsel vigorously prosecuted the action at arm’s length from the NFL Parties. Mediator Judge Phillips notes that during negotiations “Plaintiffs’ counsel [ ] consistently and passionately expressed the need to protect the interests of the retirees and their families and fought hard for the greatest possible benefits....” Phillips Supp. Decl. ¶¶ 2–5, 8–10; Phillips Decl. ¶¶ 2, 5–7, 11; Mem. in Supp. of Preliminary Approval Order, ECF No. 6083 (“[I]t appears that the proposed Settlement is the product of good faith, arm’s length negotiations.”). “It was evident throughout the mediation process that Plaintiffs’ counsel were prepared to litigate and try these cases ... if they were not able to achieve a fair and reasonable settlement....” Phillips Supp. Decl. ¶ 3.

The substantial concessions Class Counsel were able to extract from the NFL Parties confirm Judge Phillips’ observations. “[T]he uncapped nature of the proposed settlement ... indicate[s] that class counsel and the named plaintiffs have attempted to

serve the best interests of the class as a whole.” *Prudential*, 148 F.3d at 313.

Some Objectors point to Class Counsel’s proposed fee award as evidence that representation was collusive or self-serving.<sup>28</sup> *See, e.g.*, Morey Obj. at 79–80, ECF No. 6201; Heimbürger Obj. at 19–21. Class Counsel, however, did not move for a fee award in connection with final approval. At an appropriate time after the Effective Date of the Settlement, Class Counsel may file a fee petition that Class Members will be free to contest. Any award will be separate from, and in addition to, the NFL Parties’ other obligations under the Settlement. *See* Settlement § 21.1. The NFL Parties have agreed not to contest any award of attorneys’ fees and costs equal to or below \$112.5 million.

None of the fee provisions in the Settlement indicate inadequate representation. Courts are wary when attorneys’ fees are taken from a common fund because any fee given to class counsel will detract from funds available to the class. Courts are sometimes wary even when attorneys’ fees are taken from an ostensibly separate fund because of the fear that the formal division between fees and class funds is illusory and that attorneys’ fees will still deplete

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<sup>28</sup> For an additional discussion of fees, see *infra* Section IV.C.

the amount available to the class. *See GM Trucks*, 55 F.3d at 803–05, 819–20.

A fee award in this case will not come from a common fund. The ultimate amount the NFL Parties must pay in attorneys' fees will have no impact on the Monetary Awards paid or baseline assessment examinations given because the NFL Parties have already guaranteed these benefits, in full, to eligible claimants. *See Settlement* § 21.1; *see also Court Awarded Attorney Fees: Report of the Third Circuit Task Force*, 108 F.R.D. 238, 266 (1985) (noting a conflict of interest exists when “a large attorney’s fee means a smaller recovery to plaintiff”).

Moreover, the course of negotiations in this case provides assurances that attorneys' fees did not reduce the recovery available to the Class. According to Mediator Phillips, the Parties were careful not to discuss fees until after the Court had announced, on the record, an agreement regarding the total compensation for Class Members. *See Phillips Supp. Decl.* ¶ 19; Order, Aug. 29, 2013. Because Class benefits were fixed by the time the Parties discussed fees, the amount given to the Class was not compromised. *See In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 138 (E.D. La. 2013) ( “*Deepwater Horizon Clean-Up Settlement*” ) (noting mediator’s involvement during negotiations

“further ensured structural integrity”); *cf. In re Cmty. Bank of N. Va.*, 418 F.3d 277, 308 (3d Cir. 2005) (noting “special danger of collusiveness” when fees “were negotiated simultaneously with the settlement”).

Finally, Objectors point to the presence of a clear sailing provision, meaning that the NFL Parties have agreed not to contest any award of attorneys’ fees and costs equal to or below \$112.5 million, as evidence of collusion. While Objectors are correct that a clear sailing provision “should put a court on its guard,” *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991), “not every ‘clear sailing’ provision demonstrates collusion.” *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 426 (6th Cir. 2012). “[N]umerous cases ... have approved agreements containing such clear-sailing clauses.” *Deepwater Horizon Clean-Up Settlement*, 295 F.R.D. at 138.

A clear sailing provision does not “bar approval of [a] [s]ettlement” where a court “strictly scrutinize[s] both the process and substance” of the proposed agreement. *In re Excess Value Ins. Coverage Litig.*, MDL No. 1339, 2004 WL 1724980, at \*10 (S.D.N.Y. July 30, 2004). As discussed, the negotiation process that led to the Settlement in this case indicates that the clear sailing provision is not

problematic. *See Shames v. Hertz Corp.*, No. 07–2174, 2012 WL 5392159, at \*13 (S.D. Cal. Nov. 5, 2012) (overruling objection based on clear sailing provision in part because the “fee amount was negotiated separately and only after the class settlement was finalized”); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 813 (E.D. Wis. 2009) (overruling objection to a clear sailing provision in part because “the settlement was achieved after arms-length negotiation with the assistance of a Seventh Circuit mediator”).

The substance of the Settlement likewise indicates an absence of collusion. The Settlement provides uncapped, guaranteed Monetary Awards and baseline assessment examinations. *See LaGarde v. Support.com, Inc.*, No. 12–0609, 2013 WL 1283325, at \*10 (N.D. Cal. Mar. 26, 2013) (noting that “Plaintiffs did not bargain away benefits to the class ... when they secured the clear sailing provision” because “[h]ad Plaintiffs colluded ... the settlement would not [have] provide[d] such a substantial value”).

Moreover, the clear sailing provision caps uncontested attorneys’ fees at just over 10% of the Parties’ estimates of Class recovery. *Compare* Settlement § 21.1 *with* Class Counsel’s Actuarial Materials at 3 *and* NFL Parties’ Actuarial Materials

¶ 20. Courts are wary of clear sailing provisions when they insulate disproportionate fee awards. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (clear sailing provision was a “warning sign [ ]” when attorneys’ fees cap was “up to eight times the monetary *cy pres* relief afforded the class,” and there was no other recovery); *cf. Gooch*, 672 F.3d at 426 (“We find collusion particularly unlikely in this instance where the clear sailing provision caps attorney compensation at approximately 2.3% of the total expected value of the settlement to the class members. The majority of common fund fee awards fall between 20% and 30% of the fund.” (internal quotation marks omitted)); *Harris v. Vector Mktg. Corp.*, No. 08–5198, 2012 WL 381202, at \*5 (N.D. Cal. Feb. 6, 2012) (approving revised settlement because “[u]nlike the initial settlement, the award to the class ... [was] not substantially outstripped by a ‘clear sailing’ attorney fee provision”). Here, the uncontested fee award cap is not disproportionate to the compensation provided to the Class.

Of course, the clear sailing provision does not require the Court to approve the uncontested \$112.5 million award, or any other requested amount. The Court reserves full discretion to award reasonable attorneys’ fees. *See infra* Section IV.C.



*ii. Adequacy of Named Parties*

A class representative must also capably and diligently represent a class. This standard is easily met: “A class representative need only possess a minimal degree of knowledge” about the litigation to be adequate. *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) (internal quotation marks omitted); *see also Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 n.9 (3d Cir. 1973) (“Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions.”). Despite this, Objectors challenge whether Shawn Wooden and Kevin Turner fulfilled their roles as Class Representatives. *See* Morey Obj. at 80; Heimburger Obj. at 12–13; Utecht Obj. at 6–7, ECF No. 6243 (arguing that Class Representatives should be required to testify that they were advised of various provisions of the Settlement).

Both Class Representatives ably discharged their duties. Wooden and Turner have followed the litigation closely, including the negotiations process and the multiple revisions to the Settlement. *See* Aff. of Kevin Turner ¶¶ 6–9, ECF No. 6423–7 (“Turner Aff.”); Aff. of Shawn Wooden ¶¶ 3–5, 7, ECF No. 6423–8 (“Wooden Aff.”). Each authorized the filing of the Class Action Complaint and approved the

Settlement. Turner Aff. ¶¶ 8–9; Wooden Aff. ¶¶ 6–8. Although Wooden and Turner did not actively participate in settlement negotiations, their participation is not required. *See Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir. 1982) (“The adequacy-of-representation test is not concerned [with] whether plaintiff ... will personally be able to assist his counsel.”), *abrogated on other grounds by Garber v. Lego*, 11 F.3d 1197, 1206–07 (3d Cir. 1993).

*iii. Absence of Conflicts of Interest*

“The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Amchem*, 521 U.S. at 625 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157–58, n.13 (1982)). The “linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class.” *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012).

Not every distinction between a class member and a class representative renders the representative inadequate. “A conflict must be fundamental to violate Rule 23(a)(4).” *Id.* at 184 (internal quotation marks omitted). “A fundamental conflict exists where some [class] members claim to have been harmed by

the same conduct that benefitted other members of the class.” *Id.* (alteration in original) (internal quotation marks omitted). This occurs when, “by maximizing their own interests, the putative representatives would necessarily undercut the interests of another portion of the class.” Newberg on Class Actions § 3:58 (5th ed.). Benefits awarded to some class members, but not others, without adequate justification may indicate that other class members were inadequately represented. *See GM Trucks*, 55 F.3d at 797.

Structural protections in the class definition and settlement, such as separate subclasses or an uncapped fund, may eliminate fundamental conflicts. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 631 (3d Cir. 1996) (suggesting use of “structural protections to assure that differently situated plaintiffs negotiate for their own unique interests”), *aff’d sub nom. Amchem*, 521 U.S. at 591. In this case, no fundamental conflicts exist.

All Class Members allegedly were injured by the same scheme: the NFL Parties negligently and fraudulently de-emphasized the medical effects of concussions to keep Retired Players in games. Class incentives are aligned because “[t]he named parties, like the members of the class, would need to establish this scheme in order to succeed on any of

the claims” asserted. *Prudential*, 148 F.3d at 313; *see also Warfarin*, 391 F.3d at 532 (finding adequacy satisfied in part because “all shared the same goal of establishing the liability of DuPont”).

The Class includes two Subclasses that prevent conflicts of interest between Class Members. *Amchem* held that an undifferentiated class containing those with present injuries and those who have not yet manifested injury is beset by a conflict of interest. *See Prudential*, 148 F.3d at 313. Recognizing this problem, Class Counsel subdivided the Class into two Subclasses: Retired Players who have already received a Qualifying Diagnosis (and their Representative and Derivative Claimants) and Retired Players who have not. *See Ortiz v. Fibreboard*, 527 U.S. 815, 856 (1999) (holding that “a class including holders of present and future claims ... requires division into homogenous subclasses”). Each Subclass has its own independent counsel. *Warfarin*, 391 F.3d at 533 (noting that “any potential for conflicts of interest ... that may have arisen prior to and during the settlement negotiations were adequately [addressed] by the presence of separate counsel”).

Each Subclass Representative’s interests reflect the interests of the Subclass as a whole. As with all other Retired Players who already have a

Qualifying Diagnosis, Kevin Turner is interested in immediately obtaining the greatest possible compensation for his injuries and symptoms. Shawn Wooden, like all other Retired Players without a Qualifying Diagnosis, is interested in monitoring his symptoms, guaranteeing that generous compensation will be available far into the future, and ensuring an agreement that keeps pace with scientific advances. Because Wooden does not know which, if any, condition he will develop, he has an interest in ensuring that the Settlement compensates as many conditions as possible.

Additional structural protections in the Settlement ensure that each Class Member is adequately represented. Every Retired Player who receives a Qualifying Diagnosis during the 65-year life of the Settlement is entitled to a Monetary Award. The Monetary Award Fund is uncapped and baseline assessment examinations are guaranteed for all eligible Retired Players. That one Retired Player receives a Monetary Award or undergoes a baseline assessment examination presents no impediment to any other Class Member's recovery. *See Warfarin*, 391 F.3d at 532 (holding that the district court did not abuse its discretion in finding adequacy of representation satisfied in part because "recovery did not change depending on the number of the people in the class, [avoiding] the problem of

‘splitting the settlement’ ”). Monetary Awards are also indexed to inflation. Retired Players who receive Qualifying Diagnoses in the future will be on equal footing with those who are currently suffering. Additionally, the Settlement provides Supplemental Monetary Awards for worsening symptoms. Retired Players who receive more severe Qualifying Diagnoses after receiving initial Monetary Awards are entitled to supplemental payments. *See Diet Drugs*, 2000 WL 1222042, at \*49 (noting that class members with injuries that will worsen over time “are protected by the settlement in that they may ‘step up’ to higher amounts of compensation on the matrices as their level of disease progresses”).

Moreover, the presence of Mediator Judge Phillips and Special Master Golkin helped guarantee that the Parties did not compromise some Class Members’ claims in order to benefit other Class Members. “Plaintiffs’ counsel ... fought hard for the greatest possible benefits for *all* of the players” and “demanded that a range of injuries consistent with those alleged in the Complaints be considered eligible for a monetary award.” Phillips Supp. Decl. ¶¶ 2, 8 (emphasis added).

Objectors contend that an additional subclass is necessary for Retired Players who suffer from CTE. They argue that Subclass Representative

Shawn Wooden does not allege that he is at risk of developing the disease. *See, e.g.*, Morey Obj. at 27 (“Mr. Wooden, by contrast, has not alleged that he suffers from CTE.”); Chelsey Obj. at 11, ECF No. 6242; Duerson Obj. at 17–18, ECF No. 6241; Miller Obj. at 3–4, ECF No. 6213; Chelsey Supplemental Obj. at 7, ECF No. 6453.

Shawn Wooden has adequately alleged that he is at risk of developing CTE. In the Master Administrative Class Action Complaint, one of the operative pleadings for this MDL, Wooden alleges he “is at increased risk of latent brain injuries caused by [ ] repeated traumatic head impacts,” which, as Objectors point out, include CTE. *See* Master Administrative Class Action Complaint ¶ 7; Morey Obj. at 21 (alleging “CTE ... is associated with repetitive mild traumatic brain injury” (internal quotation marks omitted)). Moreover, as Subclass Representative, Wooden authorized the filing of the Class Action Complaint, which alleges that Retired Players are at risk for developing “mood swings, personality changes, and the debilitating and latent disease known as CTE.” Class Action Complaint ¶ 61; *see also* Wooden Aff. ¶ 6.

A subclass of CTE sufferers is both unnecessary and poses a serious practical problem. It is impossible to have a Class Representative who has

CTE because, as Objectors concede, CTE can only be diagnosed after death. *See, e.g.*, Morey Obj. at 26; Chelsey Obj. at 9; *infra* Section V.A.i. Thus, the best Subclass Representative for individuals who will be diagnosed with CTE post mortem is one who alleges exposure to the traumatic head impacts that cause CTE and who has an incentive to negotiate for varied and generous future awards in light of the current uncertainty in his diagnosis. In other words, the best Subclass Representative for CTE is someone in Shawn Wooden's position.

Finally, Objectors and Amici incorrectly allege that a variety of fundamental conflicts exist because Retired Players receive different compensation based on their age,<sup>29</sup> medical history,<sup>30</sup> the number of seasons they played,<sup>31</sup> and other distinctions contained within the Settlement.<sup>32</sup> In the same vein,

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<sup>29</sup> *See* Mem. of Public Citizen at 4, ECF. No. 6214–1 (alleging conflict of interest based on age offsets).

<sup>30</sup> *See, e.g.*, Morey Obj. at 32–34, ECF No. 6201 (objecting to Stroke and severe TBI offsets); Armstrong Obj. at 17, ECF No. 6233.

<sup>31</sup> *See* Armstrong Obj. at 15–16. (alleging conflict of interest based on number of eligible seasons offset).

<sup>32</sup> Many Objectors also point to the lack of Eligible Season credit for Retired Players who played in NFL Europe as evidence of inadequate representation. However, the Parties



Amici argue that inadequate representation exists because different Qualifying Diagnoses have different maximum awards.<sup>33</sup> Retired Players with ALS, for example, can receive a maximum award of \$5 million, while Retired Players with Alzheimer’s Disease can only receive a maximum award of \$3.5 million. Additionally, Objectors argue that many symptoms, particularly mood and behavioral symptoms such as depression, impulsivity, or suicidality, are not compensated.<sup>34</sup> They call for increased benefits under the Settlement and the

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amended the Settlement to address this concern, so this objection is no longer relevant. *See infra* Section V.C.iv.

<sup>33</sup> *See* Mem. of Public Citizen at 5 (“The third set of conflicts relates to how and why the dollar figures were assigned for each compensated disease category on the grid.”).

<sup>34</sup> *See, e.g.*, Heimburger Obj. at 10, ECF No. 6230 (noting conflict because of “cognitive injur[ies] ... not compensated by the [S]ettlement”); Duerson Obj. at 20–21, 25, ECF No. 6241 (noting lack of compensation for “sensitivity to noise, visual impairment, chronic pain, chronic headaches, incessant ringing in ears, attention disorders, trouble sleeping, aggression, agitation, impulsivity, suicidal thoughts and difficulty regulating, expressing and controlling complex emotions,” and epilepsy); Armstrong Obj. at 10–12 (listing pituitary hormonal dysfunction, atherosclerosis, fatigue, decreased muscle mass and weakness, mood abnormalities, epilepsy, vestibular (balance) disturbances, anosmia, ageusia, and other “physical, neurological and neurobehavioral consequences” that are “missing from the list of [Q]ualifying [D]iagnoses in the [Settlement]”); Chelsey Obj. at 5, ECF No. 6242 (noting lack of compensation for “chronic headaches, depression, mood disorders, sleep dysfunction,” and other symptoms).

creation of additional subclasses. *See, e.g.,* Heimburger Obj. at 8 (“Two settlement classes are not enough for a fact-pattern this complex....”).

Adequacy of representation of a class is not compromised simply because there may be differences in the condition or treatment of different class members. “[V]aried relief among class members with differing claims is not unusual. Such differences in settlement value do not, without more, demonstrate conflicting or antagonistic interests within the class.” *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 346 (3d Cir. 2010) (citations omitted). Differing recovery is “simply a reflection of the extent of the injury that certain class members incurred.” *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 272 (3d Cir. 2009). Plaintiffs with different injuries can coexist in a class consistent with Rule 23 and Due Process. *See Warfarin*, 391 F.3d at 532 (upholding class certification of “a single class including several types of injured plaintiffs”).

In this case, differing levels of compensation in the Settlement reflect the underlying strength of Class Members’ claims. *See Pet Food*, 629 F.3d at 347 (affirming district court’s conclusion that differing awards to class members “reflect the relative value of the different claims,” not “divergent interests between the allocation groups”); *Petrovic v. Amoco*

*Oil Co.*, 200 F.3d 1140, 1146 (8th Cir. 1999) (“If the objectors mean ... that a conflict of interest requiring subdivision is created when some class members receive more than other class members in a settlement, we think that the argument is untenable.”).

The factual basis for the distinctions among Class Members will be addressed in detail during the Rule 23(e) analysis because Objectors’ challenges to the fairness of the Settlement overlap with their challenges to adequacy of representation.<sup>35</sup> A brief summary of the justifications for distinctions made between Class Members follows.

The different maximum awards that Class Members receive for different Qualifying Diagnoses reflect the severity of the injury and symptoms suffered by each Retired Player, and do not indicate inadequate representation. *See Diet Drugs*, 2000 WL 1222042, at \*21–22 (approving personal injury class settlement providing a range of monetary awards based on severity of injury).

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<sup>35</sup> For a discussion of the Settlement’s offsets, see *infra* Section V.C. For a discussion of the differences in monetary awards, and which conditions are compensated, see *infra* Section V.B.ii. For a discussion of CTE, see *infra* Section V.A.

The offset for Retired Players with fewer than five Eligible Seasons is a reasonable proxy for Retired Players' exposure to repetitive head trauma in the NFL. Retired Players with brief careers endured fewer hits, making it less likely that NFL Football caused their impairments. Research supports the claim that repeated head trauma has an association with the Qualifying Diagnoses.

The Stroke, severe TBI, and age offsets all represent scientifically documented risk factors for the Qualifying Diagnoses. Each is strongly associated with neurocognitive illness. Older Retired Players, as well as Retired Players who suffered from Stroke or severe TBI outside of NFL Football, would find it more difficult to prove causation if they litigated their claims, justifying a smaller award. *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 562 (W.D. Wash. 2004) (“[D]isparate treatment of claims is obviously necessary if claims are to be valued.... Placing a lower value on claims that would have been barred by a defense ... is hardly evidence of a conflict.”).

Finally, the Settlement's failure to compensate every alleged symptom related to concussive hits is not fatal to the adequacy of representation requirement. Because Wooden does not yet know which symptoms he will contract, he had an

incentive to ensure that the Settlement compensated as many symptoms as possible. Additionally, the decision to exclude mood and behavioral symptoms is reasonable because Retired Players typically have many other risk factors for these symptoms, such as exposure to major lifestyle changes, a history of drug or alcohol abuse, and a high Body Mass Index (“BMI”).

To address the factual distinctions between Class Members, Objectors suggest the creation of a number of additional subclasses. A proliferation of subclasses to address each difference between Class Members, however, would not leave Class Members better off. “ ‘[I]f subclassing is required for each material legal or economic difference that distinguishes class members, the Balkanization of the class action is threatened.’ ” *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 202 (3d Cir. 2005) (alteration in original) (quoting “leading expert” John C. Coffee Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 398 (2000)). The result, “a class action containing a multitude of subclasses[,] loses many of the benefits of the class action format.” *Id.*

Objections related to the symptoms that the Settlement fails to compensate are a perfect example

of the risks involved in creating additional subclasses to address each difference. Several Objectors claim that there is inadequate representation because the Settlement fails to compensate dozens of symptoms allegedly associated with repeated concussions.<sup>36</sup> They assert that because Class Representative Kevin Turner only has ALS, he cannot adequately represent individuals with different symptoms. *See* Morey Obj. at 27; Miller Obj. at 3; Mem. of Public Citizen at 3. Requiring independent representation to address each of these symptoms likely would not have increased the total recovery of Class Members. Instead, negotiations probably would have ground to a halt. Moreover, Shawn Wooden, Class Representative for Subclass 1, already represents all Class Members because he does not know which, if any, condition he will develop. Thus, he has an interest in ensuring that the Settlement compensates as many conditions and symptoms as possible, and provides Class Members with the highest possible maximum award for each Qualifying Diagnosis.

In conclusion, Class Counsel and Class Representatives adequately represented absent Class Members. There are no fundamental conflicts of interest between Class Representatives and the

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<sup>36</sup> *See supra* note 34.

Class. The adequacy of representation requirement is satisfied.

### **E. Predominance**

Under Rule 23(b)(3), an opt-out class may be maintained if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). Predominance “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,” *Amchem*, 521 U.S. at 623, to determine whether the proposed class “ ‘would achieve economies of time, effort, and expense.’ ” *Id.* at 615 (quoting Fed. R. Civ. P. 23(b)(3) advisory committee’s notes (1966 amendments)). The predominance inquiry is a more stringent version of the commonality analysis; common questions must drive the litigation. *See Danvers Motor Co. v. Ford Motor Co.*, 543 F.3d 141, 148 (3d Cir. 2008) (“[T]he commonality requirement is subsumed by the predominance requirement.” (internal quotation marks omitted)); *Warfarin*, 391 F.3d at 528 (noting the predominance requirement to be “far more demanding” than the commonality requirement).

“[T]he focus of the predominance inquiry is on whether the defendant’s conduct was common as to

all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan*, 667 F.3d at 298. A common scheme generates predominant legal and factual questions. *See Community Bank*, 418 F.3d at 309 ("[T]he record below supports ... a finding of predominance. All plaintiffs' claims arise from the same alleged fraudulent scheme."); *Warfarin*, 391 F.3d at 528 (upholding certification where "plaintiffs have alleged that DuPont engaged in a *broad-based campaign*" (emphasis added)); *Prudential*, 148 F.3d at 314–15 (holding fraudulent sales practices by the defendant sufficient for common issues to predominate despite existence of individual questions of reliance for each investor).

Central to this case are factual questions regarding the NFL Parties' knowledge and conduct. Class Members' negligence claims depend on establishing that the NFL Parties knew of the dangers of concussive hits, yet failed to modify the rules of NFL Football to mitigate them, or even to warn Retired Players that they were risking serious cognitive injury by continuing to play. Class Members' fraud claims suggest a similarly far-reaching scheme, alleging that the NFL Parties' MTBI Committee repeatedly obfuscated the link between football play and head trauma. *See Prudential*, 148 F.3d at 314–15 (affirming district



court's finding of predominance where case "involve[ed] a common scheme to defraud millions of life insurance policy holders").

Importantly, the NFL Parties' alleged conduct injured Class Members in the same way: Retired Players all returned to play prematurely after head injuries and continued to experience concussive and sub-concussive hits. Predominance exists even though these hits resulted in different symptoms with different damages. The calculation of damages on an individual basis does not prevent certification.<sup>37</sup> See *Insurance Brokerage*, 579 F.3d at

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<sup>37</sup> The Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), does not undermine this conclusion. "*Comcast* ... did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015). All of the Circuit Courts that have had an opportunity to apply *Comcast* have reached this same conclusion. *Id.* at 408 (citing opinions of the First, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits). Rather, "*Comcast* held that a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury...." *Id.* at 407. Thus, in order to prove predominance, "a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) (discussing *Comcast* ). Here, Class Plaintiffs seek to certify a class for settlement purposes, and the NFL Parties do not challenge any expert testimony relied on to

269 (3d Cir. 2009) (“[W]e are satisfied that ... the fact of damages [ ] is susceptible to common proof, even if the amount of damage that each plaintiff suffered could not be established by common proof.”); *GM Trucks*, 55 F.3d at 817 (“Because separate proceedings can, if necessary, be held on individualized issues such as damages or reliance, such individual questions do not ordinarily preclude the use of the class action device.”).

