Nos. 16-283 & 16-413

IN THE

Supreme Court of the United States

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

RAYMOND ARMSTRONG, et al.,
Petitioners,

v.

NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES, LLC,
Respondents,

v.

KEVIN TURNER AND SHAWN WOODEN, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Turner Respondents adopt the Question Presented by the NFL Respondents. That question is:

Did the Third Circuit err in concluding that the parties' settlement abides by this Court's precedents and satisfies Rule 23(e)'s requirement that a class action settlement be "fair, reasonable, and adequate"?

PARTIES TO THE PROCEEDING

The Turner Respondents adopt the listing of the parties submitted by the NFL Respondents.

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INTRODUCTION

Petitioners do not like the NFL class settlement. That is their right. They pressed their opposition before the district court, the Third Circuit, and the en banc Circuit. That is their due. They found no takers for their argument that somehow, a better deal awaits, or that governing law prevents the resolution of claims of over 20,000 retired players. Instead, rigorous decisions of the courts below scrutinized the proposed settlement terms and the process of negotiations. All judges found that the settlement well protected the class of retired players, meeting the requirement under Fed.R.Civ.P. 23(e) that the settlement be "fair, reasonable, and adequate." Both courts also found that the settlement satisfied all of the requirements of Fed.R.Civ.P. 23(a) and (b)(3), including adequacy of representation and the absence of conflicts.

The attacks on the settlement also garnered virtually no support from the NFL retirees. Never has a settlement been more publicized and more scrutinized than this one. Even though some 5,000 individual cases were consolidated in the district court, with hundreds of lawyers representing individual claimants, less than one percent of the players objected (and less than one percent opted out). At the end of the day, 33 class members seek to frustrate the settlement. By contrast, roughly 11,000 class members have so far taken affirmative steps to begin filing for settlement benefits, even though the benefits process is stayed pending final legal resolution.

In the courts below, and in the revealed preferences of class members, the attacks on the merits of the settlement have failed. That phase of the litigation is over and the issue now is not Petitioners' rancor, but whether the Petitions present a cert-worthy issue.

On this score, the Petitions utterly fail to identify any issue meriting review. The Gilchrist Petition[1] asserts legal error in not holding a hearing pursuant to *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993), to determine the admissibility of "contested" evidence, though no such contest was raised in the district court. The Armstrong Petition claims violation of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), based on facts directly contrary to what the courts below found. That Petition then proclaims a Circuit conflict resting on two inapposite Second Circuit cases, one of which involved a mandatory class with no opt-out rights, and the other, an entirely unrepresented subclass.

What unites the two Petitions is a complete disregard of the record. One Petition ignores the legal consequences of failing to raise any evidentiary objection in the district court. The other manufactures conflicts on grounds that are directly contrary to the well-supported factual determinations below. Petitioners may not like the settlement, and they could have chosen to opt out if they thought a better result could have been had. But, they cannot urge a different fact record at the certiorari stage.

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[1] Each Petition is identified by the name of the Petitioner. Appendix references to the Armstrong Petition are cited as PA ___, and to Respondents' Appendix as RA ___.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY: DISTRICT COURT

A. Background

1. MDL Consolidation

In July 2011, 73 retired players filed suit in California state court charging the NFL with failure to protect the players from the risks of concussive and sub-concussive head injuries by fraudulently concealing the risks of football. Shortly thereafter, two additional cases were filed in California state court, and another suit was filed in the Eastern District of Pennsylvania. The NFL removed the state court actions as preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. PA 5a-6a, 64a-65a.

The Judicial Panel on Multidistrict Litigation then consolidated the cases under 28 U.S.C. § 1407 in the Eastern District of Pennsylvania before Judge Anita Brody. In short order, more than 5,000 players filed approximately 300 similar suits, and virtually all were transferred to Judge Brody. The district court then appointed executive and steering committees and ordered the filing of master complaints to serve as the operative pleadings in the case. PA 6a-7a, 65a-66a.