Additionally, the NFL Parties’ alleged conduct raises common and dispositive scientific questions. Each Class Member would have to confront the same causation issues in proving that repeated concussive blows give rise to long-term neurological damage.

Resolution of these issues would “so advance the litigation that they may fairly be said to predominate,” *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986), because the “same set of core operative facts and theory of proximate cause apply to each member of the class.” *In re Pet Food Prods. Liab. Litig.*, No. 07–2867, 2008 WL 4937632, at \*6 (D.N.J. Nov. 18, 2008), *aff’d in part, vacated in part, remanded*, 629 F.3d 333 (3d Cir. 2010).

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establish predominance. Thus, *Comcast* and *Blood Reagents* are inapposite to this case.

This case is far more cohesive than the “sprawling” class at issue in *Amchem*. There, the Supreme Court found a settlement class of asbestos victims overbroad because class members were exposed to the different asbestos products of over twenty companies during a variety of different activities. *See Amchem*, 521 U.S. at 597. Here, all injuries stem from repeated participation in the same activity, NFL Football, an activity created and administered only by the NFL Parties.

Further, *Amchem* involved thousands of plaintiffs who had little or no relationship with each other. Many did not even know definitively whether they had been exposed to asbestos. *See* 521 U.S. at 628. By contrast, Retired Players are of course all aware of the fact that they played in the NFL. Indeed, Retired Players and their families think of themselves as a discrete group, and many continue to interact with one another because they all shared the common experience of professional football. *See, e.g.,* Am. Fairness Hr’g Tr. at 185:14–18 (one Objector noting that she was “raised in the NFL” because she spent a lot of time around Retired Players and that former players called themselves her “brothers”). Class Members in this case self-associate in a way that those in a typical mass tort, involving, for example, purchasers of a car with a defective part,

simply do not. *Cf. Dewey*, 681 F.3d at 170. As a result, the Class is far more cohesive.

Additionally, settlement itself allows common issues to predominate. “[C]ourts are more inclined to find the predominance test met in the settlement context,” *Sullivan*, 667 F.3d at 304 n.29 (3d Cir. 2011) (internal quotation marks omitted), because the “individual issues which are normally present in personal injury litigation become irrelevant, allowing the common issues to predominate.” *Diet Drugs*, 2000 WL 1222042, at \*43; *see also* Newberg on Class Actions § 4:63 (5th ed.) (“[I]n settlement class actions ... predominance ... recedes in importance.... Thus, many courts have held that individualized issues may bar certification for adjudication because of predominance-related manageability concerns but that these same problems do not bar certification for settlement.”).

Objectors argue that “courts simply do not permit the certification of personal-injury classes.” Heimburger Obj. at 15. This is incorrect. Even *Amchem*, the case on which they primarily rely, states that “the text of [Rule 23] does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970’s, have been certifying such cases in increasing number.” 521 U.S. at 625. Indeed, the trend has been

particularly strong where, as here, “there are no unknown future claimants and the absent class members are readily identifiable and can be given notice and an opportunity to opt out.”<sup>38</sup> Manual for Complex Litigation § 22.72 (4th ed.); *see, e.g., Diet Drugs*, 2000 WL 1222042, at \*68 (certifying personal injury settlement class for individuals who received harmful drug prescriptions); *In re Diet Drugs (Phentermine / Fenfluramine / Dexfenfluramine) Prods. Liab. Litig.*, 369 F.3d 293, 317 (3d Cir. 2004) (describing settlement as a “landmark effort to reconcile the rights of millions of individual plaintiffs with the efficiencies and fairness of a class-based settlement”); *Deepwater Horizon Clean-Up Settlement*, 295 F.R.D. at 161 (certifying a Rule 23(b)(3) settlement class for personal injuries resulting from oil spill); *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 223 (S.D. W. Va. 2005) (certifying a Rule 23(b)(3) settlement class of “users and purchasers” of pharmaceutical products alleging

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<sup>38</sup> *See infra* Section III.B, discussing how Class Members are easily identifiable by virtue of having played NFL Football, a well-catalogued and documented event. Because the Settlement covers only Retired Players (and their Representative and Derivative Claimants), the Class is a closed set and the Court and the Parties have an almost complete list of possible claimants. *See* Class Counsel’s Actuarial Materials at 13–14 (concluding that because “extensive historical data are available from a variety of authoritative sources ... the entire population of former NFL players,” including the deceased, have been identified).

a “range of physical and economic injuries”); *PPA Prods. Liab. Litig.*, 227 F.R.D. at 555–56 (certifying a Rule 23(b)(3) class and approving settlement of claims alleging “increased risk of hemorrhagic stroke” and “a variety of injuries” caused by defective products).

The predominance requirement is satisfied.

#### **F. Superiority**

Rule 23(b)(3)’s superiority requirement “asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those alternative available methods of adjudication.” *Warfarin*, 391 F.3d at 533–34 (internal quotation marks omitted).

Superiority is satisfied because the Settlement avoids thousands of duplicative lawsuits and enables fast processing of a multitude of claims. The Third Circuit recognizes that “concentrating the litigation of [ ] claims in a single superior action” is preferable to “numerous individual suits brought by claimants.” *Sullivan*, 667 F.3d at 311–12 (internal quotation marks omitted).

The Class consists of over 20,000 Retired Players, as well as their Representative and

Derivative Claimants. *See supra* Section I.E. Consolidated in this MDL are over 300 lawsuits representing the claims of about 5,000 Retired Players. In the absence of aggregate resolution, more lawsuits will surely follow. *See Prudential*, 148 F.3d at 316 (finding superiority satisfied because of the “sheer volume” of individual claims). These cases could result in decades of litigation at significant expense. *See* Am. Fairness Hr’g Tr. at 51:25–52:2 (Counsel for the NFL Parties noting: “The [NFL Parties] could have fought these claims, successfully fought these claims in [his] view for many, many years.”). Compensation would be uncertain, and many Retired Players with progressive neurodegenerative conditions would continue to suffer while awaiting relief.

Rule 23(b)(3) specifically directs a court to consider the “desirability ... of concentrating the litigation of the claims in the particular forum,” and “class members’ interests in individually controlling the prosecution or defense of separate actions.” Fed. R. Civ. P. 23(b)(3).<sup>39</sup>

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<sup>39</sup> Rule 23 also requires consideration of “the extent and nature of any litigation concerning the controversy already begun” and “the likely difficulties in managing a class action.” Fed. R. Civ. P. 23(b)(3). The Advisory Committee notes to Rule 23 indicate that the extent and nature of ongoing litigation ties into class members’ interests in individually controlling their own claims. *See* Newberg on Class Actions § 4:70 (5th ed.).

Because I currently oversee the MDL involving these cases and have coordinated pretrial proceedings, there is a unique advantage to class resolution by this Court. *See Diet Drugs*, 2000 WL 1222042, at \*55 (noting that “from the perspective of judicial efficiency, there is a strong desirability in implementing a settlement in this MDL [ ] transferee court, the jurisdiction with the most individual and class actions pending”).

Finally, Class Members have not demonstrated that they have an interest in individually resolving their claims against the NFL Parties. Despite extensive notice and generous opportunity to opt out, only one percent of the Class elected to pursue separate litigation. *See supra* Section I.E; *infra* Section III; *see also Warfarin*, 391 F.3d at 534 (finding superiority even though some plaintiffs had “significant individual claims” because they had the opportunity to opt out); *Community Bank*, 418 F.3d at 309 (same). Thus, the superiority requirement is satisfied.

In conclusion, I will certify the Class because the requirements of Rule 23(a) and 23(b)(3) are met.

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Additionally, because this is a settlement, there are no manageability concerns. *See Amchem*, 521 U.S. at 620.



### III. Notice<sup>40</sup>

Because Class Counsel seek simultaneous certification of the proposed Class and approval of the proposed Settlement, notice must satisfy both the requirements of Rule 23(c)(2)(B) and Rule 23(e)(1). *See Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 324 (E.D. Pa. 1993).

For a class certified under Rule 23(b)(3), “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2)(B) provides:

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<sup>40</sup> Within ten days of Class Counsel moving for preliminary approval of the Settlement, the NFL Parties sent copies of the Class Action Complaint and the proposed Settlement, as well as a list of Class Members organized by state residence to the United States Attorney General, and to the Attorney General for each state, the District of Columbia, and the territories. *See* ECF No. 6501 at 2–3. Within ten days of the Preliminary Approval Date, the NFL Parties sent these same officials copies of this Court’s Preliminary Approval Order and Memorandum, copies of the Long-Form Notice and Summary Notice, and notice of the date, time, and location of the Fairness Hearing. *See id.* These mailings satisfy the notice requirements of the Class Action Fairness Act. *See* 28 U.S.C. § 1715(b). Because final approval of the Settlement will occur more than 90 days after the relevant Attorneys General received these materials, the timing requirements of the Class Action Fairness Act have also been satisfied. *See id.* § 1715(d).

The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

*Id.*

Rule 23(e)(1) of the Federal Rules of Civil Procedure requires a district court to “direct notice in a reasonable manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). “Rule 23(e) notice is designed to summarize the litigation and the settlement and to apprise class members of the right and opportunity to inspect the complete settlement documents, papers, and pleadings filed in the litigation.” *Prudential*, 148 F.3d at 327 (internal quotation marks omitted).

In addition to the requirements of Rule 23, the Due Process Clause of the Fourteenth Amendment

requires that notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The content of the Settlement Class Notice and the methods chosen to disperse it satisfy all three requirements.

**A. Content of Class Notice**

The content of the Long-Form Notice and Summary Notice satisfy the requirements of Rule 23 and due process. *See* Long-Form Notice, ECF No. 6093-1; Summary Notice, ECF No. 60932. Each was written in plain and straightforward language. The Long-Form Notice apprised all Class Members of: the nature of the action; the definition of the Class; the Class claims and issues; the opportunity to enter an appearance through an attorney at the Fairness Hearing; the opportunity to opt out of the Settlement; and the binding effect of a class judgment on Class Members under Rule 23(c)(3)(B). The Long-Form Notice also properly disclosed the date, time, and location of the Fairness Hearing.

Objectors contend that the notice materials “misleads [C]lass [M]embers about the basic compromise of the settlement” because they failed to inform Class Members that there is no compensation for Death with CTE for Retired Players who died after the Preliminary Approval Date.<sup>41</sup> Morey Obj. at 38; *see also* Miller Obj. at 7–8; Alexander Obj. at 2–3, ECF No. 6237; Duerson Obj. at 29–30 (calling notice “misleading, at best—blatantly wrong, at worst”). Objectors first argue that the Summary Notice is misleading because it neglects to mention the cutoff date for Death with CTE claims. *See* Morey Obj. at 38–40. The Summary Notice states that only “*certain* cases of chronic traumatic encephalopathy” receive Monetary Awards. Summary Notice at 1 (emphasis added). In context, this is more than adequate: none of the other Qualifying Diagnoses listed contain any type of limiting language. *Id.* Moreover, the purpose of the one-page Summary Notice is not to provide exhaustive information, but to alert Class Members to the suit and direct them to more detailed information. *See Varacallo v. Mass. Mut. Life Ins.*

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<sup>41</sup> Before the parties amended the Settlement, the cutoff date for compensation for Death with CTE was the Preliminary Approval Date, July 7, 2014. *See* Settlement as of June 25, 2014, ECF No. 6073–2 § 6.3(f). The cutoff date is now the Final Approval Date. *See* Settlement § 6.3(f). Because amendment of the Settlement occurred after the Fairness Hearing, the Settlement Class Notice, and the objections discussing it, refer to the Preliminary Approval Date.

*Co.*, 226 F.R.D. 207, 227 (D.N.J. 2005) (explaining that settlement notice is “designed only to be a summary of the litigation and the settlement and should not be unduly specific” (internal quotation marks omitted)). The Summary Notice does exactly that, with a large banner at the bottom of the page listing both a toll-free phone number and the URL of the Settlement Website.

Objectors unsuccessfully argue that the Long-Form Notice is also misleading. Objectors concede that that the Long-Form Notice states that compensation is limited to “diagnoses of Death with CTE prior to **July 7, 2014.**”<sup>42</sup> Long-Form Notice at 6. Yet they maintain that this statement is misleading because it “does not outright disclose” that those who die after that date will not be compensated. Morey Obj. at 41. This is not enough to confuse a careful reader. *See In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 199 (5th Cir. 2010) (“The choice of words, while less than one hundred percent accurate, does not render the notice so clearly misleading...”); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104–05 (5th Cir. 1977) (noting notice need not “[be] perfectly correct in its form,” and instead that “[t]he standard [ ] is that the notice ... must contain information that a

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<sup>42</sup> See *supra* note 41.

reasonable person would consider to be material in making an informed, intelligent decision” about whether to opt out); *Rodgers v. U.S. Steel Corp.*, 70 F.R.D. 639, 647 (W.D. Pa. 1976) (holding that notice is adequate when it “enable[s] reasonable and competent individuals to make an informed choice” and there is “no reason to believe ... that the language of the tender notice and release forms must be reduced to a pabulum in order for [class members] to digest its import”).

Objectors further argue that the Long-Form Notice is confusing because the term “Death with CTE” appears several times without the accompanying cutoff date. *See* Morey Obj. at 4344. Both the Summary Notice and the Long-Form Notice indicate that only “certain” cases of CTE are covered. *See* Summary Notice at 1; Long-Form Notice at 1.

Even if the Long-Form Notice were unclear, it repeatedly instructs readers to sources that can answer their questions. Like the Summary Notice, the Long-Form Notice contains a banner at the bottom of each page directing those with “Questions?” to call a toll-free support number or visit the Settlement Website. Warnings that the Long-Form Notice is only a summary and that readers should look to the Settlement for specific

details appear five times in the Long-Form Notice.<sup>43</sup> See Long-Form Notice at 2, 6, 7, 15, 19 (“This Notice is only a summary of the Settlement Agreement and your rights. You are encouraged to carefully review the complete Settlement Agreement [on the Settlement Website].”).

Finally, Objectors argue that Co-Lead Class Counsel made misleading statements during interviews, news articles, and other media outreach. See Morey Obj. at 48–52. Any allegedly misleading statements made by Co-Lead Class Counsel are irrelevant, however, because only the Summary Notice and the Long-Form Notice are pertinent to the analysis of Rule 23 and due process. See Newberg on Class Actions § 16:20 (4th ed.) (“In reviewing the class notice to determine whether it satisfies [the notice] requirements, the court must look *solely to the language of the notices* and the manner of their distribution.” (emphasis added)); *Adams v. S. Farm*

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<sup>43</sup> Amici contend that the notice materials are inadequate because they insufficiently disclose that Monetary Awards are subject to reduction because of applicable Medicare and Medicaid liens. See Mem. of Public Citizen at 11. Yet they concede that the Long-Form Notice discusses possible reductions based on “[a]ny legally enforceable liens on the award.” See Long-Form Notice at 11, ECF No. 6093–1. Because the Notice directly alerts Class Members of this possibility, and refers them to the Settlement where this topic is discussed in detail, the argument is meritless.

*Bureau Life Ins. Co.*, 493 F.3d 1276, 1286 (11th Cir. 2007) (same).

## **B. Distribution of Class Notice**

No objection challenges the efforts undertaken to distribute notice. Class Counsel conducted a thorough campaign across several fronts that successfully apprised the Class of the suit. They retained three separate firms—Kinsella Media LLC (“Kinsella Media”), BrownGreer PLC (“BrownGreer”), and Heffler Claims Group (“Heffler”)—to design, implement, and distribute Settlement Class Notice. *See Nichols v. SmithKline Beecham Corp.*, No. 00–6222, 2005 WL 950616, at \*10 (E.D. Pa. Apr. 22, 2005) (praising use of a professional firm experienced in class action notice).

First, BrownGreer constructed a master list of all readily identifiable Class Members and their addresses by aggregating 33 datasets of information from the NFL Parties, individual Member Clubs, sports statistics databases, and prior class actions involving Retired Players. *See* Decl. of Katherine Kinsella ¶ 7, ECF No. 6423–12 (“Kinsella Decl.”); Decl. of Orran L. Brown ¶¶ 8–14, 25–26, ECF No. 6423–5 (“Brown Decl.”). Kinsella Media used that master list to send a cover letter and a copy of the Long–Form Notice through first-class mail to the



over 30,000 addresses identified. *See* Kinsella Decl. ¶¶ 8–10; *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985) (“It is well settled that in the usual situation first–class mail and publication in the press fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the [D]ue [P]rocess [C]lause.”).

Second, Kinsella Media supplemented the direct notice with extensive publication notice. Kinsella Media placed advertisements in major publications, including full-page advertisements in *Ebony*, *People*, *Sports Illustrated*, and *Time*, and thirty-second television commercials on ABC, CBS, CNN, and others. *See* Kinsella Decl. ¶¶ 15–18, 21; *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 481–82 (E.D. Pa. 2010) (approving a class action settlement with a notice program including ads placed on four national cable networks); *In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 2001 WL 20928, at \*5 (E.D. Pa. Jan. 4, 2001) (approving notice program that included first-class mail and publication notice in the *Wall Street Journal* ). Internet ads were also placed on popular sites such as CNN, Facebook, Weather.com, and Yahoo!. *See* Kinsella Decl. ¶¶ 19–20.

Third, BrownGreer established a Settlement Website containing links to the Long–Form Notice

and the Settlement and providing answers to frequently asked questions. Brown Decl. ¶¶ 37, 39–41. Fourth, Heffler established and maintained a dedicated toll-free number that provided the opportunity to speak with a live operator to answer any questions about the case. *See* Decl. of Edward Radetich ¶¶ 3–10, ECF No. 6423–13 (“Radetich Decl.”); *Carlough*, 158 F.R.D. at 333 (finding notice satisfied in personal injury tort case where advertisements “urge[d] class members to call the toll-free number to obtain the complete individual notice materials”).

Finally, independent of any efforts of Class Counsel, national broadcasts and major news programs covered the case extensively. Over 900 articles have been published since the Parties first announced their initial settlement on August 29, 2013. Seeger Decl. Attachment. This “unsolicited news coverage” supplemented “the combination of individual and publication notice ... [and] greatly increased the possibility” that Class Members were informed of the litigation. *Prudential*, 148 F.3d 283, 327.

Within three weeks of the Preliminary Approval Date, the Settlement Website was launched, the toll-free number became available, and direct notice was mailed. *See* Kinsella Decl. ¶¶ 8–10,

27; Brown Decl. ¶ 37; Radetich Decl. ¶¶ 4–8. As a result, Class Members had approximately 90 days to determine whether to object or opt out. Courts routinely hold that between 30 and 60 days is a sufficient amount of time for class members to evaluate the merits of a settlement. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. 450, 562 (D.N.J. 1997) (citing cases). Kinsella Media estimates that these programs reached 90% of Class Members. *See* Kinsella Decl. ¶ 48; *see also In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1061 (S.D. Tex. 2012) (notice plan that expert estimated would reach 81.4% of class was sufficient); *Alberton v. Commonwealth Land Title Ins. Co.*, No. 063755, 2008 WL 1849774, at \*3 (E.D. Pa. Apr. 25, 2008) (direct notice projected to reach 70% of class plus publication in newspapers and internet was sufficient); *Grunewald v. Kasperbauer*, 235 F.R.D. 599, 609 (E.D. Pa. 2006) (direct mail to 56% of class and publication in three newspapers and on internet sites was sufficient).

In conclusion, the Settlement Class Notice clearly described of the terms of the Settlement and the rights of Class Members to opt out or object. Class Counsel’s notice program ensured that these materials reached those with an interest in the

litigation. The requirements of Rule 23 and due process are satisfied.

**C. Notice of Amendments to the Settlement**

After the Fairness Hearing, the Parties made several amendments to the Settlement that I proposed in consideration of some of the issues raised by Objectors. *See Parties' Joint Amendment*. Class Members who opted out ("Opt Outs") received adequate notice of these changes, and notification of Class Members is not required.

The Settlement allows Opt Outs the opportunity to rejoin the Class any time before the Final Approval Date. *See Settlement § 14.2(c)*. After making amendments to the Settlement, Class Counsel informed all Opt Outs by first-class mail of the revisions to the Settlement and their right to revoke their requests to opt out. *See Notice, Mar. 31, 2015, ECF No. 6500*.

Because these changes improved the deal for Class Members without providing any concessions to the NFL Parties, an additional round of notice for Class Members is unnecessary. *See Prudential*, 962 F.Supp. at 473 n.10 (holding that class members "need not be informed of the Final Enhancements to

the settlement because the Proposed Settlement is only more valuable with these changes. Plainly, class members who declined to opt out earlier, would not choose to do so now.”); *Trombley v. Bank of Am. Corp.*, No. 08–0456, 2013 WL 5153503, at \*6 (D.R.I. Sept. 12, 2013) (“Because the compensation provided by the Revised Settlement Agreement is more beneficial to the class than the compensation offered by the original settlement agreement, no additional notice nor a second hearing is necessary.”); *Harris v. Graddick*, 615 F.Supp. 239, 244 (M.D. Ala. 1985) (finding new notice unnecessary when “plaintiff class [was] in no way impaired by the amendment”).

#### **IV. Final Approval of the Settlement**

A class action cannot be settled without court approval, based on a determination that the proposed settlement is fair, reasonable, and adequate. *See Prudential*, 148 F.3d at 316; Fed. R. Civ. P. 23(e)(2).

“[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged.” *Warfarin*, 391 F.3d at 535 (citing *GM Trucks*, 55 F.3d at 784). These complex actions “consume substantial judicial resources and present unusually large risks for the litigants.” *GM Trucks*, 55 F.3d at 805. When evaluating a

settlement, a court should be “hesitant to undo an agreement that has resolved a hard-fought, multi-year litigation.” *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) (citing *Warfarin*, 391 F.3d at 535).

“Settlements are private contracts reflecting negotiated compromises. The role of a district court is not to determine whether the settlement is the fairest possible resolution—a task particularly ill-advised given that the likelihood of success at trial (on which all settlements are based) can only be estimated imperfectly.” *Id.* at 173–74 (citation omitted). A court must recognize that a settlement is a “yielding of the highest hopes in exchange for certainty and resolution” and “guard against demanding too large a settlement based on its view of the merits.” *GM Trucks*, 55 F.3d at 806; *see also In re Imprelis Herbicide Mktg. Sales Practices & Prods. Liab. Litig.*, 296 F.R.D. 351, 364 (E.D. Pa. 2013) (“[B]ecause a settlement represents the result of a process by which opposing parties attempt to weigh and balance the factual and legal issues that neither side chooses to risk taking to a final resolution, courts have given considerable weight to the views of experienced counsel as to the merits of a settlement.”)

In this vein, “[a] presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.” *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) (internal quotation marks omitted); *see also Warfarin*, 391 F.3d at 535 (holding presumption of fairness applied even though settlement negotiations preceded certification); *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 n.18 (3d Cir. 2001).

Despite the strong policy favoring private resolution, “the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.” *GM Trucks*, 55 F.3d at 785 (internal quotation marks omitted). This role requires special rigor “where settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously.” *Warfarin*, 391 F.3d at 534. The fiduciary obligation “is designed to ensure that class counsel has demonstrated sustained advocacy throughout the course of the proceedings and has protected the interests of all class members.” *Prudential*, 148 F.3d at 317 (internal quotation marks omitted).

#### **A. The Presumption of Fairness**

The Third Circuit applies “an initial presumption of fairness ... where: ‘(1) the settlement negotiations occurred at arm’s length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.’ ” *Warfarin*, 391 F.3d at 535 (quoting *Cendant*, 264 F.3d at 232 n.18 (3d Cir. 2001)). Each factor is satisfied.

At every stage of the proceedings, Class Counsel vigorously pursued Class Members’ rights at arm’s length from the NFL Parties. As Judge Phillips notes, “[t]he negotiations were intense, vigorous, and sometimes quite contentious. At all times the talks were at arm’s length and in good faith. There was no collusion.” Phillips Supp. Decl. ¶ 4; *see also* Phillips Decl. ¶¶ 2, 5–7, 11; *In re CIGNA Corp. Sec. Litig.*, No. 02–8088, 2007 WL 2071898, at \*3 (E.D. Pa. July 13, 2007) (agreement presumptively fair in part because “negotiations for the settlement occurred at arm’s length, as the parties were assisted by a retired federal district judge who ... served as a mediator”). The Parties tabled discussion of attorneys’ fees until after they reached an agreement in principle, and the Settlement provides that attorneys’ fees will be paid out of a fund that is separate from the funds available to Class Members. *See* Phillips Supp. Decl. ¶ 19; Settlement § 21.1.



As discussed more thoroughly in Section IV.B.iii, Class Counsel were aware of the strengths and weaknesses of their case through informal discovery. Class Counsel created and maintained a comprehensive database of claims and symptoms of thousands of individual MDL Plaintiffs. *See* Seeger Decl. ¶ 20. Class Counsel also retained numerous medical experts to analyze issues of general and specific causation. When settlement negotiations began, Class Counsel’s strategy “reflected a sound appreciation of the scientific issues” and an “aware[ness] of mainstream medical literature.” Phillips Supp. Decl. ¶ 8; *see also In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 267 (E.D. Pa. 2012) (applying presumption in part because “although no formal discovery was conducted ... [class counsel] conducted informal discovery, including, *inter alia*, independently investigating the merits”).

Additionally, Class Counsel have decades of experience in these matters. Co-Lead Class Counsel, Subclass Counsel, and Class Counsel collectively have served as class counsel or as members of leadership committees in over 170 class actions, mass torts, and complex personal injury suits. *See* Seeger Decl. ¶¶ 2–4; Levin Decl. ¶ 2; Nast Decl. ¶ 2.

Finally, as discussed in greater detail in Section IV.B.ii, the Class has tacitly endorsed the Settlement. Estimates indicate that Class Counsel reached over 90% of Class Members through direct mail and indirect advertisements. Furthermore, major newspapers and television programs consistently discussed the Settlement and its terms. Given this publicity, an opt-out and objection rate of approximately 1% each reflects positively on the Settlement. *See Processed Egg Prods.*, 284 F.R.D. at 269 (applying presumption of fairness when 1.14% of class opted out, noting that the opt-out rate was “virtually *di minimis*”).

Therefore, the presumption of fairness applies.

### **B. The *Girsh* Factors**

In evaluating a settlement, a court must consider the factors set forth in *Girsh v. Jepson*:

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class action through the trial;
- (7) the ability of the defendants to withstand a

greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

521 F.2d 153, 157 (3d Cir. 1975) (internal quotation marks and ellipses omitted). These factors indicate that the Settlement is a fair, reasonable, and adequate compromise.

*i. The Complexity, Expense, and Likely Duration of the Litigation*

This factor captures “the probable costs, in both time and money, of continued litigation.” *GM Trucks*, 55 F.3d at 812 (internal quotation marks omitted); *see also Cendant*, 264 F.3d at 233. The litigation attempts to resolve issues of considerable scale. Class Members allege negligence and a fraudulent scheme dating back a half-century. The claims of over 20,000 Retired Players are at issue. *See Prudential*, 148 F.3d at 318 (noting “sheer magnitude of the proposed settlement class”). The sheer size of the Class supports settlement.

The case implicates complex scientific and medical issues not yet comprehensively studied. As

discussed in greater detail in Section IV.B.iv, the association between repeated concussive trauma and long-term neurocognitive impairment remains unclear. *See* Decl. of Dr. Kristine Yaffe ¶¶ 13, 22, ECF No. 6422–36 (“Dr. Yaffe Decl.”) (noting “emerging consensus,” but stressing that “the medical and scientific communities have not yet determined that mild repetitive TBI causes any of the Qualifying Diagnoses”). Even if general causation could be proven, an even more daunting question of specific causation would remain.

Absent settlement, Class Members would have to conclusively establish what and when the NFL Parties knew about the risks of head injuries. This would require voluminous production from the NFL Parties, and time to sort through decades of records. Non-party discovery would be inevitable; Class Members would seek documents from individual NFL Member Clubs. To fully investigate scientific causation, the Parties would have to continue to retain costly expert witnesses. *See Prudential*, 148 F.3d at 318 (noting necessity of “several expert witnesses” supported factor). In turn, the NFL Parties would seek discovery about the medical history of 20,000 Retired Players. *See GM Trucks*, 55 F.3d at 812 (concluding that the need for class discovery by the defendants “into the background of

the six million vehicles owned by class members” pointed towards settlement).

Finally, continued motion practice in this MDL would be burdensome, expensive, and time consuming. For example, the Parties likely would seek to exclude each other’s scientific evidence, and a battle of the experts would ensue.

All the while, Retired Players with Qualifying Diagnoses would continue to suffer while awaiting uncertain relief. *See Prudential*, 148 F.3d at 318 (noting “trial ... would be a long, arduous process requiring great expenditures of time and money” and that “such a massive undertaking clearly counsels in favor of settlement”); *Warfarin*, 391 F.3d at 536. Class Representative Kevin Turner, who suffers from ALS, is a sobering example. Between the Preliminary Approval Date and the Fairness Hearing, Turner’s symptoms worsened to the point that he was unable to attend the Fairness Hearing because he can no longer breathe or eat without assistance. *See Am. Fairness Hr’g Tr.* at 5:22–6:4 (noting Kevin Turner “has deteriorated to the point where he is now on a breathing—he needs assistance with his breathing and he’s got a feeding tube....”).

The complexity, expense, and likely duration of the litigation weigh in favor of approving the Settlement.

*ii. The Reaction of the Class to the Settlement*

This factor “attempts to gauge whether members of the class support the settlement” and to use their opinions as a proxy for the settlement’s fairness. *Prudential*, 148 F.3d at 318. Courts look “to the number and vociferousness of the objectors,” while “generally assum[ing] that silence constitutes tacit consent to the agreement.” *GM Trucks*, 55 F.3d at 812 (internal quotation marks omitted). The Class has tacitly consented to this Settlement.

“[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement.” *Id.* In this case, however, so many Class Members were intimately aware of the Settlement that an inference of support from silence is sound. Class Counsel provided an estimated 90% of Class Members with notice through direct mail and a variety of secondary publications. *See supra* Section III.B. Substantial and sustained media coverage notified the entire country, not just

Class Members, of the Settlement's terms. *See supra* Section III.B.

Class Counsel's records confirm Class Members' active engagement. Since the Preliminary Approval Date, the Settlement Website has received 62,989 unique visitors, and the Settlement's toll-free hotline received 4,544 calls. Brown Decl. ¶ 43; Kinsella Decl. ¶ 28. 2,302 callers requested to speak to a live operator, and received 140 hours of personal support. Radetich Decl. ¶ 9.3,175 website visitors and 1,800 callers signed up to receive additional information about the Settlement. Kinsella Decl. ¶ 26; Brown Decl. ¶ 43; Radetich Decl. ¶ 10.

Despite this, only approximately 1% of Class Members filed objections, and only approximately 1% of Class Members opted out.<sup>44</sup> These figures are especially impressive considering that about 5,000 Retired Players are currently represented by counsel in this MDL, and could easily have objected or opted out to pursue individual suits. For comparison, at least eight times as many Class Members registered

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<sup>44</sup> The Morey Objectors point out that some Retired Players criticized the Settlement in the media. *See* Morey Obj. at 59–60. Tellingly, however, only one of the seven Retired Players identified by the Morey Objectors opted out, and none of them objected. *See* Eighth Opt-Out Report of Claims Administrator Exs. 1–2, ECF Nos. 6507–1, 6507–2; NFL Parties' Mem. of Law in Supp. of Final Approval App. A.

to receive additional information about the Settlement as expressed formal dissatisfaction with its terms.

The reaction of the Class to the Settlement weighs in favor of approving the Settlement. *See, e.g., Prudential*, 148 F.3d at 318 (affirming district court's conclusion that class reaction was favorable when 19,000 out of 8,000,000 class members opted out and 300 objected); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118–19 (3d Cir. 1990) (concluding that “response of the class members ... strongly favor[ed] settlement” where roughly 10% of 281 class members objected); *Processed Egg Prods.*, 284 F.R.D. 249, 269 (E.D. Pa. 2012) (approving settlement with no objections and an opt-out rate of 1.14% from an original notice to 13,200 class members, which was “virtually *de minimis*”).

*iii. The Stage of the Proceedings and the Amount of Discovery Completed*

This factor “captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating.” *GM Trucks*, 55 F.3d at 813. The aim is



to avoid settlement “at too incipient a stage of the proceedings.” *Id.* at 810; *see also In re Oil Spill by Oil Rig Deepwater Horizon*, 910 F. Supp. 2d 891, 932 (E.D. La. 2012) *aff’d sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) ( “*Deepwater Horizon Economic Loss Settlement*” ) (“Thus, the question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed....” (internal quotation marks omitted)).

“The Third Circuit Court of Appeals has recognized that, even if a settlement occurs in an early stage of litigation, there are means for class counsel to apprise themselves of the merits of the litigation....” *Processed Egg Prods.*, 284 F.R.D. at 270. Formal discovery is not necessary where other means of obtaining information exist. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981) (“[W]e are not compelled to hold that formal discovery was a necessary ticket to the bargaining table.”). Despite this Court’s stay of discovery, Class Counsel adequately evaluated the merits of two dispositive issues in the case: preemption and scientific causation. *See Prudential*, 148 F.3d at 319 (finding no error with the district

court's conclusion that "use of informal discovery was especially appropriate ... because the Court stayed plaintiffs' right to formal discovery for many months, and because informal discovery could provide the information that plaintiffs needed" (internal quotation marks omitted)).

First, the Parties completed full, adversarial, briefing about whether the Retired Players' Collective Bargaining Agreements preempt their negligence and fraud claims. *See Pet Food*, 2008 WL 4937632, at \*14 (factor satisfied when "Plaintiffs ... performed an extensive analysis of the legal claims"); *cf. GM Trucks*, 55 F.3d at 814 (concluding stage of proceedings factor weighed against settlement approval where there was "little adversarial briefing on either class status or the substantive legal claims."). The NFL Parties' motions to dismiss remain pending, and have the potential to eliminate all or a majority of Class Members' claims. Because preemption is a legal question, further discovery would not have increased Class Counsel's understanding of this issue. *Cendant*, 264 F.3d at 236 (noting when viability of defense "turns more on *legal considerations than on factual development* [ ] it does not substantially affect [objectors'] claim that more discovery was needed" (emphasis added) (citation omitted)); *Briggs v. Hartford Fin. Servs. Grp., Inc.*, No. 07-5190, 2009 WL 2370061, at \*11,

\*13 (E.D. Pa. July 31, 2009) (noting that “counsel could reasonably estimate the strength and value of the case ... based on an assessment of Pennsylvania law” in part because of a “threshold” legal issue).

This preemption research occurred before the Parties began settlement discussions, and influenced their strategy during negotiations. *See* Phillips Supp. Decl. ¶ 20 (“Ever present in the minds of the parties ... were the potential risks of litigation ... [including] Defendants’ preemption motions....”).

Second, Class Counsel had an adequate appreciation of the scientific issues relating to causation. Class Counsel constructed a dataset to catalogue the cognitive impairment of thousands of MDL Plaintiffs. *See* NFL Parties’ Actuarial Materials ¶ 16; Seeger Decl. ¶ 20. From there, Class Counsel retained multiple medical, neurological, neuropsychological, and actuarial experts to both interpret this data and the science underlying these injuries. *See* Seeger Decl. ¶ 30. Class Counsel’s research occurred prior to settlement negotiations, and played a vital role in their negotiation strategy. *See id.* ¶ ¶ 20, 22; Phillips Supp. Decl. ¶ 5.

Like the legal authorities on preemption, the scientific literature discussing repetitive mild traumatic brain injury is publicly available. Formal

discovery, or discovery from the NFL Parties, would not have enhanced Class Counsel's position on causation. *Pet Food*, 2008 WL 4937632 at \*12, \*14 (factor satisfied when "informal discovery, including extensive consultation with experts" occurred with respect to "complex medical and toxicological issues").

Objectors focus narrowly on the lack of discovery concerning the NFL Parties' conduct, ignoring preemption and causation to argue that Class Counsel lacked an adequate appreciation of the merits of the case before negotiating. *See Morey Obj.* at 55 (noting that "Class Counsel appear to have conducted *no discovery*" and that "[t]he absence of discovery is particularly glaring because the [Class Action Complaint] alleges fraud and negligent concealment, where the best evidence is likely in the Defendants' hands").<sup>45</sup> However, proof that the NFL Parties believed concussions to be harmful would not help Class Members remain in federal court if their CBAs required them to submit their claims to an arbitrator.

Objectors rely heavily on *GM Trucks* to support their argument that insufficient discovery

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<sup>45</sup> The same Objector, several pages later, argues that "[t]he publicly available facts show that the NFL was aware of its responsibility to protect its players." *Morey Obj.* at 61.

occurred here. *GM Trucks*, however, involved far more nascent proceedings. Only four months separated the filing of the consolidated complaint from the filing of the proposed Settlement. *See GM Trucks*, 55 F.3d at 813. By contrast, this case involved over ten months of settlement negotiations overseen by both a mediator and a special master. Class counsel in *GM Trucks* had neither “conducted significant independent discovery,” nor “retained their own experts.” *Id.* at 813–14. Both occurred here.

In sum, Class Counsel were intimately aware of the potential limitations of their case with respect to two dispositive issues as they entered settlement negotiations. The stage of the proceedings and the amount of discovery completed weigh in favor of approving the Settlement.

*iv. The Risks of Establishing Liability and Damages*

The next two *Girsh* factors consider the risks of establishing liability and damages should the case go to trial. Because these two *Girsh* factors are closely related, they are addressed together. The analysis of these factors “need not delve into the intricacies of the merits of each side’s arguments.” *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 115

(E.D. Pa. 2005); *see also Diet Drugs*, 2000 WL 1222042, at \*61 (acknowledging that “the risks of establishing liability and damages are readily apparent” and “not[ing] several obstacles that [plaintiffs] would have to overcome” to recover). These factors are satisfied because Class Members face stiff challenges surmounting the issues of preemption and causation. Other legal issues also weigh in favor of approving this Settlement.

The NFL Parties’ motions to dismiss based on preemption under § 301 of the LMRA remain pending. The NFL Parties argue that Class Members’ claims must be dismissed because they would require a judge to interpret provisions of the Retired Players’ Collective Bargaining Agreements, many of which address player health and safety. If the NFL Parties prevailed on their motions, many, if not all, of Class Members’ claims would be dismissed.

Other courts have accepted the NFL Parties’ preemption arguments. Many of the cases transferred into this MDL were originally filed in state court. The NFL Parties removed these cases to federal court on the basis of federal question jurisdiction under § 301 of the LMRA. When the plaintiffs in these actions sought to remand, the NFL Parties made the same arguments in support of jurisdiction that they assert in their motions to

dismiss: that the former players' tort claims require interpretation of players' CBAs. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (noting that § 301 preemption “converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule”) (internal quotation marks omitted).

For example, in *Duerson v. National Football League*, Retired Player David Duerson's representative alleged that the NFL Parties “fail[ed] to educate players about the risks of concussions and the dangers of continuing to play after suffering head trauma.” No. 12–2513, 2012 WL 1658353, at \*1, \*4, \*6 (N.D. Ill. May 11, 2012). The court denied Duerson's motion to remand because resolving his claims would implicate provisions of the CBAs that require player notice if the player possessed an injury that could be exacerbated by returning to the field. Similarly, in *Maxwell v. National Football League*, the court denied Retired Player Vernon Maxwell's motion to remand because resolving his claims would implicate provisions of the CBAs that give team physicians “primary responsibility” for diagnosing player injuries. Order Den. Pls.' Mot. to Remand at 1–2, *Maxwell*, No. 11–8394, ECF No. 58, 2011 WL 10677453 (C.D. Cal. Dec. 8, 2011); *see also* Order Den. Pls.' Mot. to Remand at 1–2, *Pear v. Nat'l Football League*, No. 11–8395, ECF No. 61 (C.D. Cal.

Dec. 8, 2011); Order Den. Pls.’ Mot. to Remand at 1–2, *Barnes v. Nat’l Football League*, No. 11–8396, ECF No. 58 (C.D. Cal. Dec. 8, 2011); *Smith v. Nat’l Football League Players Ass’n*, No. 14–1559, 2014 WL 6776306, at \*8 (E.D. Mo. Dec. 2, 2014) (finding negligent misrepresentation claims relating to concussive injury preempted based on provision in CBA that also bound the NFL).<sup>46</sup>

Based on similar reasoning, other courts have outright dismissed claims involving other injuries allegedly resulting from NFL Football. In *Stringer v. National Football League*, Retired Player Korey Stringer’s representative alleged that the NFL Parties had a duty “to use ordinary care in overseeing, controlling, and regulating practices, policies, procedures, equipment, working conditions and culture of the NFL teams ... to minimize the risk of heat-related illness.” 474 F. Supp. 2d 894, 899 (S.D. Ohio 2007). The court granted summary judgment for the NFL Parties because it found that

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<sup>46</sup> Objectors rely exclusively on *Green v. Ariz. Cardinals Football Club LLC*, which granted a motion to remand on the same issue. 21 F.Supp.3d 1020, 1025–26 (E.D. Mo. 2014). *Green* is an outlier, and is insufficient to show that there is no litigation risk on this issue. See *Prudential*, 148 F.3d at 319–20 (holding fourth and fifth *Girsh* factors satisfied in part because district court took notice of adverse outcome in one similar case against the defendant); *Aetna*, 2001 WL 20928, at \*9 (noting that “[i]f further litigation presents a realistic risk of dismissal,” then “plaintiffs have a strong interest to settle the case early”).



these claims “must be considered in light of pre-existing contractual duties imposed by the CBA on the individual NFL clubs concerning the general health and safety of the NFL players.” *Id.* at 910. In *Dent v. National Football League*, the court dismissed claims that the NFL Parties negligently and fraudulently concealed the dangers of repeated painkiller use to allow players to return to the field. Order at 7–10, 20–21, *Dent v. Nat’l Football League*, No. 14–2324, ECF No. 106, 2014 WL 7205048 (N.D. Cal. Dec. 17, 2014). The court held that the claims were encompassed by the CBAs because it was “through [ ] CBAs [that] players’ medical rights have steadily expanded.” *Id.* at \*7, \*12.

Class Members also face serious hurdles establishing causation. Though “[t]here has been widespread media coverage and speculation regarding the late-life or post-retirement risks of cognitive impairment in athletes who engaged in sports involving repetitive head trauma[,] ... there has been very little in the way of peer-reviewed scientific literature involving data that suggests any such risk.” Christopher Randolph et al., *Prevalence and Characterization of Mild Cognitive Impairment in Retired National Football League Players*, 19 J. Int’l Neuropsychological Soc’y 873, 873 (2013), ECF No. 6422–7 (noting “the first attempt to systematically explore late-life cognitive

impairments in retired NFL players” occurred in 2005); Paul McCrory et al., *Consensus Statement on Concussion in Sport: The 4th International Conference on Concussion in Sport Held in Zurich, November 2012*, 47 *Brit. J. Sports. Med.* 250, 257 (2013), ECF No. 6422–8 (“*Consensus Statement on Concussions*” ) (noting that “the speculation that repeated concussion or subconcussive impacts cause CTE remains unproven”).

A consensus is emerging that repetitive mild brain injury is associated with the Qualifying Diagnoses. Dr. Yaffe Decl. ¶ 13; Decl. of Dr. Kenneth Fischer ¶¶ 6–7, 9, ECF No. 6423–17 (“Dr. Fischer Decl.”); Decl. of Dr. Christopher Giza ¶ 21, ECF No. 6423–18 (“Dr. Giza Decl.”); Decl. of Dr. David Hovda ¶ 25, ECF No. 6423–19 (“Dr. Hovda Decl.”). However, the available research is not nearly robust enough to discount the risks that Class Members would face in litigation. The scientific community has long recognized the existence of multiple categories of traumatic brain injury. *See* Dr. Yaffe Decl. ¶ 41 (noting scientists “categorize[ ] TBI into three categories: severe, moderate, and mild”). However, investigation into repetitive mild TBI, typical of Retired Players, is relatively new. Most studies linking head injury with Qualifying Diagnoses have been limited to serious brain injuries, often involving a loss of consciousness. *See* Dr. Yaffe Decl. ¶¶ 42–45.

Results regarding the effect of repetitive mild TBI have been more mixed. See Yi-Kung Lee et al., *Increased Risk of Dementia in Patients with Mild Traumatic Brain Injury: A Nationwide Cohort Study*, 8 PLOS ONE 1, 1 (2013), ECF No. 642226 (“A [s]ystematic review has found that [Alzheimer’s Disease] was associated with moderate and severe TBI, but not with mild TBI unless there was loss of consciousness...”); *id.* at 7 (“A history of severe and moderate TBI increased the risk of dementia, but there was no significant risk of dementia ... in those with mTBI.”); M. Anne Harris et al., *Head Injuries and Parkinson’s Disease in a Case–Control Study*, 70 Occupational & Env’tl. Med. 839, 839 (2013), ECF No. 6422–27 (“Severe injuries and those entailing loss of consciousness seem more strongly associated with [Parkinson’s Disease].” (footnotes omitted)); Inst. of Med. of the Nat’l Acads., *Sports–Related Concussions in Youth: Improving the Science, Changing the Culture* (2013), at 2, ECF No. 6422–10 (“*Changing the Culture*” ) (“[I]t remains unclear whether repetitive head impacts and multiple concussions sustained in youth lead to long-term neurodegenerative diseases...”). Complicating matters, scientists have only recently begun to standardize the criteria used to discuss the differing levels of severity of TBI. Therefore, it is difficult to determine any one study’s utility to Class Members’ case. See Dr. Yaffe Decl. ¶ 41.

Given this background, continued litigation would be a risky endeavor. Even if Class Members ultimately prevailed, a battle of the experts would be all but certain. *See Sullivan*, 667 F.3d at 322 (“find[ing] no flaw in the District Court’s decision that the additional risk in establishing damages counsel[ed] in favor of approval of the settlement” when “proceedings would likely entail a battle of the experts” (internal quotation marks omitted)); *Prudential*, 962 F.Supp. at 539 (“[A] jury’s acceptance of expert testimony is far from certain, regardless of the expert’s credentials. And, divergent expert testimony leads inevitably to a battle of the experts.”).

Even if Class Members could conclusively establish general causation, the problem of specific causation remains. Class Members argue that the cumulative effect of repeated concussive blows Retired Players experienced while playing NFL Football led to permanent neurological impairment. Yet the overwhelming majority of Retired Players likely experienced similar hits in high school or college football before reaching the NFL. Brain trauma during youth, while the brain is still developing, could also play a large role in later neurological impairment. *See Inst. of Med., Changing the Culture* at 2 (“[L]ittle research has been

conducted specifically on changes in the brain following concussions in youth....”). Isolating the effect of hits in NFL Football from hits earlier in a Retired Player’s career would be a formidable task. *See id.* (“Currently, there is a lack of data concerning the overall incidence of sports-related concussions in youth, although the number of reported concussions has risen over the past decade.”).

Finally, in addition to preemption and causation risks, Class Members would face other legal barriers to successful litigation, such as affirmative defenses and risks establishing damages. For example, Retired Players would have to demonstrate that their claims would not be barred by the relevant state’s statute of limitations in order to proceed with litigation. This is especially true given that many of these players have been suffering, and may have been aware of their suffering for some time. Further, Class Members’ recovery might be compromised by a state’s comparative fault or contributory negligence regime. Football is an inherently violent sport and a voluntary activity. If a Retired Player contributed to his injury in any way, such as a particularly aggressive playing style or poor tackling form, he could see his award reduced or eliminated. *See* Dr. Hovda Decl. ¶ 18 (noting that “some risks for repeat concussion are biobehavioral,

that is, aggressive styles of play or poor playing style”).

In sum, Class Members would face a host of challenges if they proceeded with litigation. The Settlement eliminates or mitigates each of these substantial risks. The risks of establishing liability and damages weigh strongly in favor of approving the Settlement.

*v. The Risks of Maintaining the Class Action through Trial*

This factor “measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial.” *Warfarin*, 391 F.3d at 537. Because class certification is subject to review and modification at any time during the litigation, the uncertainty of maintaining class certification favors settlement. *See Zenith Labs., Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976).

The Third Circuit, however, cautions that this factor is somewhat “toothless” when analyzing settlement class actions. *Prudential*, 148 F.3d at 321. “Because the district court always possesses the authority to decertify or modify a class that proves unmanageable, examination of this factor in the standard class action [ ] appear[s] to be perfunctory.”

*Id.* (noting “that after *Amchem* the manageability inquiry in settlement-only class actions may not be significant”).

The risks of maintaining this Class Action through trial weigh in favor of approving the Settlement; however, this factor warrants only minimal consideration.

*vi. The Ability of Defendants to Withstand a Greater Judgment*

This factor assesses the ability of defendants to withstand a greater judgment, and is “most clearly relevant where a settlement in a given case is less than would ordinarily be awarded but the defendant’s financial circumstances do not permit a greater settlement.” *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011). However, when there is no “reason to believe that [d]efendants face any financial instability[,] ... this factor is largely irrelevant.” *Id.*; *see also Sullivan*, 667 F.3d at 323 (“[I]n any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement.” (internal quotation marks omitted)).

This is not the case here. The NFL Parties do not claim that the Settlement is fair because they could not pay more. Rather, by uncapping the Monetary Award Fund and establishing adequate security, they have guaranteed that all Retired Players who receive Qualifying Diagnoses will be able to receive an award. *See Warfarin*, 391 F.3d at 538 (“[T]he fact that [defendant] could afford to pay more does not mean that it is obligated to pay any more than what ... class members are entitled to under the theories of liability that existed at the time the settlement was reached.”).

The ability of the NFL Parties to withstand a greater judgment is a neutral factor.

*vii. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of All Attendant Risks of Litigation*

In evaluating these factors, a Court must ask “whether the settlement represents a good value for a weak case or a poor value for a strong case.” *Warfarin*, 391 F.3d at 538. Put another way, a court must compare “the amount of the proposed settlement” with “the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not



prevailing.” *GM Trucks*, 55 F.3d at 806. The settlement must be judged “against the realistic, rather than theoretical, potential for recovery after trial.” *Sullivan*, 667 F.3d at 323 (internal quotation marks omitted).

The Settlement offers Monetary Awards of up to \$5 million for serious medical conditions associated with repeated head trauma. Retired Players whose symptoms worsen will receive Supplemental Monetary Awards to ensure that they receive the maximum possible compensation for their symptoms. Unlike recoveries achieved after continued litigation, these awards will be promptly available to Retired Players currently suffering. *See Prudential*, 962 F.Supp. at 537 (emphasizing that settlement “would afford plaintiffs relief months and perhaps years earlier than would be possible in a litigation environment”).

The Settlement allows Class Members to choose certainty in light of the risks of litigation. The Settlement eliminates the possibility that a Class Member’s claims could be arbitrated. It also eliminates the potentially dispositive issues of issues of general causation, specific causation, statutes of limitations, and other defenses. The Settlement insulates Class Members from the practical vagaries of litigation, including the particular judge, jury

panel, and the skill of the attorneys involved. Because the MAF is uncapped, it ensures that all Class Members who receive Qualifying Diagnoses within the next 65 years will receive compensation. It ensures that all Retired Players with half of an Eligible Season credit have access to free baseline assessment examinations so that they may monitor their symptoms, and receive Qualifying Diagnoses more easily if their symptoms worsen. Finally, for Retired Players who believed they could fare better in litigation, there was a lengthy opt-out period. *See Diet Drugs*, 2000 WL 1222042, at \*62 (“[T]he settlement ... offers choice. Class members who wish to bear the risks of trial had an initial opt out right....”). In light of these benefits, Class Members receive fair value for their claims.

Objectors rely on *GM Trucks* to argue that the Settlement is unfair because it allegedly does not compensate CTE, which was “at the heart of the Class Action Complaint.” Morey Obj. at 69–70. In *GM Trucks*, the Third Circuit explained that “the relief sought in the complaint serves as a useful benchmark” in evaluating a settlement. 55 F.3d at 810. However, *GM Trucks* is distinguishable. In *GM Trucks*, the complaint alleged that the fuel tank design on certain pick-up trucks made them especially vulnerable to fires, and sought recall of, or repairs for, the trucks at issue. *GM Trucks*, 55 F.3d

at 777–79. The settlement, however, only offered coupons towards the purchase of new trucks. In part, the Third Circuit vacated the settlement because the proposed coupons would do little to remove the dangerous trucks from the road, risking new injuries. *Id.* at 810 n.28. Here, Retired Players are at no further risk of injury; they are retired. The Settlement compensates the key harm alleged—the long term effects of repeated concussive hits—through medical monitoring and cash awards. Moreover, as discussed in depth *infra* Section V.A, Objectors’ claims that the Settlement ignores CTE are baseless.

The range of reasonableness factors weigh in favor of approving the Settlement.

### **C. The Prudential Factors**

A court may also consider the additional factors identified by the Third Circuit in *In re Prudential Insurance Co. America Sales Practice Litigation*, 148 F.3d 283 (3d Cir. 1998), when examining a settlement’s fairness. Unlike the mandatory *Girsh* factors, the *Prudential* factors are “permissive and non-exhaustive, ‘illustrat[ing] ... [the] additional inquiries that in many instances will be useful for a thoroughgoing analysis of a settlement’s terms.’ ” *Baby Prods.*, 708 F.3d at 174

(quoting *Pet Food*, 629 F.3d at 350); see also *Processed Egg Prods.*, 284 F.R.D. at 268 (noting Prudential factors “are not essential or inexorable”).

*Prudential* asks a court to consider:

[1] the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys’ fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

148 F.3d at 323–24.

The relevant *Prudential* factors weigh in favor of approving the Settlement. Class Counsel were able to make an informed decision about the probable outcome of trial. *See supra* Sections IV.B.iii–IV.B.iv; *infra* Section V.A; *Pet Food*, 2008 WL 4937632, at \*24 (noting *Prudential* factors “are substantially similar to the factors provided in *Girsh*”). All Class Members had the opportunity to opt out. Finally, the claims process is reasonable in light of the substantial monetary awards available to Class Members, and imposes no more requirements than necessary. *See infra* Section V.E.

Whether any provisions for attorneys’ fees are reasonable is a neutral factor because Class Counsel have not yet moved for a fee award. *See Processed Egg Prods.*, 284 F.R.D. at 277 (holding fifth *Prudential* factor neutral when fee motion would be filed at a later date). Amici argue that “[t]he absence of a fee application ... prevents a complete evaluation of the fairness of the settlement.” Mem. of Public Citizen at 7–8. Although there is no fee application pending, the Class Notice explained: the NFL Parties have agreed not to contest any award of attorneys’ fees and costs equal to or below \$112.5 million; there may be set-off provisions; and Class Members with individual counsel may see their awards diminished pursuant to retainer agreements. *See Long-Form Notice* at 11, 17.

At an appropriate time after Final Approval, Class Counsel will file a fee petition that Class Members will be free to contest. This is an accepted approach. *See* Newberg on Class Actions § 14:5 (5th ed.) (“In some situations, the court will give final approval to a class action settlement and leave fees and costs for a later determination.”); *In re Diet Drugs* (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., 582 F.3d 524, 534–35 (3d Cir. 2009) (upholding award of attorneys’ fees made six years after final approval of settlement); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, No. 1014, 2000 WL 1622741, at \*1 (E.D. Pa. Oct. 23, 2000) (approving fee award three years after final approval). Once Class Counsel files their fee petition, Objectors will have an opportunity to submit objections to the proposed fee award. Pursuant to Rule 23(h), the Court will then schedule a hearing to evaluate the reasonableness of any such fees sought. *See Processed Egg Prods.*, 284 F.R.D. at 277. Objectors’ arguments regarding attorneys’ fees will be considered at that time.

The *Prudential* factors weigh in favor of approving the Settlement.

## **V. Responses to Specific Objections**

Rule 23 does not require a settlement to be perfect, only “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *see also Baby Prods.*, 708 F.3d at 173–74 (“The role of a district court is not to determine whether the settlement is the fairest possible resolution....”). Settlements are negotiated compromises. Inherent in the negotiation process is “a yielding of the highest hopes in exchange for certainty and resolution;” no Class Member, nor the NFL Parties, will ever receive everything sought. *GM Trucks*, 55 F.3d at 806; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (“Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.”).

Objectors raised some valid concerns. At my request, the Parties addressed these concerns by revising the Settlement to improve the deal for Class Members. Retired Players who played overseas in NFL Europe now receive some Eligible Season credit. Notwithstanding the \$75 million funding cap to the BAP, all Retired Players with half of an Eligible Season credit are now entitled to a baseline assessment examination. The Settlement now compensates Death with CTE up until the Final Approval Date, instead of the Preliminary Approval Date. The Claims Administrator now has the

authority to waive the \$1,000 appeal fee for those who demonstrate financial hardship. Finally, the Settlement eases the requirements for establishing proof of a Qualifying Diagnosis for Retired Players whose medical records have been lost because of *force majeure* type events. *See* Parties' Joint Amendment.

### **A. Objections Related to CTE**

The most commonly raised objection relates to the Settlement's treatment of Chronic Traumatic Encephalopathy.<sup>47</sup> Objectors argue that CTE is the most prevalent, and thus most important, condition afflicting Retired Players—"the industrial disease of football." *See* Am. Fairness Hr'g Tr. at 76:5–6; Chelsey Obj. at 3 (calling CTE the "NFL's industrial disease"). Objectors contend that ending compensation for the disease on the Final Approval Date renders the Settlement hollow. *See* Armstrong Obj. at 17, ECF No. 6233 (CTE "is at the heart of this litigation"); Duerson Obj. at 10 ("This has always been a CTE case."); Chelsey Obj. at 7 (noting lack of CTE compensation is "extraordinary"). Thus, Objectors argue that the Settlement cannot be fair,

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<sup>47</sup> *See, e.g.*, Morey Obj. at 22–29; Miller Obj. at 4–5, ECF No. 6213; Jones Obj. at 3–4, ECF No. 6235; Alexander Obj. at 6–7, ECF No. 6237; Flint Obj. at 1, ECF No. 6347; Gilchrist Obj. at 1, ECF No. 6364; Jordan Obj. at 1, ECF No. 6375; Carrington Obj. at 2–3, ECF No. 6409.



reasonable, and adequate unless it continues to compensate Retired Players with CTE.

Objectors are incorrect. Retired Players cannot be compensated for CTE in life because no diagnostic or clinical profile of CTE exists, and the symptoms of the disease, if any, are unknown. But the Settlement *does* compensate the cognitive symptoms allegedly associated with CTE. The studies relied on by Objectors indicate that the majority of Retired Players whose brains were examined would have received compensation under the Settlement if they were still alive. Furthermore, it is reasonable not to compensate the mood and behavioral conditions anecdotally associated with CTE. Indeed, limiting compensation to objectively measurable symptoms of cognitive and neuromuscular impairment is a key principle of the Settlement. The compensation provided for Death with CTE is reasonable because it serves as a proxy for Qualifying Diagnoses deceased Retired Players could have received while living. The Parties provided compensation for Death with CTE until the Final Approval Date because they recognized that Retired Players who died prior to final approval did not have sufficient notice that they had to obtain Qualifying Diagnoses. Finally, the Settlement recognizes that knowledge about CTE will expand, and requires the Parties to confer in good faith about possible revisions to the definitions

of Qualifying Diagnoses based on scientific developments.

*i. State of Scientific and Medical Knowledge of CTE*

The study of CTE is nascent, and the symptoms of the disease, if any, are unknown. Chronic Traumatic Encephalopathy is a neuropathological diagnosis that currently can only be made post mortem.<sup>48</sup> Dr. Yaffe Decl. ¶ 55. This means no one can conclusively say that someone had CTE until a scientist looks at sections of that person's brain under a microscope to see if abnormally phosphorylated tau protein ("abnormal tau protein") is present, and if so whether it is present in a reportedly unique pattern.<sup>49</sup> *See id.*; Decl. of Dr. Julie Ann Schneider ¶ 22, ECF No. 6422–35 ("Dr. Schneider Decl.").

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<sup>48</sup> Objectors do not dispute this fact. *See supra* Section II.D.iii.

<sup>49</sup> Some scientists even dispute whether CTE is a unique neuropathology—that is, the extent to which tissue samples from CTE are distinct from tissue samples associated with other diseases. Abnormal tau protein is also a primary component of other neurodegenerative conditions such as Alzheimer's Disease. Dr. Schneider Decl. ¶ 21. Even if CTE is a unique neuropathology, studies examining it have found significant differences among subjects, including where the abnormal tau protein typically accumulates in the brain. *Id.* ¶ 23.

Beyond identifying the existence of abnormal tau protein in a person's brain, researchers know very little about CTE. They have not reliably determined which events make a person more likely to develop CTE. McCrory et al., *Consensus Statement on Concussions* at 257 (“[I]t is not possible to determine the causality or risk factors [for CTE] with any certainty. As such, the speculation that repeated concussion or subconcussive impacts cause CTE remains unproven.”). More importantly, researchers have not determined what symptoms individuals with CTE typically suffer from while they are alive. See Dr. Schneider Decl. ¶ 38; Dr. Hovda Decl. ¶ 25.

Arguably, these uncertainties exist because clinical study of CTE is in its infancy.<sup>50</sup> Only 200

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<sup>50</sup> Objectors point out that researchers have been aware of CTE since the 1920s, previously labeling it “dementia pugilistica” or “punch drunk syndrome.” While this is true, the rigorous study necessary to understand the symptoms associated with CTE, or its prevalence, have not taken place. See, e.g., Robert C. Cantu, *Chronic Traumatic Encephalopathy in the National Football League*, 61 *Neurosurgery* 223, 224 (2007), ECF No. 6201–11 (chronicling history of CTE research and admitting that “[t]he most pressing question to be answered concerns the prevalence of the problem” and that “[o]nly an immediate prospective study will determine the true incidence of this problem”); Philip H. Montenegro et al., *Clinical Subtypes of Chronic Traumatic Encephalopathy: Literature Review and Proposed Research Diagnostic Criteria for Traumatic Encephalopathy Syndrome*, 6 *Alzheimer’s Research & Therapy* 68, 70 (2014), ECF No. 6201–4 (“The scientific

brains with CTE have ever been examined, all from subjects who were deceased at the time the studies began. Dr. Schneider Decl. ¶ 25; Dr. Yaffe Decl. ¶ 68. This is well short of the of the sample size needed to understand CTE's symptoms with scientific certainty. Dr. Schneider Decl. ¶ 25. The studies that have occurred suffer from a number of biases intrinsic to their design that make it difficult to draw generalizable conclusions. *Id.* ¶¶ 24–25; Dr. Yaffe Decl. ¶¶ 56, 66.

Objectors principally rely on two studies: Ann McKee et al., *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 *Brain* 43 (2013), ECF No. 6201–2 (“McKee Study”) and Robert Stern et al., *Clinical Presentation of Chronic Traumatic Encephalopathy*, 81 *Neurology* 1122 (2013), ECF No. 6201–4 (“Stern Study”). The McKee Study and the Stern Study are representative of both the broader

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community also has become dramatically more aware of CTE since it was discovered in American football players.”). The studies of dementia pugilistica and punch drunk syndrome Objectors identify are the same type of limited case series reports as those discussed *infra* by Drs. McKee and Stern. As a result, these studies suffer from the same limitations and biases. *See Cantu, supra*, at 224 (noting several studies of boxers with CTE); *see also* Baugh et al., *Current Understanding of Chronic Traumatic Encephalopathy*, 16 *Current Treatment Options in Neurology* 306, 307 (2014), ECF No. 6201–4 (noting that “much of the scientific literature on CTE, to-date, is derived from clinicopathologic [sic] case series” and “early literature about the disease focused on the boxing population”).

literature and the limitations of current medical knowledge about CTE. *See* Dr. Schneider Decl. ¶¶ 26, 30; Dr. Fischer Decl. ¶ 11; Dr. Hovda Decl. ¶ 22.

The McKee Study and the Stern Study collectively examined the brains of 93 deceased subjects.<sup>51</sup> Subjects were selected because they had a history of repetitive mild TBI. McKee Study at 45; Stern Study at 1123. In the McKee Study, 18 individuals without a history of repetitive mild TBI served as the control group; in the Stern Study, there was no control group. McKee Study at 45; Stern Study at 1127. The studies found abnormal tau protein accumulation indicative of CTE in the majority of the brains examined. From there, each study attempted to reconstruct the symptoms the subjects experienced during life by asking their family members to describe their behaviors before death. In the McKee Study, researchers only reconstructed the symptoms of about half of the subjects. *See* Dr. Schneider Decl. ¶ 31. Thus, the symptoms, if any, of half of the subjects during life remain unknown.

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<sup>51</sup> The McKee Study and the Stern Study both drew from the same bank of brains diagnosed with CTE. The McKee Study examined 85 brains. *See* McKee Study at 45. The Stern Study examined 36 brains, 28 of which had already been examined by the McKee Study. *See* Stern Study at 1123 & n.1.

Predictive, generalizable conclusions about CTE cannot be drawn from case reports such as these.<sup>52</sup> See Dr. Giza Decl., ¶¶ 16–19; Dr. Yaffe Decl. ¶ 66. Because the studies examined only 93 brains, statistically significant conclusions are difficult to draw. Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 576 (3d ed. 2011) (“FJC Manual”) (noting that “[c]ommon sense” dictates that “a large enough sample of individuals must be studied”). Because the studies selected subjects with a history of repetitive brain injury, a selection bias exists that makes it difficult to infer the incidence of CTE in the general population, or even among athletes. FJC Manual at 583–84; Dr. Hovda, Decl. ¶ 21 (“[S]cience [ ] has yet to systematically study the presence or absence of CTE pathology in non-concussed men and women....”). Because the researchers had to rely on the subjects’ family members instead of medical professionals to determine how the subjects behaved during life, any attempt to tie the existence of abnormal tau protein to particular symptoms is suspect. FJC Manual at 586. Finally, the studies did not control for other potential risk factors for impairment that Retired Players commonly share, such as higher BMI, lifestyle change, age, chronic pain, or substance abuse. See McCrory et al.,

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<sup>52</sup> All agree that Drs. McKee and Stern merit praise for their important and valuable scientific research. Objectors, however, overstate the results of their studies.

*Consensus Statement on Concussions* at 257 (“The extent to which age-related changes, psychiatric or mental health illness, alcohol/drug use or co-existing medical or dementing illnesses contribute to [CTE] is largely unaccounted for in the published literature.”); FJC Manual at 552 (“[I]t should be emphasized that *an association is not equivalent to causation.*”).

Because of these limitations, researchers do not know the symptoms someone with abnormal tau protein in his brain will suffer from during life. No diagnostic or clinical profile for CTE exists. Establishing the relationship between abnormal tau protein and specific symptoms requires long-term, longitudinal, prospective epidemiological studies in living subjects. *See* Dr. Yaffe Decl. ¶¶ 23–38, 59–67. For CTE, this long process is just beginning.<sup>53</sup> *See* McCrory et al., *Consensus Statement on Concussions* at 257 (“At present, the interpretation of causation in the modern CTE case studies should proceed cautiously.”).

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<sup>53</sup> Alzheimer’s Disease provides a useful contrast and a cautionary lesson. Establishing the clinical profile of Alzheimer’s Disease took decades of studies of millions of subjects. *See* Dr. Hovda Decl. ¶ 24; Dr. Yaffe Decl. ¶ 68. Initial conclusions were not always correct. For example, the medical community once believed that changes in mood, specifically depression, were associated with Alzheimer’s Disease. This belief has now been thoroughly refuted. *See* Dr. Schneider Decl. ¶ 45.

*ii. Compensation of Symptoms  
Allegedly Associated with CTE*

Objectors allege that CTE is associated with both neurocognitive symptoms and mood and behavioral symptoms. The Settlement compensates Retired Players with the neurocognitive symptoms allegedly associated with CTE. The Settlement reasonably does not compensate Retired Players with the mood and behavioral symptoms allegedly associated with CTE—or any other Qualifying Diagnosis.

Relying on the McKee Study, Objectors allege that CTE progresses in four stages. In Stages I and II, the disease allegedly affects mood and behavior while leaving a Retired Player's cognitive functions largely intact. Headache, aggression, depression, explosivity, and suicidality are common. *See e.g.*, Morey Obj. at 22–23. Later in life, as a Retired Player progresses to Stages III and IV, severe memory loss, dementia, loss of attention and concentration, and impairment of language begin to occur. *Id.* at 23.

No definitive clinical profile yet exists for CTE, however, and the idea that CTE progresses in defined stages—or even that it is associated with the symptoms listed—has not been sufficiently tested in



living subjects. *See supra* Section V.A.i; Dr. Hovda Decl. ¶ 20 (“CTE does not appear to advance in a predictable and sequential series of stages and progression of physical symptoms....”); Dr. Schneider Decl. ¶ 29 (“[A]ssumptions regarding symptoms that constitute the diagnostic and clinical profile of CTE are premature.”).

Assuming *arguendo* that Objectors accurately describe the symptoms of CTE, the existing Qualifying Diagnoses compensate the neurocognitive symptoms of the disease. Levels 1.5 and 2 Neurocognitive Impairment compensate all objectively measurable neurocognitive decline, *regardless of underlying pathology*. These Qualifying Diagnoses provide relief for Retired Players who exhibit decline in two or more cognitive domains, including complex attention and processing speed, executive function, learning and memory, language, and spatial-perceptual. *See* Settlement Ex. 1; Dr. Kelip Decl. ¶ 29. Any Retired Player who becomes sufficiently impaired in these areas is entitled to compensation, whether his impairment is the result of abnormal tau protein or any other irregular brain structure.

In the McKee Study, almost all subjects with late-stage CTE allegedly showed decline in cognitive domains compensated by Levels 1.5 and 2

Neurocognitive Impairment. For Stage III, “[t]he most common presenting symptoms were memory loss, executive dysfunction ... and difficulty with attention and concentration.” McKee Study at 56. The McKee Study states that “[s]eventy-five per cent [sic] of subjects were considered cognitively impaired.” *Id.* For Stage IV, “[e]xecutive dysfunction and memory loss were the most common symptoms at onset, and all developed severe memory loss with dementia.” *Id.* 58–59; *see also* Dr. Yaffe Decl. ¶¶ 72, 8182.

Additionally, CTE studies to date have found a high incidence of comorbid disease. This means that, in addition to CTE neuropathology, subjects had other conditions, including ALS, Alzheimer’s Disease, Parkinson’s Disease, and frontotemporal dementia. *See* Dr. Fischer Decl. ¶ 12; Dr. Giza Decl. ¶ 16; Dr. Schneider Decl. ¶ 43. In the McKee Study, for example, 37% of those with CTE had comorbid disease, including Parkinson’s Disease and Alzheimer’s Disease. McKee Study at 61. The Stern Study excluded from consideration 35% of potential subjects because they had comorbid disease such as Alzheimer’s Disease. Stern Study at 1123.

In sum, even if CTE is a unique disease, it inflicts symptoms compensated by Levels 1.5 and 2 Neurocognitive Impairment and is strongly

associated with the other Qualifying Diagnoses in the Settlement. “[A]ccepting the findings in the McKee Study as accurate, at least 89% of the former NFL players studied by Dr. Stern, Dr. McKee, and their colleagues would have been compensated under the [S]ettlement while living.” Dr. Yaffe Decl. ¶ 83.

Objectors also argue that the alleged mood and behavioral symptoms of early stage CTE, such as irritability, depression, and proclivity to commit suicide, are excluded from the Settlement.<sup>54</sup> Objectors are correct. The Settlement does not compensate these symptoms, a result not limited to CTE. Mood and behavioral symptoms do not entitle a Retired Player to any Qualifying Diagnosis. *See* Settlement § 6.6(b) (“Monetary Awards ... shall compensate Settlement Class Members only in circumstances where a [Retired Player] manifests actual cognitive impairment and/or actual neuromuscular impairment....”).

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<sup>54</sup> *See* Morey Obj. at 28–29; Armstrong Obj. at 19 (“By exclusively focusing on cognitive impairment, the same BAP program that is supposed to assist CTE sufferers by giving them a general dementia diagnosis excludes retirees suffering from mood, behavioral and other non-cognitive symptoms....”); Duerson Obj. at 20 (“This Settlement proposes to take care of the minority of retired NFL players who suffer from cognitive impairment, while leaving the majority of former players with nothing.”); Flint Obj. at 1; Johnson Obj. at 2, ECF No. 6395.

Excluding mood and behavioral symptoms from the Settlement is reasonable. While Objectors list many symptoms they believe are linked to head trauma, *see supra* note 34, the Settlement only provides compensation for serious, objectively verifiable neurocognitive and neuromuscular impairment with an established link to repetitive head injury. *See Deepwater Horizon Clean-Up Settlement*, 295 F.R.D. at 156 (approving settlement that provided compensation for conditions that had a medical basis to support causation and excluding those lacking that proof).

Class Members would face more difficulty proving that NFL Football caused these mood and behavioral symptoms than they would proving that it caused other symptoms associated with Qualifying Diagnoses. Mood and behavioral symptoms are commonly found in the general population and have multifactorial causation.<sup>55</sup> Dr. Schneider Decl. ¶ 39;

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<sup>55</sup> Objectors argue that the link between NFL Football and CTE would be easier to prove at trial because unlike the Qualifying Diagnoses, repetitive head trauma is a necessary condition for developing CTE. *See* Morey Obj. at 30; Chelsey Obj. at 10. As discussed *supra*, CTE studies to date have not had sufficient control groups to confirm this link. Moreover, other researchers dispute whether repetitive head trauma is a prerequisite for developing CTE. *See* McCrory et al., *Consensus Statement on Concussions* at 257 (“It was further agreed that CTE was not related to concussions alone or simply exposure to contact sports.”); Dr. Schneider Decl. ¶ 35. Moreover, even if

Dr. Yaffe Decl. ¶¶ 75-76. Even if head injuries were a risk factor for developing these symptoms, many other risk factors exist. *See* Dr. Giza Decl. ¶ 14 (“While medical literature and clinical practice has *associated* psychological symptoms such as anxiety, depression, liability, irritability and aggression in patients with a history of concussions, this association has not led to *conclusive causation.*”).

Retired Players tend to have many other risk factors for mood and behavioral symptoms. For example, a typical Retired Player is more likely than an average person to have experienced sleep apnea, a history of drug and alcohol abuse, a high BMI, chronic pain, or major lifestyle changes. Dr. Schneider Decl. ¶ 39; Dr. Yaffe Decl. ¶¶ 75–76 (noting Retired Players’ risk factors for mood and behavioral issues, as well as for suicide); Dr. Giza Decl. ¶ 14. An individual Retired Player would have a difficult time showing that head impacts, as opposed to any one of these other factors, explain his symptoms. *See* Dr. Giza Decl. ¶ 14 (“It remains a challenge with an individual patient to discern whether or not these symptoms are a consequence of a head injury or associated with comorbidities (e.g.,

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head trauma were a necessary condition for CTE, the clinical profile is insufficiently developed to indicate whether specific mood disorders are associated with the neuropathology.

preexisting stress and social difficulties, learning disabilities, alcohol or drug abuse, etc.)....”).

The Settlement simply does not entitle any Retired Player with mood and behavioral symptoms to any Qualifying Diagnosis.

*iii. Compensation of Death with CTE*

Objectors argue that even if the Settlement compensates the symptoms of CTE in living Retired Players, it unfairly treats those currently living with CTE less favorably than those with CTE who died before the Final Approval Date. They argue that there is no reason for Death with CTE compensation to end.<sup>56</sup> They also argue that Death with CTE benefits are comparatively more generous than the benefits for the remaining Qualifying Diagnoses, which compensate living Retired Players allegedly suffering from CTE. *See, e.g.,* Alexander Obj. at 2; Jones Obj. at 3–4, ECF No. 6235.

Sound reasons exist to distinguish between Retired Players with CTE who died before the Final Approval Date and those still alive after that date. A prospective Death with CTE benefit would

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<sup>56</sup> *See, e.g.,* Morey Obj. at 25–26; Miller Obj. at 4–5; Jones Obj. at 3–4; Moore Obj. at 3–4, ECF No. 6399; Carrington Obj. at 2–3.

incentivize suicide because CTE can only be diagnosed after death. One Retired Player wrote to the Court expressing this concern. E. Williams Obj. at 3, ECF No. 6345 (“Players diagnosed with CTE (living) today, have to kill themselves or die for their family to ever benefit.”).

More importantly, after the Final Approval Date, a living Retired Player does not need a death benefit because he can still go to a physician and receive a Qualifying Diagnosis. The Death with CTE benefit provides awards to families of Retired Players with compensable symptoms who died before the Settlement became operative, because neither Retired Players nor their families had sufficient notice that they had to obtain Qualifying Diagnoses.<sup>57</sup> Thus, Death with CTE serves as a proxy for Qualifying Diagnoses deceased Retired Players *could* have received while living.

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<sup>57</sup> Some Objectors contend that Qualifying Diagnoses are “not the kinds of conditions that could have been missed during the deceased players’ lifetimes.” Miller Supplemental Obj. at 2, ECF No. 6452. However, the NFL Parties allegedly encouraged a gladiator mentality, teaching players to ignore or minimize their injuries as a demonstration of strength. Am. MAC §§ 62, 107. Many Retired Players allegedly retained that outlook well after retirement, refusing to seek medical help. *See, e.g.*, Stern Obj. at 1, ECF No. 6355 (“Like most men of his generation going to the doctor was for women and children not men....”); Hawkins Obj. at 9, ECF No. 6373 (“[T]heir pride and honor ... [have] overshadowed their willingness to admit their past and current needs or their vulnerability.”).

The Parties extended the Death with CTE benefit from the Preliminary Approval Date to the Final Approval Date because they recognized that Retired Players who died before final approval would not have had sufficient notice of the need to obtain Qualifying Diagnoses. *See* Parties' Joint Amendment at 4–5. Preliminary Approval of the Settlement and the accompanying notice program informed Retired Players of the need to seek testing in order to obtain Qualifying Diagnoses. However, the Parties did not expect that Retired Players could do so immediately. By final approval, living Retired Players should be well aware of the Settlement and the need to obtain Qualifying Diagnoses if sick. Thus, by final approval, there no longer is a need for Death with CTE to serve as a proxy for Qualifying Diagnoses.

Additionally, the benefits for Death with CTE are not more generous than the benefits for those who receive Qualifying Diagnoses while alive. *See, e.g.,* Morey Post-Fairness Hearing Supplemental Obj. at 19, ECF No. 6455 (“Morey Final Obj.”) (arguing that “a class member with CTE would never be able to receive the same maximum compensation through a dementia diagnosis as could be received through a diagnosis of [D]eath with CTE....”). Monetary Award values for Death with CTE are higher than awards for Levels 1.5 and 2



Neurocognitive Impairment in the same age bracket because the alleged symptoms Death with CTE compensates did not begin when Retired Players died. Retired Players living with Levels 1.5 and 2 Neurocognitive Impairment now know to seek Qualifying Diagnoses as early as possible. The Death with CTE awards reflect that deceased Retired Players with CTE did not have that opportunity.

*iv. Development of Scientific and Medical Knowledge of CTE*

Finally, Objectors argue that the Settlement unreasonably excludes CTE in light of expected scientific advances. Specifically, they argue that “CTE will be reliably detectable before death; within five to ten years, CTE will likely be diagnosed in the living.” Morey Obj. at 26; *see also* Morey Final Obj. at 12; Flint Obj. at 1, ECF No. 6347; Chelsey Obj. at 9; Carrington Obj. at 4, ECF No. 6409.

Objectors again overstate the conclusions of their experts. A reliable method of detecting CTE via buildup of abnormal tau protein during life may well be available in the next decade, but the longitudinal epidemiological studies necessary to build a robust clinical profile will still take a considerable amount of time. *See* Dr. Schneider Decl. ¶ 47 (noting “the presence of a biomarker for a protein does not

currently tell us whether an individual is exhibiting symptoms or the likelihood that he will experience symptoms”); Dr. Yaffe Decl. ¶ 77 (noting that even an FDA approved test “does not mean that we will soon understand what causes CTE or the diagnostic profile of CTE” and that “[i]t will take many years before science can fully understand these issues”). The Settlement compensates symptoms that cause Retired Players to suffer, not the presence of abnormal tau protein (or any other irregular brain structure) alone. *See* Settlement § 6.6(b) (“Monetary Awards ... shall compensate Settlement Class Members only in circumstances where a [Retired Player] manifests actual cognitive impairment and/or actual neuromuscular impairment....”).

Even if Objectors are correct, and researchers ultimately determine that CTE causes the mood and behavioral symptoms they allege, the Settlement will still be reasonable. As discussed *supra*, the decision to compensate only cognitive and neuromuscular impairment across all Qualifying Diagnoses is justified. Those symptoms tend to be more serious and more easily verifiable than mood and behavioral symptoms. *See supra* Section V.A.ii.

The Monetary Award Fund lasts for 65 years; researchers may learn more about CTE and head trauma in that time. Recognizing this, the

Settlement requires the Parties to meet at least every ten years and confer in good faith about possible modifications to the definitions of Qualifying Diagnoses. *See* Settlement § 6.6(a).

Objectors argue that this is an empty benefit because the NFL Parties must consent to any prospective changes. *See e.g.*, Armstrong Obj. at 27 (“[I]f the NFL unilaterally does not want to accept a new method of detecting CTE, for example, it will not be required to do so.”); Utecht Obj. at 7–8. While this is true, the process is subject to judicial oversight, and the NFL Parties stipulated that they will not withhold their consent in bad faith. *See* Am. Fairness Hr’g Tr. at 16:16–17:8 (Counsel for the NFL Parties agreeing that “modifications to the settlement” will “in good faith ... be implemented”). Independently, the Settlement requires the NFL Parties to implement the entire agreement in good faith. Settlement § 30.11 (“Counsel for the NFL Parties will undertake to implement the terms of this Settlement Agreement in good faith.”); *id.* § 26.1 (“The Parties will cooperate, assist, and undertake all reasonable actions to accomplish the steps contemplated by this Settlement....”).

## **B. Objections to Monetary Awards**

*i. Definitions of Levels 1.5 and 2  
Neurocognitive Impairment*

To receive a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment through the BAP,<sup>58</sup> a Retired Player must perform 1.7–1.8 standard deviations worse than his expected level of pre-impairment (“premorbid”) functioning in two cognitive domains tested by the Test Battery, and exhibit mild functional impairment consistent with the National Alzheimer’s Coordinating Center’s Clinical Dementia Rating (“CDR”) scale. Settlement Ex. 1, at 2; *id.* Ex. 2, at 5. Level 2 Neurocognitive Impairment requires a performance 2 standard deviations worse than a Retired Player’s expected premorbid functioning, and moderate functional impairment on the CDR scale. *Id.* Ex. 1, at 3; *id.* Ex. 2, at 5. A diagnosis of Level 1 Neurocognitive Impairment, which triggers BAP Supplemental Benefits as opposed to a Monetary Award, occurs when a Retired Player performs 1.5 standard deviations worse than his expected functioning, and exhibits questionable functional impairment on the CDR. *Id.* Ex. 1, at 1; *id.* Ex. 2, at 5.

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<sup>58</sup> Retired Players may also receive diagnoses of Levels 1.5 and 2 Neurocognitive Impairment outside the BAP, but the diagnosing physician must use similar diagnostic criteria. See Settlement Ex. 1, at 2–3.

Objectors contend that these cutoffs are “unreasonably high” and will prevent the compensation of many Retired Players whom physicians typically would diagnose with dementia. Morey Obj. at 71–72; *see also* Johnson Obj. at 2, ECF No. 6395 (“I feel the bar should be lowered even more below the standard 1.0 or 1.5....”). These concerns are misguided.

Both the cognitive and functional cutoffs are drawn directly from well-established sources. The Neurocognitive Disorders section of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM–5), a universally recognized classification and diagnostic tool, divides neurocognitive disorders into mild and major disorders based on the severity of the impairment. *See* Dr. Kelip Decl. ¶ 21. Major disorders require impairment 2 or more standard deviations below a person’s expected premorbid capabilities. *Id.* ¶ 22. When this type of impairment extends beyond a single cognitive domain, it corresponds with a diagnosis of moderate dementia. *Id.* Mild disorders fall between 1 and 2 standard deviations below premorbid expectations. Empirical research demonstrates that 1.5 standard deviations below population norms is a relevant boundary—it substantially increases the likelihood of progression from a mild disorder to a major one. *Id.* ¶ 23.

Thus, the levels of neurocognitive impairment recognized by the Settlement are empirically tied to the cutoffs in the DSM-5.<sup>59</sup> Level 1 triggers BAP Supplemental Benefits because Retired Players with that score risk progressing from mild cognitive impairment to dementia. Level 2 matches the DSM-5's definition of moderate dementia.<sup>60</sup> Level 1.5 includes early dementia and begins at the midway point between Level 1 and moderate dementia.<sup>61</sup>

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<sup>59</sup> One Objector argues that the Settlement is “vague, ambiguous, and/or not sufficiently disclosed” because, among other things, the user manual participating physicians will receive setting out the specific cutoff scores for each test within the Test Battery has not been disclosed. Alexander Obj. at 4–5. This objection is overruled because the methodology is sufficiently clear from the Settlement and the record.

<sup>60</sup> Objectors argue that “it is not common for dementia patients to score consistently more than two standard deviations below healthy controls.” Dr. Stern Decl. ¶ 50, ECF No. 6201–16. The Settlement’s algorithm, however, recognizes that “[p]eople with neurocognitive impairment and dementia exhibit a range of scores on neuropsychological testing.” Decl. of Dr. Richard Hamilton ¶ 17, ECF No. 6423–25. While “some of [the Test Battery’s] scores must be low,” others “can be in the average range (or even above average),” yet still qualify a Retired Player for a Monetary Award. *Id.*

<sup>61</sup> Objectors provide affidavits from eight physicians indicating that they are “not aware of the use of the diagnostic or classification categories” of Levels 1, 1.5, and 2 Neurocognitive Impairment anywhere in the medical community. *See* Morey Final Obj. Exs. 3, 5–11. This is irrelevant. Although the precise terms are unique to the Settlement, the levels of impairment they represent are well established.

Likewise, the functional impairment criteria are directly adopted from the CDR scale. The CDR is a highly validated test for functional impairment associated with dementia. *See* Keith Wesnes, *Clinical Trials in Which The CDR System Has Been Employed to Detect Enhancements in Cognitive Function* (Feb. 2013), available at <http://bracketglobal.com/sites/default/files/ISCTM-Spring-4.pdf> (last accessed Apr. 21, 2015) (stating that CDR has been used in approximately 1,400 clinical trials on over 8,000 patients).

Objectors also contend that the algorithm for translating test performance into compensable neurocognitive impairment categories is arbitrary and unknown in the medical fields. *See* Decl. of Robert Stern ¶¶ 48–51, ECF No. 6201–16 (“Dr. Stern Decl.”). Specifically, they argue that “it is uncommon to require distinct criteria tables for levels of impairment based on a single estimate of premorbid functioning to be used across large groups of individuals.” *Id.* ¶ 51.

The algorithm is reasonable. A single test score is meaningless because there is no baseline for comparison. The Settlement’s Test Battery includes a test designed to estimate premorbid function in a

test taker.<sup>62</sup> That premorbid estimate compares the test taker's score to the scores of other individuals with similar premorbid intelligence. Dr. Kelip Decl. ¶ 45 (“[I]t is a standard feature of any neuropsychological assessment to only judge raw scores in the context of demographic factors and estimates of premorbid ability.”); Decl. of Dr. Richard Hamilton ¶ 15, ECF No. 6423–25 (“Dr. Hamilton Decl.”) (noting “using the [TOPF] together with a complex demographics statistical model ... is a fair and reasonable manner to account for individual variability”). Simply put, Retired Players with lower estimated pre-injury IQs must do comparatively worse on the same test to qualify for compensation than Retired Players with higher pre-injury ability. The practice of grouping test scores based on estimated premorbid intelligence, as well as the specific cutoffs for the three distinct groupings the Settlement uses, are all based on preexisting empirical research. Dr. Millis Decl. ¶ 21; Dr. Kelip Decl. ¶ 33 (“It is well known ... that premorbid ability has a profound effect on the expression of deficits following brain injury or disease.”). The Settlement's algorithm for translating these scores into compensable diagnoses is empirically based and transparent in its rationale. *See* Dr. Millis Decl. ¶ 33;

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<sup>62</sup> See *infra* Section V.D.ii for a more in-depth discussion of this test, including evidence that it is commonly administered as a standalone estimate of premorbid function.



Dr. Kelip Decl. ¶ 41; Dr. Hamilton Decl. ¶ 16, 23 (“The principles underlying the algorithms have been published in many studies, and have been derived from statistical analyses of cognitive test data from thousands of healthy subjects.”).

*ii. List of Qualifying Diagnoses and their Maximum Awards*

Objectors argue that the Settlement excludes dozens of other conditions associated with repetitive mild traumatic brain injury, from pituitary hormonal dysfunction to epilepsy to sleep disorders.<sup>63</sup> Objectors also argue that the maximum awards for each Qualifying Diagnosis should be larger, and that the different maximum awards for each Qualifying Diagnosis are arbitrary. However, the current

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<sup>63</sup> See, e.g., Davis Obj. at 1–2, ECF No. 6354 (seeking to include hearing loss); Collier Obj. at 2–3, ECF No. 6220 (seeking to include multiple sclerosis); Barber Obj. at 3, ECF No. 6226 (seeking to include post-concussion syndrome); *supra* note 34. Most Objectors cite no record evidence that these symptoms are associated with repetitive head trauma. *Cf.* Dr. Yaffe Decl. ¶ 91 (concluding that there is no link between multiple sclerosis and repeated head trauma). Additionally, many Objectors argue that mood and behavioral disorders, such as an increased propensity to commit suicide, should be compensated. Because these objections are frequently tied to a lack of coverage for CTE, they are discussed *supra* Section V.A.ii.

Qualifying Diagnoses and their maximum awards are reasonable.

Alzheimer's Disease, Parkinson's Disease, and ALS are all well-defined and robustly studied conditions. Epidemiological study has associated each of these diseases with repetitive mild traumatic brain injury. Dr. Fischer Decl. ¶¶ 6–7; Dr. Yaffe Decl. ¶ 13. Levels 1.5 and 2 Neurocognitive Impairment compensate a broad range of functional and neurocognitive symptoms regardless of underlying pathology.<sup>64</sup> Dr. Fischer Decl. ¶ 9. These objectively measurable symptoms have also been associated with concussions through epidemiological study. *Id.*

Tellingly, no Objector disputes that it is appropriate to include these conditions. Instead, Objectors seek to revise the Settlement to include additional maladies. This type of objection could be made to any class settlement. The essence of settlement is compromise; neither side will achieve a perfect outcome. *See GM Trucks*, 55 F.3d at 806. A settlement need not compensate every injury to be fair, especially where class members “not satisfied with the benefits provided in the Settlement may opt

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<sup>64</sup> See *infra* Section V.D.ii.

out of the Settlement.”<sup>65</sup> *Deepwater Horizon Clean-Up Settlement*, 295 F.R.D. at 158 (“It is well established that parties can settle claims without providing compensation for every alleged injury.” (citing *Maheer v. Zapata Corp.*, 714 F.2d 436, 438 (5th Cir. 1983))).

Objectors also argue that maximum awards for the Qualifying Diagnoses should be greater. Many contend that awards are insufficient to cover the cost of care for these conditions, especially as Retired Players age.<sup>66</sup> Because class action settlements must be negotiated in the shadow of what could be achieved through a lengthy and uncertain litigation process, they are rarely able to make injured victims whole. *See, e.g., In re AT & T Corp. Sec. Litig.*, 455 F.3d 160, 170 (3d Cir. 2006) (holding that “[t]he District Court did not abuse its discretion in concluding that in light of the risks of establishing liability and damages, the \$100 million settlement was an ‘excellent’ result,” despite the fact

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<sup>65</sup> A major benefit of the Settlement is that Retired Players retain their NFL CBA Medical and Disability Benefits. *See* Settlement §§ 2.1(zzz), 18.1(a) (viii), 18.6. Some of the uncompensated conditions likely trigger benefits under these benefit plans. The Settlement provides the certainty of compensation for more serious conditions that Retired Players may develop.

<sup>66</sup> *See, e.g.,* Grimm Obj. at 1, ECF No. 6346; LaPlatney Obj. at 1, ECF No. 6390; Moore Obj. at 4–5.

that the settlement likely provided compensation for only 4% of the total damages claimed); *Henderson v. Volvo Cars of N. Am., LLC*, No. 09–4146, 2013 WL 1192479, at \*9 (D.N.J. Mar. 22, 2013) (“A settlement is, after all, not full relief but an acceptable compromise.” (internal quotation marks omitted)). Additionally, the maximum awards are in line with other personal injury settlements. *See, e.g., PPA Prods. Liab. Litig.*, 227 F.R.D. at 556–57 (approving class action settlement where class members asserted claims for “increased risk of hemorrhagic stroke” and other injuries; settlement provided for awards ranging from \$100 to \$5 million); *Serzone Prods. Liab. Litig.*, 231 F.R.D. at 229–30 (approving class action settlement where class members asserted claims for “serious hepatic injuries,” including liver failure; settlement provided for awards ranging from \$100,000 to \$3.5 million).

Moreover, the relative differences in maximum awards for the Qualifying Diagnoses (\$1.5 million for Level 1.5 Neurocognitive Impairment, \$3 million for Level 2 Neurocognitive Impairment, \$3.5 million for Alzheimer’s Disease and Parkinson’s Disease, and \$5 million for ALS) are supported by objective variations in the severity of symptoms and the scientific understanding of each condition.

Level 1.5 Neurocognitive Impairment compensates objectively measurable cognitive decline in five cognitive domains: complex attention and processing speed, executive functioning, learning and memory, language, and spatial-perceptual. *See supra* Section V.B.i; *infra* Section V.D.ii. Level 2 Neurocognitive Impairment compensates these same impairments when they become more severe, justifying a higher award. *See supra* Section V.B.i.; *infra* Section V.D.ii.

Alzheimer's Disease, Parkinson's Disease, and ALS<sup>67</sup> also affect the five cognitive domains compensated by Levels 1.5 and 2 Neurocognitive Impairment, but additional considerations specific to each justify higher awards. *See* Dr. Hamilton Decl. ¶ 13.

Alzheimer's Disease is well-defined and its clinical progression is well understood. *See* Dr. Hovda Decl. ¶ 24; Dr. Schneider Decl. ¶ 42. The course of Alzheimer's Disease, including the timing and necessity of medical care, can be predicted with reasonable specificity. Dr. Schneider Decl. ¶ 42 (noting that highly accurate initial clinical diagnosis of Alzheimer's Disease is possible). Unlike Alzheimer's Disease, Levels 1.5 and 2 Neurocognitive

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<sup>67</sup> Compensation for Death with CTE is discussed *supra* Section V.A.iii.

Impairment compensate a broad range of cognitive decline regardless of the link to any established disease or syndrome. Thus, whether Retired Players' symptoms for Levels 1.5 and 2 Neurocognitive Impairment will worsen and what the cost of their care will be are difficult to predict. *See* Dr. Fischer Decl. ¶ 9. Retired Players with Alzheimer's Disease, on the other hand, would face an easier task proving their injury is related to concussive hits and establishing their prospective damages. Therefore, the Settlement justifiably provides higher awards for Retired Players with Alzheimer's Disease than for Retired Players with Levels 1.5 and 2 Neurocognitive Impairment.

Parkinson's Disease and ALS cause debilitating neuromuscular impairment in addition to cognitive impairment. Because people with Parkinson's Disease and ALS must endure additional symptoms, the Settlement justifiably provides higher awards for Retired Players with these Qualifying Diagnoses than for Retired Players with Levels 1.5 and 2 Neurocognitive Impairment. The additional symptoms of Parkinson's Disease include tremors, rigidity, and posture and gait disorders. *See* Ali Samii et al., *Parkinson's Disease*, 363 *The Lancet* 1783, 1783–1784 (May 29, 2004). People with ALS experience rapid and sweeping degeneration of the entire neuromuscular system. They watch their

bodies decompose until they require a feeding tube, ventilator, and 24-hour medical care merely to stay alive.<sup>68</sup> See Matthew C. Kiernan et al., *Amyotrophic Lateral Sclerosis*, 377 *The Lancet* 942, 944–45 (Feb. 7, 2011) (noting that 50% of victims die within three years of symptom onset). ALS' horrific symptoms explain why Retired Players with this Qualifying Diagnosis are eligible for the highest maximum award.

In conclusion, the record demonstrates that Class Counsel negotiated at arm's-length from the NFL Parties for most of a year with the guidance of Mediator Judge Phillips and Special Master Golkin. Class Counsel's decision to seek compensation for the conditions underlying the Qualifying Diagnoses at the levels specified in the Settlement is supported by scientific evidence. The nature of the negotiations and the scientific evidence in the record establish that the Qualifying Diagnoses and their maximum awards are reasonable.

### **C. Objections to Offsets**

#### *i. Age Offset*

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<sup>68</sup> Regrettably, Class Representative Kevin Turner has already begun to decline to this point. See *supra* Section IV.B.i.

Monetary Awards decrease as the age at which a Retired Player receives a Qualifying Diagnosis increases. *See* Settlement Ex. 3. Some Objectors argue that this offset should be eliminated.<sup>69</sup> Other Objectors argue that if age is relevant, then Class Members should have the opportunity to prove Retired Players experienced symptoms before a formal diagnosis was made in order to decrease their age bracket and increase their award.<sup>70</sup> Both the offset, and exclusive reliance on the date of a Retired Player's Qualifying Diagnosis, are reasonable.

The age offset has considerable scientific support. Epidemiologically, Retired Players' most significant risk factor for developing each of the Qualifying Diagnoses is age. Dr. Yaffe Decl. ¶ 50. For example, a 75 year old is 302 times more likely to have dementia than a 45 year old. *See* Decl. of Thomas Vasquez ¶ 12, ECF No. 6423-21 ("Vasquez

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<sup>69</sup> *See, e.g.*, Flint Obj. at 1 ("[A]s we get older the money goes down instead of up."); Duncan Obj. at 2-3, ECF No. 6357; Wilson Obj. at 1, ECF No. 6361; Alexander Stewart Obj. at 1, ECF No. 6392; Decl. of Drs. Brent Masel & Gregory O'Shanick ¶ 18, ECF No. 6180-2 ("The consequences of a brain injury are the same whether experienced in the past ... or the future....").

<sup>70</sup> *See, e.g.*, Barber Obj. at 5-6; Duerson Obj. at 21-23; Daniel Obj. at 1, ECF No. 6367 ("Most people with symptoms of Alzheimer's [D]isease have suffered for a long time prior to diagnosis."); Perfetto Obj. at 2-5, ECF No. 6371.



Decl.”); FJC Manual at 602. As a Retired Player ages and becomes further removed from NFL Football, the likelihood that NFL Football caused his impairment decreases. Because it would be more difficult for an older Retired Player to prove specific causation at trial, this offset is justified.

Additionally, it is reasonable to provide greater compensation to younger Retired Players. Retired Players who did not become impaired until later in life enjoyed a longer life without neurological injury. In the tort system, awards for the same condition tend to be smaller for older plaintiffs. *See Vasquez Decl.* ¶ 15.

Objectors also argue that some Retired Players neglected to receive a Qualifying Diagnosis until after they had already suffered for many years. *See, e.g., Hawkins Obj.* at 9, ECF No. 6373 (“[O]lder alumni are being penalized for the fact that the medical discoveries and the awareness of neurodegenerative diseases related to head trauma did not exist decades ago, even though for many players, their unrecognized and untreated symptoms were prevalent.”). Objectors argue that NFL Football’s alleged culture of downplaying injury exacerbated this issue. *Owens Obj.* at 1, ECF No. 6210 (“The NFL [Parties] encouraged a warrior mentality, leading its players to ignore pain and

eventually, the damaging symptoms of brain disease.”). Objectors take issue with the Settlement’s exclusive reliance on a Retired Player’s age at the time he received a Qualifying Diagnosis for calculating compensation. They argue that a Retired Player should be permitted to present evidence about the onset of his impairment in order to use his younger age for calculating compensation. While these concerns may well be true, the Settlement is nonetheless reasonable.

Only physicians with sufficient qualifications in the field of neurology may make Qualifying Diagnoses. *See* Settlement §§ 6.3(b)–6.3(f) (noting that, with one exception to accommodate deceased Retired Players, all physicians must be board certified). Objectors, in effect, wish to expand this list to include friends, family members, and others without formal medical training who may have observed symptoms in a Retired Player before he received a Qualifying Diagnosis.

The potential for wrongful manipulation of such an exception is too great. Even if an appropriately credentialed physician subsequently confirms a diagnosis, it would be very difficult to retrospectively determine with any certainty when the condition first manifested. *See* Dr. Yaffe Decl. ¶ 93. Contemporaneous evaluation of a Retired

Player's symptoms by a clinician is necessary. The formal diagnosis requirement incentivizes Retired Players to actively seek the care they need, whether through the BAP or a Qualified MAF Physician.

*ii. Severe TBI Offset*

The Settlement offsets a Monetary Award by 75% if a Retired Player suffers a severe TBI unrelated to NFL Football. *See* Settlement § 6.7(b)(iii). Objectors argue that a single severe TBI should not have such a large effect on a Retired Player's Monetary Award because the NFL Parties allegedly exposed Retired Players to dozens of such hits over the course of their careers. *See, e.g.,* Morey Obj. at 32; Duerson Obj. at 25–27.

This objection stems from a misunderstanding of terms.<sup>71</sup> Retired Players were allegedly at an increased risk of repetitive mild traumatic brain injuries, including concussions. After suffering a mild traumatic brain injury, a Retired Player became impaired, but usually remained conscious, allowing

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<sup>71</sup> This is not necessarily Objectors' fault. The medical community is still in the process of developing uniform definitions for the severity of various TBIs: "[W]hen a study finds that a TBI is a risk factor for or associated with a certain condition, it is often unclear whether the study means severe TBI, moderate TBI, mild TBI, or repetitive TBI—or any mix of these combinations." Dr. Yaffe Decl. ¶ 41.

him to return to play and continue experiencing dangerous blows. *See* Dr. Hovda Decl. ¶ 14. The traumatic brain injuries that trigger the offset are much more serious: “open or closed head trauma resulting in a loss of consciousness for greater than 24 hours.” Dr. Fischer Decl. ¶ 21; *see also* Settlement § 2.1(aaaaa) (defining “Traumatic Brain Injury” consistent with World Health Organization’s International Classification of Diseases that are used for severe TBIs). Severe TBI is well-studied, and a single severe TBI has a very strong association with dementia, Alzheimer’s Disease, and Parkinson’s Disease.<sup>72</sup> Dr. Yaffe Decl. ¶ 90. This strong association justifies the 75% offset for Retired Players who suffered a severe TBI.

Moreover, even if a Retired Player suffered a severe TBI, the Settlement still provides that Retired Player with an opportunity to demonstrate by clear and convincing evidence that the severe TBI did not cause his Qualifying Diagnosis. *See* Settlement § 6.7(d).

*iii. Stroke Offset*

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<sup>72</sup> Objectors argue that CTE causes severe TBI because CTE impedes impulse control and increases the risk of severe TBI through car accidents. *See* Morey Obj. at 32 n.33; Duerson Obj. at 26. Even if true, this risk is too attenuated to render this offset unfair.

Objectors similarly contend that the 75% offset for Stroke is unreasonable. *See* Morey Obj. at 32–34; Barber Obj. at 6–8, ECF No. 6226.

Like severe TBI, Stroke is a well-known cause of the Qualifying Diagnoses. Indeed, the medical community recognizes that Stroke is the second most common cause of dementia. Dr. Yaffe Decl. ¶ 87. Doctors often refer to this particular type of dementia as vascular dementia. Dr. Fischer Decl. ¶ 18.

Objectors do not dispute this, and instead argue that the repetitive mild TBI Retired Players were exposed to also cause Stroke. *See* Morey Obj. 32–33; Decl. of Drs. Masel & O’Shanick ¶ 17. However, the studies they cite do not support this proposition. Two of the cited studies examine the effects of moderate and severe TBI, not repetitive mild TBI, on Stroke.<sup>73</sup> Other studies do not address

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<sup>73</sup> *See* James F. Burke et al., *Traumatic Brain Injury May Be an Independent Risk Factor for Stroke*, 81 *Neurology* 1, 2 (2013), ECF No. 6201–6 (limiting study to individuals with head injury so serious that it required a visit to a hospital emergency room or inpatient admission); Yi-Hua Chen et al., *Patients with Traumatic Brain Injury: Population-Based Study Suggests increased Risk of Stroke*, 42 *Stroke* 2733, 2734 (2011), ECF No. 6422–22 (limiting study to individuals “who had visited ambulatory care centers ... or had been hospitalized with a principal diagnosis of TBI” and finding a large portion of

Stroke at all.<sup>74</sup> Objectors also argue that the NFL Parties' alleged administration of the drug Toradol to Retired Players increased the risk of Stroke, but cite no studies in support of this claim. *See* Duerson Obj. at 26–27; *see also* Dr. Fischer Decl. ¶ 20 (“I am not aware of any scientific support for [the contention that Toradol increases latent stroke risk], and I have seen no such reference in any of the papers cited by the objectors.”). The Stroke offset is reasonable.

Moreover, as with the severe TBI offset, any Retired Player has an opportunity to demonstrate by clear and convincing evidence that the Stroke he

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Stroke risk occurred in the three months after experiencing severe TBI).

<sup>74</sup> *See* Erin D. Bigler, *Neuropsychology and Clinical Neuroscience of Persistent Post-Concussive Syndrome*, 14 J. Int'l Neuropsychological Soc'y 1 (2008), ECF No. 6201–6 (failing to mention Stroke). Objectors also contend that repetitive mild TBI increases microbleeds, which increase Stroke. Although the study they cite found that 4 out of 45 Retired Players had microbleeding, researchers were unable to conclude that this percentage was any higher than what would be found in a control group. *See* Ira R. Casson et al., *Is There Chronic Brain Damage in Retired NFL Players? Neuroradiology, Neuropsychology, and Neurology Examinations of 45 Retired Players*, 6 Sports Health 384, 391 (2014), ECF No. 6201–6 (“It is not yet known whether the 9% frequency of microbleeds is higher than what might appear in an age-matched normal population....”). Moreover, the study does not address Stroke.

suffered did not cause his Qualifying Diagnosis. *See* Settlement § 6.7(d).<sup>75</sup>

*iv. Eligible Season Offset*

Objectors argue that the offset for playing fewer than five Eligible Seasons is unfair because “[a] single severe concussion in the first game of a player’s career could cause a player to suffer dementia.” Armstrong Obj. at 16; *see also* Drs. Masel & O’Shanick Decl. ¶ 16 (“[A] single concussion ... is capable of generating debilitating physical, cognitive and behavioral impairments...”); Duncan Obj. at 2, ECF No. 6357 (“[B]rain damage is sustained from the intensity and severity of the incident and could result from a single hit.”).

The Eligible Season offset serves as a proxy for the number of concussive hits a Retired Player experienced as a result of playing NFL Football. *See* Drs. Masel & O’Shanick Decl. ¶ 16 (conceding it is “reasonable to assume that that exposure to mild TBI increases as playing time increases”). Retired Players with brief careers endured fewer hits,

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<sup>75</sup> Objectors contend that the NFL Parties should bear the burden of proving that the offsets for severe TBI and Stroke are reasonable. *See* Barber Obj. at 6–8. Given the strength of the association between these events and neurocognitive impairment, placing the burden of proof on a Retired Player is reasonable.

making it less likely that NFL Football caused their impairments. Research supports the claim that *repeated* mild TBI have an association with Qualifying Diagnoses. *See* Dr. Fischer Decl. ¶¶ 6–7; Dr. Yaffe Decl. ¶ 13.

Objectors cite no authority for the assertion that a single mild TBI is enough to create long lasting, permanent neurological damage. *See* Dr. Fischer Decl. ¶¶ 5–6 (noting “the critical subgroup [is] those individuals who have sustained repeated clinical and subclinical traumatic brain injuries over a significant period of time” and that Qualifying Diagnoses have been associated with “repeated traumatic brain injury”). Short-term concussion symptoms—the wooziness typically experienced after a hit—come from the release of the excitatory amino acid glutamate. Dr. Hovda Decl. ¶ 15. An isolated concussion does not result in cell death or structural damage to the brain and is a largely recoverable diagnosis. Dr. Giza Decl. ¶ 12. However, permanent damage can occur if the brain continues to experience trauma before making a full recovery, such as when people experience additional head injuries. *Id.* Thus, the offset for playing fewer than five Eligible Seasons is reasonable.

A Retired Player receives an Eligible Season credit if he was on an NFL Member Club’s Active



List for at least three regular or postseason games, or if he was on a Member Club's Active List for at least one regular season or postseason game and spent two games on an inactive list or injured reserve list due to a concussion or head injury. *See* Settlement § 2.1(kk). A Retired Player receives half of an Eligible Season credit if he satisfied either of these criteria playing for a team in the World League of American Football, NFL Europe League, or NFL Europa League (collectively, "NFL Europe"). A Retired Player receives half of an Eligible Season credit if he was on an NFL Member Club's practice, developmental, or taxi squad roster for at least eight regular or postseason games. *Id.*

Objectors argue that the definition of an Eligible Season should derive from the definition of "Credited Season" used in the Bert Bell/Pete Rozelle NFL Player Retirement Plan because the latter credits seasons in which a Retired Player was placed on injured reserve at any time, for any injury. *See, e.g.,* Slack Obj. at 6–7, ECF No. 6223. Objectors contend that "[t]he basis for limiting the injured reserve credit to players on injured reserve due to a concussion or head injury is not explained in the proposed Settlement." Andrew Stewart Obj. at 3, ECF No. 6175.

Eligible Seasons are a proxy for exposure to concussive hits. Retired Players on injured reserve did not play or practice. A Retired Player on injured reserve because of a concussion was almost certainly at a higher risk of long-term neurological damage than a Retired Player on injured reserve for an injury unrelated to concussive hits. Limiting Eligible Season credit to Retired Players placed on injured reserve with a head injury is reasonable.

Objectors also argue that Retired Players who played in NFL Europe should receive full Eligible Season credit. As amended, the Settlement now allows Retired Players to earn half of an Eligible Season credit for time spent on an active roster in NFL Europe.<sup>76</sup> *See* Settlement § 2.1(kk). A Retired Player may combine his half of a season credit with other Eligible Season credit from time spent on a domestic Member Club's roster, but may only earn one total Eligible Season credit per year.<sup>77</sup> *See id.* § 6.7(c).

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<sup>76</sup> Previously, Retired Players received no Eligible Season credit for participation in NFL Europe. The amendment addresses concerns raised by several Objectors. *See, e.g.*, Morey Obj. at 34–36; Slack Obj. at 3–4, ECF No. 6223; Duff Obj. at 1, ECF No. 6348; Jones Obj. at 2–4; Zeno Obj. at 1–2, ECF No. 6386.

<sup>77</sup> Seasons in NFL Europe occurred in the spring, and did not overlap with the domestic NFL Football season. Without this limitation, a Retired Player who, in one year, played three games on an Active List for both NFL Europe and domestic

NFL Europe had a shorter regular season than domestic NFL Football—10 games rather than 16—and held fewer practices. Decl. of T. David Gardi ¶ 14, ECF No. 6422–33. Additionally, NFL Europe Retired Players face a litigation risk that other Retired Players do not. To play in NFL Europe, Retired Players had to sign employment contracts that provided workers’ compensation benefits. Florida and Georgia law govern these agreements and mandate that workers’ compensation is the exclusive remedy for work related injuries. *See id.* ¶¶ 5, 8–9, 12. The NFL Europe Eligible Season credit is reasonable.

Lastly, Objectors challenge the exclusion of training camp and preseason games from the calculation of Eligible Season credit. They argue that these activities exposed Retired Players to concussive hits because many Retired Players had to play hard to ensure roster spots. *See, e.g.,* Andrew Stewart Obj. at 4–5 (“Training camps were full contact, twice a day for 3.5 hours each session.”); Moore Obj. at 2, ECF No. 6399 (noting that “the hitting in scrimmages and live practices was (is) just as intense, if not more so, than in the regular season games”).

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NFL Football could have earned one-and-a-half Eligible Season credits.

While training camp and preseason were undoubtedly brutal, so too were the regular and postseason games that qualify a Retired Player for Eligible Season credit. It is reasonable to assume that Retired Players who made the roster, and thus continued to play NFL Football that season, were exposed to a greater number of potentially harmful hits. While the Settlement may have been more generous if Retired Players received Eligible Season credit for training camp and preseason participation, the lack of credit does not render the Settlement unfair.

In sum, the calculation of Eligible Season credit is reasonable.

*v. BAP Offset*

Retired Players who neglect to take a baseline assessment examination and who later develop a Qualifying Diagnosis will see their awards reduced by 10%. *See* Settlement § 6.7(b)(iv). Objectors challenge this provision as arbitrary. *Morey Obj.* at 74.

The offset is a reasonable means to encourage Retired Players to participate in the BAP. Baseline assessment examinations either result in a

Qualifying Diagnosis or produce a more complete picture of a Retired Player's neurocognitive profile. The latter makes a subsequent Qualifying Diagnosis easier to render by providing a point of comparison. *See infra* Section V.D.i. The scope of the offset confirms that its purpose is to incentivize baseline assessment examinations. The offset does not apply to Retired Players who received Qualifying Diagnoses before the Preliminary Approval Date or those without Qualifying Diagnoses who are still eligible to participate in the BAP. *See* Settlement § 6.7(b)(iv).

**D. Objections to the Baseline Assessment Program**

*i. BAP Fund*

The primary purpose of the BAP is to provide free, comprehensive neurological and neuropsychological examinations to Retired Players. Retired Players may receive diagnoses of Level 1 Neurocognitive Impairment and Qualifying Diagnoses of Levels 1.5 and 2 Neurocognitive Impairment through baseline assessment examinations.<sup>78</sup> Class Counsel's actuarial expert

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<sup>78</sup> Qualifying Diagnoses of Alzheimer's Disease, Parkinson's Disease, and ALS cannot be made through baseline assessment examinations. *See infra* Section V.D.ii. Retired

predicts that the cost of these exams will account for less than two thirds of the \$75 million BAP Fund. *See* Vasquez Decl. ¶¶ 23–24. Even if the costs of these exams exceed the \$75 million BAP Fund, the Parties amended the Settlement to guarantee that every eligible Retired Player can receive an exam regardless of the total cost. *See* Parties’ Joint Amendment at 3–4.

Any remaining money in the BAP Fund will go toward BAP Supplemental Benefits for Retired Players who are diagnosed with Level 1 Neurocognitive Impairment. *See* Settlement § 5.14(b) (noting that benefits per Retired Player will be calculated in light of the cost of providing Retired Players with baseline assessment examinations). Objectors argue that these benefits are insufficient because the annual cost of treating dementia is allegedly \$56,000. *See* Morey Obj. at 72. Objectors, however, compare apples to oranges. Level 1 Neurocognitive Impairment is not early dementia; it is less severe. *See* Settlement Ex. 1, at 1–2; *supra* Section V.B.i. If a Retired Player progresses to early dementia (Level 1.5 Neurocognitive Impairment), he

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Players must visit Qualified MAF Physicians to receive any of these Qualifying Diagnoses. Qualified MAF Physicians may also provide Retired Players with Qualifying Diagnoses of Levels 1.5 and 2 Neurocognitive Impairment. *See* Settlement § 6.3(b).

will be entitled to compensation from the uncapped Monetary Award Fund. *See* Settlement §§ 23.1(a)-(b).

Moreover, Class Counsel's actuary estimates that the average BAP Supplemental Benefit per Retired Player will range from \$35,000 to \$52,000; the NFL Parties' actuaries predict that there may be an \$11 million surplus in the BAP Fund even after payment of BAP Supplemental Benefits to Retired Players. Vasquez Decl. ¶ 28; NFL Parties' Actuarial Materials ¶ 10.

*ii. Test Battery*

Baseline assessment examinations subject Retired Players to a Test Battery that provides a comprehensive neuropsychological and neurological examination. The Test Battery consists of four components, all administered by a board-certified neurologist and an appropriately credentialed neuropsychologist. First, the Advanced Clinical Solutions Test of Premorbid Functioning ("TOPF") is used to estimate a Retired Player's basic pre-injury ability level. *See* Settlement Ex 2. Second, a series of tests assesses a Retired Player's level of functioning in five cognitive domains, including complex attention and processing speed, executive functioning, learning and memory, language, and spatial-perceptual. *Id.* The series also includes tests

of functional impairment, such as a Retired Player's ability to perform daily chores. Third, the Test Battery includes two tests that focus on emotional functioning and aspects of personality, the MMPI-2RF and the Mini International Neuropsychiatric Review ("Mini"). *Id.* Finally, there are several "validity" measures, designed to ensure that test takers are not intentionally submitting incorrect answers to seem impaired. *Id.*

Collectively, these tests provide Retired Players with a comprehensive baseline assessment of their cognitive capabilities and their neuropsychological state. See Dr. Fischer Decl. ¶ 14. Numerous empirical studies show that these tests are effective at identifying impairment, especially in persons who have sustained brain injury. *Id.* ¶ 16. It would be very difficult for any significant neurological abnormalities to escape an examination of this breadth.<sup>79</sup>

Objectors argue that the Test Battery does not resemble exams typically given by

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<sup>79</sup> See Dr. Fischer Decl. ¶ 14 (noting that the Test Battery will include "constitutional evaluation, mental status testing, speech testing, full cranial nerve investigation, motor function, sensory function, coordinative testing, reflex testing, back and neck evaluation, and gait and posture").



neuropsychologists in the field.<sup>80</sup> This is incorrect. The Parties and their experts did not construct any test from scratch; each individual exam in the Test Battery is a well-established and validated tool for diagnosing neurocognitive impairment in any age group and is supported by extensive empirical testing to ensure its validity. *See, e.g.*, Dr. Kelip Decl. ¶¶ 28, 33; Dr. Millis Decl. ¶¶ 17–20, 24–25; Dr. Hamilton Decl. ¶ 14 (practicing physician noting that the Test Battery includes exams that are “very similar (and, in many cases, identical)” to tests used in every day practice for these types of diagnoses). The TOPF is a well-accepted exam for estimating premorbid function.<sup>81</sup> Dr. Millis Decl. ¶ 17. The cognitive domains tested in the Test Battery are those laid out in the Neurocognitive Disorders section of the DSM–5. *See* Dr. Kelip Decl. ¶ 17. Functional impairment is measured by the National

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<sup>80</sup> *See, e.g.*, Morey Obj. at 73 (“The testing protocols prescribed by the Settlement are generally considered inappropriate for the evaluation of individuals with neurodegenerative diseases.”); Drs. Masel & O’Shanick Decl. ¶ 12 (arguing for a “more holistic, human-based, and less linguistically reliant” examination); Duerson Obj. at 24.

<sup>81</sup> Some Objectors argue that the TOPF disadvantages those with accents because one component asks participants to read a list of words and pronounce them exactly. *See* Drs. Masel & O’Shanick Decl. ¶ 14. The TOPF, however, also includes demographic formulas based on age, education, and gender that provide an alternative means for assessing premorbid ability. Dr. Millis Decl. ¶ 37.

Alzheimer's Coordinating Center's CDR scale, a validated and commonly-used scale for assessing the progression of dementia symptoms. *See* Settlement Ex. 1; Dr. Kelip Decl. ¶ 35. A survey of 747 well-credentialed psychologists "shows that the tests included in the Test Battery are among the most widely used neuropsychological tests across all patient groups." Dr. Millis Decl. ¶ 25.

Objectors also argue that the Test Battery's five-hour length is excessive, and that many genuinely impaired Retired Players will be unable to complete it. *See* Morey Obj. at 73; Dr. Stern Decl. ¶ 44. The Test Battery contains countermeasures to ensure that this does not occur. Most of the individual tests administered have "stopping rules" that allow the examiner to shorten the exam based on how the participant is performing. *See* Dr. Millis Decl. ¶ 26. More broadly, the neurologists and neuropsychologists who will administer the Test Battery will have training and experience administering tests of this length to impaired subjects. *See id.*; Dr. Kelip Decl. ¶ 40. Empirical evidence shows that patients suffering from dementia can tolerate tests of this length. *See* Dr. Kelip Decl. ¶¶ 36, 40.

Objectors also challenge the Test Battery's validity measures and argue that these exams will

produce false positives and exclude Retired Players who are legitimately impaired. *See* Dr. Stern Decl. ¶ 46. Validity measures, however, are universally regarded as a necessary component of any neurocognitive testing because they ensure the reliability of the data. Dr. Millis Decl. ¶ 28; Dr. Kelip Decl. ¶ 43. They are particularly reasonable where, as here, test takers have a significant financial incentive to appear impaired. The Test Battery incorporates well-established validity criteria that take into account the overall performance of the subject and how that performance compares to known patterns of impairment. Dr. Millis Decl. ¶ 30; Dr. Kelip Decl. ¶ 44.

Finally, many Objectors argue that the Test Battery provides insufficient testing for mood and behavioral conditions allegedly associated with CTE.<sup>82</sup> Because the Settlement does not compensate these conditions, more limited testing is reasonable. Nonetheless, the Test Battery does include two tests, the Mini and MMPI-2RF, which exclusively test for mood and behavioral abnormalities. These two tests include questions on irritability, lowered inhibitions,

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<sup>82</sup> *See, e.g.*, Duerson Obj. at 23 (“The BAP does not test for the mood and behavioral disorders that plague many individuals who suffer from CTE, effectively excluding a significant number of Class Members from the possibility of compensation.”); Morey Supplemental Obj. at 3, ECF No. 6232.

suicidal thinking, and depression. *See* Dr. Kelip Decl. ¶ 39; Dr. Hamilton Decl. ¶ 22. Red flags on these neuropsychological tests can become the focus of follow up care, including additional testing and treatment.

*iii. BAP Protocols*

Objectors challenge the age cutoffs for baseline assessment examinations and the ten-year length of the BAP.<sup>83</sup> *See* Morey Obj. at 74; Armstrong Obj. at 19–20; Alexander Obj. at 7. These requirements are both reasonable and scientifically based.

A Retired Player who is younger than 43 has ten years or until his 45th birthday, whichever happens first, to receive a baseline assessment examination. *See* Settlement § 5.3. A Retired Player 43 or older has two years from the commencement of the BAP to receive an exam. *Id.* In all circumstances, a Retired Player will have at least two years to receive a baseline assessment examination. Two years is a reasonable period of time for a Retired Player to complete a free, five-hour exam.

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<sup>83</sup> Objectors also challenge the 180-day registration requirement. *See* Armstrong Obj. at 19. Because this is a prerequisite to many settlement benefits, it is discussed *infra* Section V.E.ii.

Both the structure of the Settlement and neurological science justify these deadlines. The age offset decreases the Monetary Awards for Qualifying Diagnoses rendered after age 45. *See* Settlement Ex. 3. As discussed *supra*, this is because Retired Players' most significant risk factor for developing each Qualifying Diagnosis is age. *See* Vasquez Decl. ¶ 11; Dr. Yaffe Decl. ¶ 50. Timely baseline assessment examinations ensure that funds are most likely to be distributed to Retired Players whose symptoms are a result of playing NFL Football. These deadlines also work to the benefit of Retired Players. Earlier exams may lead to earlier Qualifying Diagnoses and result in higher awards. Even if a Retired Player is not yet impaired, an earlier exam will provide a more accurate picture of the Retired Player's premorbid functioning. The same reasoning justifies the ten-year limit on the BAP.

*iv. Selection Process for Qualified  
BAP Providers*

Only pre-selected Qualified BAP Providers may administer baseline assessment examinations. Settlement § 5.2. The BAP Administrator will select these BAP Providers, subject to limited veto rights of both the NFL Parties and Co-Lead Class Counsel. *See id.* § 5.7(a)(i) (providing for 20 vetoes each). Some Objectors argue that this unfairly slants the process

towards the NFL Parties because the neuropsychologists selected “are likely to be far more conservative in ‘calling’ impairment than a neuropsychologist chosen by a player.” Armstrong Obj. at 20; *see also* Alexander Obj. at 8.

The selection requirement is reasonable. Qualified BAP Providers must be well-trained and credentialed. Neurologists must be board certified, and neuropsychologists must be certified by the American Board of Professional Psychology or the American Board of Clinical Neuropsychology. *See* Settlement § 5.2. A BAP Provider is ineligible if he has committed a crime of dishonesty. *Id.* § 5.7(a)(ii). Co-Lead Class Counsel also have the ability to veto potential Qualified BAP Providers, and an absolute right to exclude any BAP Provider with some connection to the litigation as an expert witness or consultant.<sup>84</sup> *Id.* § 5.7(a)(i).

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<sup>84</sup> Some Objectors argue that this rule is unfair because it prejudices the ability of Opt Outs to retain experts to prosecute their cases. Because a physician cannot be both an Opt Out’s expert witness and a Qualified BAP Provider, Objectors imply that physicians will choose to become Qualified BAP Providers rather than serve as experts for Opt Outs. *See* Morey Obj. at 86. However, Objectors lack standing to assert the rights of Opt Outs because they are Class Members. Moreover, Objectors cite no evidence that the pool of available physicians is small enough for this to be a burden.

*v. Use of Mail Order Pharmacy Vendors*

The Qualified BAP Pharmacy Vendors that provide prescription drugs as part of BAP Supplemental Benefits are all mail order pharmacies. *See id.* §§ 2.1(xxx); 5.7(b). Objectors challenge this limitation, claiming that mail order pharmacies may be unable to deliver certain necessary medications because of storage requirements and will “deprive Class Members of the personal, face-to-face counseling available at local ‘brick and mortar’ pharmacies.” *Armstrong Obj.* at 23.

The Claims Administrator intends to work with all potential mail order Qualified BAP Pharmacy Vendors to ensure that each “offers the option to fill prescriptions at a local retail pharmacy, when necessary, due to the transportation and storage requirements of required therapies; the necessity of frequent medication dose adjustments ... [and] the desire of Class Members to avail themselves of ‘face-to-face’ counseling.” *Garretson Aff.* ¶ 15. Thus, there is no reason for concern.

For all of the reasons discussed above, the Baseline Assessment Program is reasonable. Objections to the BAP are overruled.

### **E. Objections to the Claims Process**

Objectors argue that the claims process is unduly burdensome. They fear that few Class Members will submit claims, and that Class Members who do submit claims will be thwarted by a “complex and burdensome administrative process.” Morey Obj. at 73; Heimburger Obj. at 18.

Objectors fail to consider that the claims process needs to be rigorous enough to deter submission of fraudulent claims. Monetary Awards may amount to hundreds of thousands if not millions of dollars to eligible Class Members. Settlement Ex. 3. The NFL Parties are entitled to reasonable procedures and documentation to ensure that large awards go to deserving claimants. In cases with large awards, an overabundance of fraudulent claims, rather than a dearth of valid ones, is the main concern. Submission of fraudulent claims to class settlements is, unfortunately, a documented phenomenon. *See In re Diet Drugs (Phentermine / Fenfluramine / Dexfenfluramine) Prods. Liab. Litig.*, 573 Fed. App’x. 178, 180 (3d Cir. 2014) (noting that the settlement was “inundated with fraudulent claims that included manipulated [medical] test results”); *United States v. Penta*, No. 08–0550 (E.D. Pa. Sept. 11, 2008) (indictment



charging five people, who all ultimately pleaded guilty, with submitting \$40 million in fraudulent claims to the *Nasdaq Market-Makers, Cendant*, and *BankAmerica Securities* settlements); *Oetting v. Green Jacobson, P.C.*, No. 13–1148, 2014 WL 942952, at \*1 (E.D. Mo. Mar. 11, 2014) (noting millions of dollars of false claims submitted in *BankAmerica Securities* settlement).

Objectors also fail to consider the protections built into the Settlement to ensure that deserving claims are approved. Specifically, the Claims Administrator responsible for implementing the claims process is an independent entity subject to oversight by an independent Special Master and, ultimately, this Court. *See* Settlement § 5.6(a)(iv) (“The Special Master ... will oversee the BAP Administrator, and may, at his or her sole discretion, request reports or information from the BAP Administrator”); *id.* § 10.2(a)(iii) (“The Court may, at its sole discretion, request reports or information from the Claims Administrator.”); *id.* § 10.2(e) (Claims Administrator may be replaced for cause upon order of the court, or by joint motion of the Parties). This independent oversight will ensure that all claims are objectively evaluated. Additionally, the NFL Parties have contracted to implement the Settlement in good faith, and remain subject to this Court’s continuing jurisdiction and oversight. *See id.*

§§ 20.1(n), 27.1 (“[T]he Court retains continuing and exclusive jurisdiction ... to interpret, implement, administer and enforce the Settlement...”); *id.* § 30.11 (“Counsel for the NFL Parties will undertake to implement the terms of this Settlement in good faith.”).

*i. Cognitive Impairment of Certain Retired Players*

Objectors argue that the claims process is unreasonable because Retired Players suffering from cognitive impairment cannot be expected to keep track of forms, deadlines, and submission requirements. *See, e.g.*, Morey Obj. at 78 (“Someone laboring under [a Qualifying Diagnosis] has little hope of navigating the procedural morass required to claim payment under the Settlement.”); Carrington Obj. at 7.

The Settlement reasonably accommodates the needs of cognitively impaired Retired Players. The Settlement allows any Class Member to use a representative to conduct the claims process for him. Any Class Member may retain counsel to compile and submit any relevant forms on his behalf. Settlement § 30.2(a). The Settlement provides an extension of the registration deadline for good cause, and an opportunity for any Class Member to cure an

incomplete Claim Package. *See id.* §§ 4.2(c)(i), 8.5. The Claims Administrator, who is experienced in administering claims in personal injury settlements, will be especially sensitive to the needs of cognitively impaired Retired Players. *See Brown Decl.* ¶ 57.

*ii. Registration Requirement*

Class Members must register with the Claims Administrator within 180 days of receiving notice that the Settlement has gone into effect. *See Settlement* § 4.2(c). Registration is a prerequisite to Class Members' receipt of most Settlement benefits, including receipt of Monetary Awards and participation in the BAP. *See id.* §§ 5.1, 6.2. Objectors assert that this creates an unfair "opt in" settlement. *Morey Obj.* at 74. The registration requirement is reasonable, not onerous. *See In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 316 (3d Cir. 2001) ("[D]eadlines are an integral component of effective consolidation and management of the modern mass tort class action.").

To register, a Class Member must only submit basic biographical information, including name, contact information, and the dates and nature of a Retired Player's employment with the NFL Parties sufficient to determine that the registrant is a Class

Member.<sup>85</sup> *See* Settlement § 4.2(b). In the event that a Class Member cannot register in the six-month window, the Settlement provides an extension for good cause. *Id.* § 4.2(c). If the Claims Administrator rejects a Class Member's application, he has an opportunity to appeal. *Id.* § 4.3(a)(ii); *see also* *Diet Drugs*, 2000 WL 1222042, at \*20, \*23–24 (describing various registration requirements for benefits).

Class Members will receive ample reminders to complete the registration process. Within 30 days of the Effective Date of the Settlement, Class Members will be mailed materials reminding them to register. Settlement § 14.1(d). An automatic telephone service established by the Claims Administrator will likewise inform Class Members of upcoming deadlines. *See id.* §§ 4.1(b), 10.2(b)(i) (2), 14.1(d).

The registration requirement is not a meaningless exercise; rather, it enables the Settlement to provide key services. The BAP Administrator and Claims Administrator must approve lists of Qualified BAP Providers and Qualified MAF Physicians to provide baseline assessment examinations and make Qualifying

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<sup>85</sup> Representative and Derivative Claimants must also identify the Retired Player through whom they have a claim. *See* Settlement §§ 4.2(b)(i)-(ii).

Diagnoses. Class Members' contact information enables the BAP Administrator to appoint physicians in sufficient quantity and geographical distribution to ensure that all Class Members can access these benefits. *See id.* §§ 5.7(a)(ii), 6.5(b). Registration also enables more effective communication between the Claims Administrator and the Class, so that Class Members may remain abreast of deadlines and other relevant information. *See id.* § 4.2(b) (asking registrants to choose between email, U.S. mail, and other methods of communication); *id.* § 4.3(a)(i) (noting that, upon successful registration, Class Members will receive access to a secure web-based portal that provides information regarding the Claim Package and awards).

*iii. Use of Qualified MAF Physicians*

After the Effective Date, Retired Players must, at their own expense, visit Qualified MAF Physicians to receive a Qualifying Diagnosis of Alzheimer's Disease, Parkinson's Disease, or ALS.<sup>86</sup> *See id.* §§ 6.3(b), 6.5(a). Objectors argue that Class Members should be allowed to choose their own physicians to

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<sup>86</sup> Qualifying Diagnoses of Levels 1.5 and 2 Neurocognitive Impairment may be made by both Qualified MAF Physicians and through the BAP by Qualified BAP Providers. *See id.* § 6.3(b). Compensation for Death with CTE ends on the Final Approval Date. *See supra* Section V.A.iii.

reduce the burden of obtaining Qualifying Diagnoses. *See* Morey Obj. at 76 (noting lack of hardship provision for Class Members geographically isolated from a Qualified MAF Physician); Daniel Obj. at 1–2, ECF No. 6367; Erickson Obj. at 5, ECF No. 6380; Taylor Obj. at 2–3, ECF No. 6397.

Requiring Retired Players to visit a Qualified MAF Physician to receive certain Qualifying Diagnoses is reasonable. Qualified MAF Physicians must be board certified and able to perform the exams necessary to render Qualifying Diagnoses. *See* Settlement §§ 2.1(www), 6.5(c). A Retired Player’s primary care physician will not necessarily have this training. Moreover, visiting a Qualified MAF Physician is not an undue burden. The Claims Administrator must take into account geographic proximity to Retired Players when selecting Qualified MAF Physicians. *See id.* § 6.5(b).

*iv. Claim Package*

To receive a Monetary Award, a Class Member must submit a Claim Package that includes a signed Claim Form, records demonstrating employment with the NFL Parties, a Diagnosing Physician Form, and medical records reflecting a Qualifying Diagnosis. *Id.* § 8.2(a). As amended, the Settlement allows a Representative Claimant of a deceased

Retired Player to petition the Claims Administrator to excuse the latter two requirements if those records were lost in a hurricane or other *force majeure* type event, and the Representative Claimant can produce a death certificate referencing the Qualifying Diagnosis.<sup>87</sup> *Id.* § 8.2(a)(ii). To demonstrate that a Retired Player participated in more than one Eligible Season, a Class Member must include evidence beyond a Retired Player’s sworn statement attesting to his playing time. *Id.* § 9.1(a)(i). A Claim Package “must be submitted to the Claims Administrator no later than two (2) years after the date of the Qualifying Diagnosis or within two (2) years after the Settlement Class Supplemental Notice is posted on the Settlement Website, whichever is later.” *Id.* § 8.3(a)(i).

The contents of the Claim Package are reasonable. “Class members must usually file claims forms providing details about their claims and other information needed to administer the settlement.” Manual for Complex Litigation § 21.66 (4th ed.). Only information necessary to determine that a Retired Player played in the NFL and received a Qualifying Diagnosis is required. Objectors complain that the specific forms constituting the Claim

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<sup>87</sup> The amendment addresses the concerns raised in the objection of Delano Williams. *See* D. Williams Obj. at 4–6, ECF No. 6221.

Package have not been disclosed, but cite no source requiring disclosure at this stage. *See* Morey Obj. at 75. Class Members will receive “detailed information regarding the Claim Package” and application process upon registration. Settlement § 4.3(a)(i).

Objectors challenge the requirement that a Retired Player needs to submit more than just a sworn statement in order to receive more than one Eligible Season credit. *See id.* § 9.1(a)(i); Morey Obj. at 75 (contending that there is “no possible justification for this procedural hurdle because *the NFL itself has this data*”). This requirement, however, is reasonable as an initial screen to weed out fraudulent claims. If a Class Member’s proffered evidence is insufficient, the NFL Parties and individual Member Clubs are required to turn over, in good faith, any records that they possess. *See id.* § 9.1(a); *Varacallo*, 226 F.R.D. at 243 (concluding that it is reasonable to require submission of documents in support of a claim even though the defendant was also required to submit a file that “may [have] contain[ed] information that would support” the claim). Moreover, Retired Players likely retain employment records, especially because their retirement and disability benefits similarly turn on the number of seasons played. *See* Andrew Stewart Obj. at 7 (“The Term ‘Credited Season’ is familiar to all players and is routinely used to determine



eligibility pension and disability benefits.”); *id.* Ex. 6, ECF No. 6175–3 (Bert Bell/Pete Rozelle NFL Player Retirement Plan).

Finally, Objectors challenge the two-year window the Settlement provides Class Members to submit a Claim Package after a Retired Player has received a Qualifying Diagnosis. However, courts in the Third Circuit have upheld far shorter periods. *See In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2007 WL 542227, at \*10 (D.N.J. Feb. 16, 2007) (holding that five-month period to submit claims forms is reasonable), *aff’d*, 579 F.3d 241 (3d Cir. 2009); *Processed Egg Prods.*, 284 F.R.D. at 256 (approving settlement where class members had “127 days from the postmark date that the notice of the settlement was mailed by first-class mail ... to return a completed Claim Form to make a claim for benefits”). Moreover, if a Class Member can demonstrate substantial hardship, then this window may be expanded by an additional two years. *See* Settlement § 8.3(a)(i).

*v. Appeals Process*

Class Members, Co–Lead Class Counsel, and the NFL Parties may each appeal the Claims Administrator’s decision as to whether a Class Member is entitled to a Monetary Award. *Id.* § 9.5.

To appeal, a Class Member must pay a \$1,000 fee, which will be refunded if the appeal is successful. *Id.* § 9.6(a). As amended, the Settlement allows the Claims Administrator to waive the fee if a Class Member can show financial hardship.<sup>88</sup> *id.* § 9.6(a) (i). Appeals are limited to five single-spaced pages, and subject to proof by clear and convincing evidence. *Id.* §§ 9.7(a), 9.8. The Court is the ultimate arbiter of any appeal, and may consult a member of an Appeals Advisory Panel for medical advice. *Id.* § 9.8.

Objectors contend that exempting the NFL Parties from an appeal fee is unfair, and that the exemption will allow them to undertake unlimited appeals. *Armstrong Obj.* at 23–24; *see also Morey Obj.* at 76. The NFL Parties may only undertake appeals in good faith, and Co–Lead Class Counsel may petition this Court for appropriate relief if the NFL Parties subvert this requirement. *See Settlement* § 9.6(b).

Objectors also argue that the five-page limit and the clear and convincing standard will make successful appeals “extremely rare.” *Armstrong Obj.* at 24. These provisions, however, also apply to the NFL Parties and thus protect favorable awards to Class Members. Moreover, the five-page limit applies

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<sup>88</sup> This amendment addresses a concern raised by several Objectors. *See, e.g., Morey Obj.* at 76; *Armstrong Obj.* at 23–24.

only to written statements; additional medical records and other evidence in support of an appeal are exempted. *See* Settlement § 9.7(a). Furthermore, even if an appeal is unsuccessful, a Class Member may submit another Claim Package.<sup>89</sup>

*vi. Anti-Fraud Provisions*

To ensure that only Retired Players actually affected by neurocognitive or neuromuscular impairment—and their Representative and Derivative Claimants—receive Monetary Awards, the Settlement establishes an audit system. Objectors incorrectly contend that these are “anti-payment provisions.” *Morey Obj.* at 77 (internal quotation marks omitted).

Audits are particularly appropriate in this case because the Settlement offers substantial cash awards; Class Members will receive hundreds of thousands, if not millions of dollars. *See* Manual for Complex Litigation § 21.66 (4th ed.) (“Large claims might warrant a field audit to check for inaccuracies or fraud.”). Additionally, the proposed audits are reasonable in scope. The Claims Administrator will randomly audit 10% of each month’s successful award applications. *See* Settlement § 10.3(c). It will

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<sup>89</sup> Repeated Claim Package submissions may trigger audits. *See infra* Section V.E.vi.

also audit claims that raise predetermined red flags, such as those from Class Members who already submitted an unsuccessful Claim Package in the last year. *See id.* § 10.3(d). Though an audit may require Class Members to submit additional documentation, only those who unreasonably refuse to comply with the procedure will forfeit their claims. *See id.* §§ 10.3(b)(ii), 10.3(e). While the NFL Parties may conduct their own audits, they may only do so in good faith and at their expense. *Id.* § 10.3(a).

## **F. Other Objections**

### *i. Education Fund*

Objectors argue that the Education Fund, which provides \$10 million in funding to youth football safety initiatives and programs educating Retired Players about their NFL CBA Medical and Disability Benefits, is an improper *cy pres* distribution and should be eliminated. *See* Heimburger Obj. at 21–23; Armstrong Obj. at 29–34; Settlement § 12.1. The Education Fund is not a *cy pres* distribution, and even if it were, it is reasonable.

*Cy pres* involves the distribution of unclaimed or residual settlement funds to third parties. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (“[A] *cy pres* distribution is designed to be a

way for a court to put any unclaimed settlement funds to their next best compensation use....” (emphasis added) (internal quotation marks omitted)); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2008 WL 4542669, at \*3 (E.D. Pa. Oct. 3, 2008) (noting that federal courts create *cy pres* distributions based upon their “broad discretionary powers to shape equitable decrees for distributing *unclaimed* class action funds” (emphasis added)); *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 576 (E.D. Pa. 2005) (“A court may also utilize *cy pres* principles to distribute *unclaimed funds* from a class action settlement.” (emphasis added)).

In this case, the Education Fund is a separate allocation distinct from the Monetary Award Fund and the BAP Fund, and does not direct how unclaimed funds should be distributed. Eliminating the Education Fund would not result in more Class Members receiving Monetary Awards or baseline assessment examinations because the NFL Parties have already guaranteed these benefits to eligible claimants. Moreover, Education Fund benefits inure in part directly to Class Members; the Fund educates Retired Players about their medical and disability benefits under their Collective Bargaining Agreements.

Even if the Education Fund were a *cy pres* distribution, it is nonetheless justified. In *Baby Products*, the Third Circuit noted that *cy pres* provisions are appropriate if a settlement contains sufficient direct benefit to the class. 708 F.3d at 174; *see also id.* at 176 (“We do not intend to raise the bar for obtaining approval of a class action settlement simply because it includes a *cy pres* provision.”).

Direct distributions to Class Members constitute the vast majority of the Settlement. *Compare* Settlement § 23.1(c) (noting Education Fund is \$10 million), *with* Class Counsel’s Actuarial Materials at 3 (estimating “total compensation of approximately \$950 million”) *and* NFL Parties’ Actuarial Materials ¶ 20 (estimating “approximately \$900 million will be paid out”). Additionally, by funding football safety initiatives, the Education Fund deals with the chief harm alleged in the Class Action Complaint: the risks of head injury from football. *See Baby Prods.*, 708 F.3d at 172 (“We join other courts of appeals in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury.”); *Harlan v. Transworld Sys., Inc.*, No. 13–5882, 2015 WL 505400, at \*10 (E.D. Pa. Feb. 6, 2015) (approving a

settlement with a *cy pres* distribution when it assisted “Class Members in knowing and protecting their rights”); *cf. Schwartz*, 362 F. Supp. 2d at 577 (E.D. Pa. 2005) (rejecting a *cy pres* “distribution to either a law school’s legal clinic or a charter school ... [because it] does not touch upon the subject matter of the law suit (football or sports-related activities)”).

The Education Fund is not a *cy pres* distribution. Even if it were, it is reasonable.

*ii. Statutes of Limitations Waiver*

Class Counsel negotiated a statutes of limitations waiver for any Representative Claimants of Retired Players who died on or after January 1, 2006. Representative Claimants of Retired Players who died prior to January 1, 2006 must demonstrate that their claims would not be barred by the relevant state’s statute of limitations in order to be eligible for Monetary Awards. Settlement § 6.2(b). For statutes of limitations analyses, the Settlement deems Class Members who have not commenced individual suits against the NFL Parties to have filed their claims on June 25, 2014, the date Class Counsel moved for preliminary approval of the Settlement. *See id.* §§ 2.1(pppp), 6.2(b).

Objectors challenge the 2006 cutoff date for any waiver of a statute of limitations. *See* D. Williams Obj. at 1–4, ECF No. 6221. That additional Class Members may have benefitted from a more generous rule does not render the 2006 cutoff date unfair. “[L]ines must be drawn somewhere, and the objectors have failed to demonstrate that the line drawn here was not reasonable.” *Deepwater Horizon Economic Loss Settlement*, 910 F. Supp. 2d at 949. Moreover, that Class Counsel were able to negotiate any waiver represents a benefit to the Class.

Objectors also argue that the June 25, 2014 filing date—the date Class Counsel moved for preliminary approval—is prejudicial. They claim that under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the statutes of limitations for their claims were tolled as of August 17, 2011, the date Class Counsel filed the *Easterling* putative class action, and that the date Class Counsel moved for preliminary approval is irrelevant. *See* Kinard Obj. at 3–4, ECF No. 6219.

Contrary to Objectors’ assertion, if a state has adopted an analogue to the *American Pipe* rule,<sup>90</sup>

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<sup>90</sup> *American Pipe* itself does not apply because the doctrine deals only with federal statutes of limitations, and the Class Action Complaint included only state law claims. *See* McLaughlin on Class Actions § 3:15 (11th ed.) (“*American Pipe*



Class Members will be able to argue that their claims are timely. The Court will consider all applicable state law—including tolling rules—to determine if a Class Member is eligible for a Monetary Award. Moreover, the Parties recognize the Court’s authority to conduct a statute of limitations analysis for each wrongful death or survival claim. *See* Settlement § 6.2(b) (recognizing that a “Representative Claimant of a deceased Retired NFL Football Player will be eligible for a Monetary Award ... if the Court determines that a wrongful death or survival claim filed by the Representative Claimant would not be barred by the statute of limitations under applicable state law”); Parties’ Joint Proposed Findings of Fact ¶ 414, ECF No. 6497.

*iii. Releases*

Objectors argue that the Releases are overbroad because they release CTE claims. This position, however, is merely an extension of the argument that the Settlement does not compensate CTE. *See e.g.*, Morey Obj. at 28 (“Class Counsel and the NFL have offered no justification for the Settlement’s failure to compensate current and

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did not itself announce any tolling rule applicable to state law claims.”); *Vincent v. Money Store*, 915 F. Supp. 2d 553, 561 (S.D.N.Y. 2013) (“The plaintiffs must look to any state analogue to *American Pipe* tolling rather than *American Pipe* itself.”).

future cases of CTE—while at the same time requiring a release of all CTE claims.”); Alexander Obj. at 9–10. Because this is incorrect, see *supra* Section V.A, this objection is overruled.

Indeed, failing to release CTE when its alleged symptoms are included in other Qualifying Diagnoses would permit Class Members double recovery. See *Prudential*, 148 F.3d at 326 (holding that the settlement properly released all claims arising out of “a common scheme of deceptive sales practices”). Moreover, a broad release that “achiev[es] global peace is a valid, and valuable, incentive to class action settlements.” *Sullivan*, 667 F.3d at 311 (rejecting dissenting colleagues’ suggestion to limit class to those with colorable claims because “those ultimately excluded would no doubt go right back into court to continue to assert their claims”); see also *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001) (noting that “permitting parties to enter into comprehensive settlements that prevent relitigation of settled questions” serves an “important policy interest of judicial economy” (internal quotation marks omitted)).<sup>91</sup>

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<sup>91</sup> Objectors also argue that the Releases could be construed as a release of claims in *Dent*, a related lawsuit against the NFL Parties. See Armstrong Obj. at 34. This objection is now moot. On December 17, 2014, the *Dent* court

The Releases are fair and reasonable.

*iv. NFL Parties' Security*

Objectors question whether sufficient funds will exist throughout the 65-year life of the Monetary Award Fund to pay all valid claims. Specifically, they challenge the security that the Statutory Trust provides. The Settlement's security provisions, however, are adequate.

"No later than the tenth anniversary of the Effective Date,"<sup>92</sup> the NFL Parties will establish a Statutory Trust that as of the tenth anniversary date

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held that the plaintiffs' claims were preempted by their Collective Bargaining Agreements. Order, *Dent*, No. 14-2324, ECF No. 106 (N.D. Cal. Dec. 17, 2014); *supra* Section IV.B.iv. After the plaintiffs failed to amend their complaint, the court dismissed the case. *See* Judgment, *Dent*, No. 14-2324, ECF No. 107 (N.D. Cal. Dec. 31, 2014).

<sup>92</sup> Objectors do not seriously question the security for the first ten years of the Settlement. The NFL Parties promise to pay \$120 million over the first six months of the Settlement. *See* Settlement § 23.3(b). Thereafter, they will refill the Settlement Trust Account based on the Claims Administrator's monthly funding requests. *Id.* § 23.3(b)(ii). A targeted reserve will ensure a surplus over the life of the Settlement. *See id.* § 23.3(b)(v). The NFL Parties also warrant that they will maintain an investment grade rating on their Stadium Program Bonds during this ten-year period to serve as additional security. *See id.* § 25.6(a).

“shall contain funds that, in the reasonable belief of the NFL Parties ... will be sufficient to satisfy the NFL Parties’ remaining anticipated payment obligations.” Settlement § 25.6(d). The NFL Parties’ creditors will not be able to access this fund, and its sole purpose will be to ensure that funds are available to pay Monetary Awards. *Id.* (noting withdrawals will only be permitted to pay claims, maintain the Trust, return excess security, and wind down the Trust when the Settlement expires).

Objectors argue that the NFL Parties’ “reasonable belief” of what is sufficient is an illusory protection because financial predictions decades in advance are unreliable. Utecht Obj. at 11 (quoting Settlement § 25.6(d)); *see* Utecht Supplemental Obj. at 7, ECF No. 6437. Several factors, however, limit the uncertainty the NFL Parties will face when determining how much to place into the Trust. The pool of Retired Players, and thus potential claimants, is finite. Additionally, other than adjustments for inflation, Monetary Awards are fixed sums. Most importantly, the Settlement delays creation of the Trust precisely to allow the NFL Parties to collect ten years of data regarding payouts from the Monetary Award Fund. The NFL Parties will use this data to create a reasonable estimate of the financial needs of the MAF for its remaining 55 years. Claims data from Retired Players who retired

decades ago will provide a useful estimate of the funds required to ensure that younger Retired Players will receive payment as they age.

Moreover, independent of the Statutory Trust, the NFL Parties remain personally liable for their payments under the Settlement.<sup>93</sup> In the event of material default, the Settlement provides that the Court may nullify the Releases, allowing Class Members to return to the tort system. *See* Settlement § 25.6(g). Though Objectors are correct that anything can happen over the course of 55 years, the personal liability of the NFL Parties nonetheless provides real security. The NFL Parties have substantial and reliable revenue streams. *See, e.g.*, Morey Obj. at 58 (noting that the NFL Parties have \$10 billion in annual revenue in part because of renewable TV deals). While the NFL Parties' income is not projected to decline, the Settlement's pool of potential claimants will decrease in size as Class Members

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<sup>93</sup> Objectors contend that the NFL Parties are not personally liable because they have "agreed only to pay money into certain trusts from which awards may be paid." Utecht Supplemental Obj. at 10, ECF No. 6437. This is incorrect. Independent of the provisions establishing the Statutory Trust, the Settlement states that "the NFL Parties will pay ... money sufficient to make all payments [in the Monetary Award Fund.]" Settlement § 23.1. Moreover, trust law mandates the inclusion of the Settlement provision cited by Objectors. Pursuant to trust law, after initial instructions, the entity that establishes a trust may not order the trustee to make specific disbursements.

age. Thus, the Settlement becomes comparatively less of a liability to the NFL Parties as time passes.

Finally, Objectors insist on a “*fully collateralized guaranty*,” but provide no legal precedent in support of that requirement.<sup>94</sup> Utecht Final Obj. at 7, ECF No. 6454. In sum, the NFL Parties’ proffered security is reasonable.

*v. Objector Signature Requirement*

Amici contend that requiring Class Members to personally sign their objections to the Settlement is an unnecessary hurdle designed to deter filings. *See* Mem. of Public Citizen at 9–11. However, they cite no relevant support for their argument. Requiring Class Members to personally sign their objections does not violate Federal Rule of Civil Procedure 23(c)(2)(B)(iv), which allows Class Members to “enter an appearance through an attorney,” or 28 U.S.C. § 1654, which allows parties to “plead and conduct their [ ] cases ... by counsel.” *See Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 355 (6th Cir. 2009) (holding that “the district court

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<sup>94</sup> Objectors repeatedly allege that the NFL Parties and Co-Lead Class Counsel falsely represented the security provisions of the Settlement. *See* Utecht Supplemental Obj. at 14–16; Utecht Final Obj. at 1, ECF No. 6454. This claim has no merit. The terms of the Settlement were readily available for Class Members to inspect, and no evidence of fraudulent intent exists.

appropriately exercised its power by requiring individually signed opt-out forms” and noting that the right in the Michigan Constitution to prosecute a suit by an attorney did not save the objector’s argument).

On the contrary, a class member’s signature is commonly required to object or opt out. *See, e.g., Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 478, 501 n.43 (E.D. Pa. 1995) (noting denial of requests “to permit attorneys’ signatures on exclusion request forms”); *In re Chinese–Manufactured Drywall Prods. Liab. Litig.*, MDL No.2047, 2012 WL 92498, at \*15 (E.D. La. Jan. 10, 2012) (“All objections must be signed by the individual Class Member....”).

*vi. Lien Resolution Program*

Amici challenge the Lien Resolution requirements in the Settlement, claiming they “could indefinitely block payments to [C]lass [M]embers.” Mem. of Public Citizen at 11. Amici argue that payments will necessarily be delayed because the Settlement mandates satisfaction of a Class Member’s governmental health insurance liens before the payment of any award. *See* Settlement § 11.3(g). Contrary to Amici’s characterization, however, the Lien Resolution program that

accompanies these provisions is a substantial benefit for Class Members.

The NFL Parties' insistence on lien satisfaction as a precondition to disbursement of awards is reasonable. Similar lien satisfaction provisions exist in virtually all mass tort and class action personal injury settlements. Garretson Aff. ¶ 23. Federal law mandates Medicare's secondary payer status, and requires states to seek reimbursement as a condition of receiving Medicaid funds. 42 U.S.C. § 1395y(b)(2)(B)(ii)-(iv); 42 U.S.C. § 1396a(a)(25). Settling tortfeasors that fail to comply with these reimbursement requirements face significant penalties. *See, e.g.*, 42 U.S.C. § 1395y(b)(2)(B)(iii) (authorizing the United States to sue for double damages); Garretson Aff. ¶ 23.

The Lien Resolution program will streamline this necessary process and ensure that Class Members receive Monetary Awards as quickly as possible. The Lien Resolution Administrator, Garretson Resolution Group ("GRG"), pioneered the practice and has successfully administered it in four other mass tort settlements. *See In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 461 (E.D.N.Y. 2006) (praising "unique series of agreements" that could "provide a model for the handling of Medicare and Medicaid liens in future mass actions"); Garretson



Aff. ¶ 25. GRG intends to execute an aggregate resolution of many of Class Members' claims, avoiding the delays inherent in individual processing. *See* Garretson Aff. ¶¶ 28(a)(1)-(4). For the remaining Class Members, GRG expects to be able to determine "holdback" amounts that will allow for immediate disbursement. GRG will estimate the expected future costs of a particular Qualifying Diagnosis, and withhold that sum from a Class Member's Monetary Award, distributing the remainder to the Class Member immediately. In the event that a Class Member's medical costs ultimately fall short of this initial estimate, he will be entitled to a refund. *See id.* ¶¶ 28(b) (2), 29(a)(2).

*vii. Parties' Experts*

Objectors argue that the scientific experts retained by the Parties cannot be trusted because they received compensation for their services. *See* Morey Final Obj. at 3, 9–11 (arguing against use of "bought-and-paid-for experts"). This argument has no merit.

The Parties' experts have extensive qualifications. Included among them are professors of psychology, neuropsychology, neurosurgery, neurology, psychiatry, and epidemiology, as well as a board-certified neurologist with 39 years of clinical

practice experience and a licensed psychologist. Each expert deals routinely with neurodegenerative conditions or the effects of traumatic brain injury. Collectively, the experts have authored over 850 peer-reviewed scientific articles.<sup>95</sup> Several experts provided months of assistance throughout the negotiation process to ensure that the Settlement was grounded in current science. It is unreasonable to expect any expert to provide such a substantial contribution for free.

A presumption of bias does not arise merely because an expert receives compensation. *See Richardson v. Perales*, 402 U.S. 389, 403 (1971). Moreover, that some of these experts work at institutions that have received grants from the NFL Parties and their affiliates does not compromise these experts' objectivity. *See* Morey Final Obj. at 10–11. For example, the Boston University CTE Center, with which Drs. McKee and Stern are associated, has received donations from the NFL Parties. Yet the Objectors do not question the objectivity of Drs. McKee and Stern, whose studies they rely upon. *See Chronic Traumatic Encephalopathy*, Boston University School of

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<sup>95</sup> *See generally* Dr. Millis Decl. ¶¶ 2–9; Dr. Schneider Decl. ¶¶ 2–12; Dr. Yaffe Decl. ¶¶ 2–8; Dr. Fischer Decl. ¶¶ 2–3; Dr. Giza Decl. ¶¶ 2–9; Dr. Hovda Decl. ¶¶ 2–11; Dr. Kelip Decl. ¶¶ 2, 4; Dr. Hamilton Decl. ¶¶ 1, 2, 6.

Medicine,  
<http://www.bumc.bu.edu/supportingbusm/research/brain/cte/> (last accessed Apr. 21, 2015) (noting Center is “[s]upported by grants from ... the NFL”).

*viii. Parties’ Disclosures*

Objectors argue that they lacked the information to properly evaluate the Settlement because they did not have access to materials the Parties relied on during negotiations. *See* Morey Obj. at 80–81 (claiming that “[C]lass [M]embers have been left in the dark”); Mot. for Disclosure of Docs. Relevant to Fairness of Settlement, ECF No. 6461 (moving for access to documents relating to CTE, and the NFL Parties’ insurance). These claims largely repeat those made in prior requests for discovery. *See, e.g.,* Mem. in Supp. of Mot. for Disc. at 8, ECF No. 6169–1 (requesting “information Class Counsel relied on in entering the preliminary settlement”). I have already denied Objectors’ prior requests, with good reason. *See* Order Den. Mots. for Disc., ECF No. 6245.

Objectors have no absolute right to discovery. *Community Bank*, 418 F.3d at 316. Though discovery may be appropriate if the record is inadequate to support approval of a settlement or if objectors are denied meaningful participation in a fairness

hearing, neither circumstance exists here. *Id.* The Parties, Objectors, and Amici collectively submitted dozens of scientific articles and 22 expert declarations discussing the critical scientific issues underlying the Settlement. Objectors' concerns also materially impacted the Settlement—the Parties revised the agreement to address deficiencies identified at the Fairness Hearing. *See* Parties' Joint Amendment.

Objectors also argue that because “[b]rain damage from playing football is a public health issue,” the NFL Parties must disclose what they knew about the dangers of concussions. Alexander Obj. at 5; *see also* Pyka Obj. at 1, ECF No. 6359 (“I and every parent along with the players had and have a right to know of the dangers of playing football...”). Settlements, however, are private compromises, and the NFL Parties need not make this information public to obtain approval. *See, e.g., Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010) (holding that class action settlement that admitted no wrongdoing and denied all liability was a “binding and enforceable contract”); *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 318 (E.D. Pa. 2012) (approving class action settlement that admitted no wrongdoing). Nonetheless, the Settlement contributes to the public’s knowledge on these issues. Subject to the consent of Retired Players, data from

baseline assessment examinations will be used in medical research about safety and injury prevention in football. *See* Settlement § 5.10(a).

*ix. Opt-Out Procedure*

Objectors reiterate their unsuccessful request for an opportunity to opt out after the Fairness Hearing. They claim their request is justified because being forced to choose between opting out and objecting is coercive, and because notice was inadequate for Retired Players to understand the ramifications of the Settlement. *See* Utecht Obj. at 3–6; Duerson Obj. at 28–29. I have already denied this request, and these additional arguments do not demonstrate that the opt-out structure was unfair. *See* Order, Oct. 9, 2014, ECF No. 6204.

Due process does not require a second opt-out period. In a class action, class members' rights are sufficiently protected when there is: "(1) adequate notice to the class; (2) an opportunity for class members to be heard and participate; (3) the right of class members to opt out; and (4) adequate representation by the lead plaintiff(s)." *Cobell v. Salazar*, 679 F.3d 909, 922 (D.C. Cir. 2012) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985)). As discussed *supra*, each of these requirements is satisfied. Notice cogently described

the key elements of the Settlement, and Class Members had 90 days to review the agreement and either opt out or object. *See supra* Section III. Class Counsel and the Class Representatives fought zealously for Class Members, and no fundamental conflicts of interest existed to undermine the adequacy of their representation. *See supra* Section II.D.

The choice between opting out and objecting is not coercive. It is well established that “class members may either object or opt out, but they cannot do both.” Newberg on Class Actions § 13:23 (5th ed.). Moreover, the Third Circuit has implicitly rejected Objectors’ position; it would be impossible to consider “the reaction of the class to the settlement” for the purposes of Rule 23(e)(2) if Class Members were allowed to opt out up until the point of final approval. *Girsh*, 521 F.2d at 157 (internal quotation marks omitted); *see also Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922, 936 (E.D. Mich. 2007) (“There are several examples of federal cases where the opt-out deadline matches the objection deadline.”). Thus, the opt-out procedure was reasonable, and no additional opportunity to opt out was required.

## **VI. Conclusion**

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For the reasons set forth above, I will certify the proposed Class pursuant to Rule 23(a) and 23(b)(3). I will also approve the Settlement as fair, reasonable, and adequate pursuant to Rule 23(e).

s/ Anita B. Brody

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ANITA B. BRODY, J.

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App. 305

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

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No. 2:12-md-02323-AB  
MDL No. 2323

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**IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY LITIGATION**

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Kevin Turner and Shawn Wooden, *on behalf of  
themselves and others similarly situated,*

Plaintiffs,

v.

National Football League and NFL Properties, LLC,  
successor-in-interest to NFL Properties, Inc.,

Defendants.

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**THIS DOCUMENT RELATES TO: ALL ACTIONS**



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**AMENDED FINAL ORDER AND JUDGMENT**<sup>1</sup>

**AND NOW**, this 8th day of MAY, 2015, in accordance with the Court's Memorandum (ECF. No. 6509), it is **ORDERED**:

1. The Court has jurisdiction over the subject matter of this action.
2. The Court certifies the Settlement Class and Subclasses under Federal Rule of Civil Procedure 23.

The Settlement Class is defined as follows:

- (i) All living NFL Football Players who, prior to the date of the Preliminary Approval and Class Certification Order, retired, formally or informally, from playing professional football with the NFL or any Member Club, including American Football League, World League of American Football, NFL Europe League and NFL Europa League players, or were formerly on any roster, including preseason, regular

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<sup>1</sup> Unless otherwise noted, the terms used in this Order that are defined in the Settlement Agreement have the same meanings in this Order as in the Settlement Agreement.

season, or postseason, of any such Member Club or league and who no longer are under contract to a Member Club and are not seeking active employment as players with any Member Club, whether signed to a roster or signed to any practice squad, developmental squad, or taxi squad of a Member Club (“Retired NFL Football Players”); and

- (ii) Authorized representatives, ordered by a court or other official of competent jurisdiction under applicable state law, of deceased or legally incapacitated or incompetent Retired NFL Football Players (“Representative Claimants”); and
- (iii) Spouses, parents, children who are dependents, or any other persons who properly under applicable state law assert the right to sue independently or derivatively by reason of their relationship with a Retired NFL Football Player or deceased Retired NFL Football Player (“Derivative Claimants”).

The Subclasses are defined as follows:

- (i) “Subclass 1” means Retired NFL Football Players who were not diagnosed with a Qualifying Diagnosis prior to the date of the

Preliminary Approval and Class Certification Order and their Representative Claimants and Derivative Claimants.

- (ii) “Subclass 2” means Retired NFL Football Players who were diagnosed with a Qualifying Diagnosis prior to the date of the Preliminary Approval and Class Certification Order and their Representative Claimants and Derivative Claimants, and the Representative Claimants of deceased Retired NFL Football Players who were diagnosed with a Qualifying Diagnosis prior to death or who died prior to the date of the Preliminary Approval and Class Certification Order and who received a post-mortem diagnosis of CTE.

3. The Court finds that the Settlement Class satisfies the applicable prerequisites for class action treatment under Federal Rules of Civil Procedure 23(a) and (b). The Settlement Class Members are so numerous that their joinder is impracticable. There are questions of law and fact common to the Class and Subclasses. The claims of the Class Representatives and Subclass Representatives are typical of the Settlement Class Members and the respective Subclass Members. The Class Representatives and Subclass Representatives and Co-Lead Class Counsel, Class Counsel and Subclass

Counsel have fairly and adequately represented and protected the interests of all Settlement Class Members. The questions of law or fact common to the Class and Subclasses predominate over any questions affecting only individual Settlement Class Members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

4. The Court finds that the dissemination of the Settlement Class Notice and the publication of the Summary Notice were implemented in accordance with the Order granting preliminary approval, and satisfy the requirements of Federal Rules of Civil Procedure 23(c)(2)(B) and 23(e), the United States Constitution and other applicable laws and rules, and constituted the best notice practicable under the circumstances. The Notice given by the NFL Parties to state and federal officials pursuant to 28 U.S.C. § 1715 fully satisfied the requirements of that statute.

5. The Court confirms the appointment of Shawn Wooden and Kevin Turner as Class Representatives and Shawn Wooden as Subclass 1 Representative and Kevin Turner as Subclass 2 Representative.

6. Pursuant to Federal Rule of Civil Procedure 23(g), the Court confirms the appointment of Christopher A. Seeger, Sol Weiss, Steven C. Marks,

Gene Locks, Arnold Levin and Dianne M. Nast as Class Counsel. In addition the Court confirms the appointment of Christopher A. Seeger and Sol Weiss as Co-Lead Class Counsel, and confirms the appointments of Arnold Levin and Dianne M. Nast as Subclass Counsel for Subclasses 1 and 2, respectively.

7. Pursuant to Federal Rule of Civil Procedure 23, the Court finds that the Settlement Agreement is fair, reasonable and adequate and approves the Settlement Agreement in its entirety.

8. The Court expressly incorporates into this Final Order and Judgment: (a) the Settlement Agreement and exhibits originally filed with the Court on June 25, 2014, as amended and filed on February 13, 2015, and (b) the Settlement Class Notice Plan and the Summary Notice, both of which were filed with the Court on June 25, 2014.

9. The Parties are ordered to implement each and every obligation set forth in the Settlement Agreement in accordance with the terms and provisions of the Settlement Agreement.

10. So there can be no misunderstanding, Article XVIII of the Settlement Agreement is expressly incorporated in this Order. Therefore the Settlement

Class, the Class and Subclass Representatives and each Settlement Class Member, on his or her own behalf and on behalf of his or her respective predecessors, successors, assigns, assignors, representatives, attorneys, agents, trustees, insurers, heirs, next of kin, estates, beneficiaries, executors, administrators, and any natural, legal, or juridical person or entity to the extent he, she, or it is entitled to assert any claim on behalf of any Settlement Class Member (the “Releasers”), waive and release, forever discharge and hold harmless the Released Parties, and each of them, of and from all Released Claims.

11. Any judgment or award obtained by the Releasers against any alleged tortfeasor, co-tortfeasor, co-conspirator or co-obligor, other than Riddell, by reason of judgment or settlement, for any claims that are or could have been asserted in the Class Action Complaint or in any Related Lawsuit, or that arise out of or relate to any claims that are or could have been asserted in the Class Action Complaint or in any Related Lawsuit, or that arise out of or relate to any facts in connection with the Class Action Complaint or any Related Lawsuit (collectively, “Tortfeasors”), shall be reduced by the amount or percentage, if any, necessary under applicable law to relieve the Released Parties of all liability to such Tortfeasors on claims for contribution or indemnity (whether styled as a claim

for contribution, indemnity or otherwise). Such judgment reduction, partial or complete release, settlement credit, relief, or setoff, if any, shall be in an amount or percentage sufficient under applicable law to compensate such Tortfeasors for the loss of any such claims for contribution or indemnity (whether styled as a claim for contribution, indemnity or otherwise) against the Released Parties.

12. Notwithstanding anything to the contrary in this Final Order and Judgment, this Final Order and Judgment and the Settlement Agreement are not intended to and do not effect a release of any rights or obligations that any insurer has under or in relation to any contract or policy of insurance to any named insured, insured, additional insured, or other insured person or entity thereunder, including those persons or entities referred to in Section 2.1(bbbb)(i)-(ii) of the Settlement Agreement.

13. The Court confirms the appointment of The Garretson Resolution Group, Inc. as the BAP Administrator, BrownGreer PLC as the Claims Administrator, The Garretson Resolution Group, Inc. as the Lien Resolution Administrator and Citibank, N.A. as the Trustee, and confirms that the Court retains continuing jurisdiction over those appointed. Pursuant to Federal Rule of Civil Procedure 53 and

the inherent authority of the Court, the Court appoints Wendell Pritchett and Jo-Ann M. Verrier as Special Master to perform the duties of the Special Master as set forth in the Settlement Agreement for a five-year term commencing from the Effective Date of the Settlement Agreement.

14. As provided in the Settlement Agreement, this Final Order and Judgment and the related documents and any actions taken by the NFL Parties or the Released Parties in the negotiation, execution, or satisfaction of the Settlement Agreement: (a) do not and shall not, in any event, constitute, or be construed as, an admission of any liability or wrongdoing, or recognition of the validity of any claim made by the Class and Subclass Representatives, the Settlement Class, or any Settlement Class Member in this or any other action or proceeding; and (b) shall not, in any way, be construed as, offered as, received as, used as, or deemed to be evidence, admissible or otherwise, of any kind, or used in any other fashion, by the Class and Subclass Representatives, the Settlement Class, any Settlement Class Member, Class Counsel, or any of the Released Parties in any litigation, action, hearing, or any judicial, arbitral, administrative, regulatory or other proceeding for any purpose, except a proceeding to resolve a dispute arising under, or to enforce, the Settlement Agreement.



Neither the Settlement Agreement nor any of its provisions, negotiations, statements, or court proceedings relating to its provisions, nor any actions undertaken in this Settlement Agreement, will be construed as, offered as, received as, used as, or deemed to be evidence, admissible or otherwise, or admission or concession of any liability or wrongdoing whatsoever on the part of any person or entity, including, but not limited to, the Released Parties, or as a waiver by the Released Parties of any applicable defense, or as a waiver by the Class and Subclass Representatives, the Settlement Class, or any Settlement Class Member, of any claims, causes of action, or remedies. This Paragraph shall not apply to disputes between the NFL Parties and their insurers, as to which the NFL Parties reserve all rights.

15. The Class Action Complaint is dismissed with prejudice, without further costs, including claims for interest, penalties, costs and attorneys' fees, except that motions for an award of attorneys' fees and reasonable incurred costs, as contemplated by the Parties in Section 21.1 of the Settlement Agreement, may be filed at an appropriate time to be determined by the Court, after the Effective Date of the Settlement Agreement.

16. All Related Lawsuits pending in the Court are dismissed with prejudice.

17. The Court retains continuing and exclusive jurisdiction over this action including jurisdiction over the Parties and their counsel, all Settlement Class Members, the Special Master, BAP Administrator, Claims Administrator, Lien Resolution Administrator, Appeals Advisory Panel, Appeals Advisory Panel Consultants, and Trustee. In accordance with the terms of the Settlement Agreement, the Court retains continuing and exclusive jurisdiction to interpret, implement, administer and enforce the Settlement Agreement, and to implement and complete the claims administration and distribution process. The Court also retains continuing jurisdiction over any “qualified settlement funds,” that are established under the Settlement Agreement as defined under § 1.468B-1 of the Treasury Regulations promulgated under Sections 461(h) and 468B of the Internal Revenue Code of 1986, as amended.

18. Without further approval from the Court, and without the express written consent of Class Counsel and Counsel for the NFL Parties, the Settlement Agreement is not subject to any change, modification, amendment, or addition.

19. The terms of the Settlement Agreement and of this Final Order and Judgment are forever binding on the Parties, as well as on their respective heirs, executors, administrators, predecessors, successors, affiliates and assigns. The Opt Outs are excluded from the Settlement Class pursuant to request and are not bound by the terms of the Settlement Agreement or this Final Order and Judgment. The Claims Administrator has posted a list of Opt Outs. *See* ECF No. 6533.

s/ Anita B. Brody

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ANITA B. BRODY, J.

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App. 317

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

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No. 2:12-md-02323-AB  
MDL No. 2323

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**IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS' CONCUSSION INJURY LITIGATION**

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Kevin Turner and Shawn Wooden, *on behalf of  
themselves and others similarly situated,*

Plaintiffs,

v.

National Football League and NFL Properties, LLC,  
successor-in-interest to NFL Properties, Inc.,

Defendants.

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**THIS DOCUMENT RELATES TO: ALL ACTIONS**

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**ORDER**<sup>1</sup>

**AND NOW**, this 11th day of May, 2015, it is **ORDERED** that the Amended Final Order and Judgment, dated May 8, 2015, is clarified as follows:

Paragraph 16 dismisses with prejudice all Related Lawsuits pending in the Court in which Releasors are the only named plaintiffs and Released Parties are the only named defendants. In all other Related Lawsuits pending in the Court, all Released Claims against the Released Parties are dismissed with prejudice.

All other terms of the Amended Final Order and Judgment remain unchanged.

s/ Anita B. Brody

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ANITA B. BRODY, J.

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<sup>1</sup> Unless otherwise noted, the terms used in this Order that are defined in the Settlement Agreement have the same meanings in this Order as in the Settlement Agreement.

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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Nos. 15-2217 & 15-2234

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**IN RE: NATIONAL FOOTBALL LEAGUE  
PLAYERS CONCUSSION INJURY LITIGATION**

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Cleo Miller; Judson Flint; Elmer Underwood; Vincent  
Clark, Sr.; Ken Jones; Fred Smerlas; Jim Rourke;  
Lou Piccone; James David Wilkins, II,  
Appellants (15-2217)

Darren R. Carrington,  
Appellant (15-2234)

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Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil Action Nos. 2-12-md-02323 and 2-14-cv-  
00029)

District Judge: Honorable Anita B. Brody

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Before: McKEE, Chief Judge, AMBRO, FUENTES,  
SMITH, FISHER, CHAGARES, JORDAN,  
HARDIMAN, GREENAWAY, Jr., VANASKIE,

SHWARTZ, RESTREPO and NYGAARD, Circuit  
Judges

**SUR PETITION FOR REHEARING**

The petitions for rehearing filed by Appellants for case numbers 15-2217 and 15-2234 in the above-entitled matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc*, are denied.

By the Court,  
s/ Thomas L. Ambro, Circuit  
Judge

Dated: June 1, 2016

mlr/cc: all counsel

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