2. Court-Ordered Mediation

From the beginning, the NFL argued that the underlying tort claims were "substantially dependent" on the terms of the collective bargaining agreements ("CBAs") between the players and the NFL, and were thereby preempted by federal law. PA 8a-9a, 68a-69a. The district court stayed discovery and granted the NFL's request to file motions to dismiss solely on the potentially dispositive preemption issue (which, if

granted, would have forced the retired players to arbitrate claims pursuant to the grievance procedures under the CBAs). PA 68a. After oral argument, the court deferred ruling and instead ordered the parties to mediation. PA 9a, 69a. The July 8, 2013 order appointed retired federal district judge Layn Phillips as the mediator, further deferred the preemption issue, and continued the discovery stay. PA 69a.

3. The Mediation Process

The parties promptly commenced vigorous negotiations in mediation until agreement was reached on basic settlement terms on August 29, 2013. Both parties retained medical and actuarial/economics experts, who advised the parties and also met directly with Judge Phillips. PA 9a, 69a-71a.

From the outset of the negotiations, and under Judge Phillips's direction, class counsel were sensitive to the need "to ensure the adequate and unconflicted representation of all of the proposed class members," and accordingly, early in the negotiations, created "two proposed separate subclasses, each represented by separate counsel." RA 47a, ¶7, 52a, ¶7. In Judge Phillips's view, having such subclasses – with one representing retired players with manifest compensable ailments (termed "Qualifying Diagnoses") and the other representing retired players without such present Qualifying Diagnoses – would ensure that any final resolution did not favor retired players who received a Qualifying Diagnosis over those who had not. RA 52a, ¶7.

The two subclasses were represented by separate counsel: Arnold Levin for those *without* current Qualifying Diagnoses (subclass 1) and Dianne Nast representing those *with* Qualifying Diagnoses (subclass

2). Both were members of the steering committee previously appointed by the district court. PA 22a-23a. There were also separate subclass representatives. For subclass 1, Cory J. Swinson initially represented the subclass; after his sudden death, Shawn Wooden took over that role. Neither Swinson nor Wooden had been diagnosed with any condition. For subclass 2, the representative was Kevin Turner, a retired player with Amyotrophic Lateral Sclerosis ("ALS").[2] Judge Phillips recognized that subclass counsel, who had conferred regularly with the pertinent subclass representative, performed their own due diligence, and were otherwise involved throughout the negotiation process. PA 20a, 22a, 90a-91a; RA 54a, ¶17.

Judge Phillips observed that class counsel and subclass counsel "zealously represented the proposed class and subclasses." RA 49a, ¶11. These attorneys "fulfilled their fiduciary responsibilities . . . to determine for themselves whether [the deal] was fair and satisfied the needs of their respective Subclass members and Due Process." RA 54a, ¶17. In negotiations, both sides understood the litigation risks involved. PA 129a, 140a-141a.

4. Initial Settlement

Ultimately, the NFL was willing to compensate only objectively verifiable and serious neurocognitive and neuromuscular injuries, *i.e.*, dementia, Alzheimer's Disease, Parkinson's Disease, and ALS, which had been associated with head injury and which manifested in living players. PA 157a-158a; RA 52a-53a, ¶8. The NFL would not agree to compensate less objectively verifiable and multifactorial conditions,

[2] Kevin Turner died after oral argument below. PA 20a n.6.

like depression, anger, and other mood and behavioral disorders. The settlement compensated living players for clinically manifested disease, not a post-mortem pathological finding of Chronic Traumatic Encephalopathy ("CTE"). RA 53a, ¶11.

One contentious issue involved players who had already died and whose brain autopsies revealed CTE. Retrospectively, it was impossible to obtain a Qualifying Diagnosis, because the player could not have known that a settlement would ensue, nor its requirements, while alive. PA 30a-31a, 47a-48a, 150a, 160a-161a. Class counsel was able to secure recoveries for class members who had died before the settlement and who had received a pathological finding of CTE, as a proxy for a Qualifying Diagnosis. RA 53a, ¶11.

Despite subsequent changes, the basic settlement structure remained intact. The settlement provided for awards of up to $5 million for serious medical conditions (including Parkinson's Disease, Alzheimer's Disease, and ALS) associated with concussions and other brain traumas. PA 12a, 72a, 77a. The settlement fund was originally capped at $675 million (but was later uncapped, *see infra* at I.A.5). A separate $75 million fund would pay for medical baseline assessment examinations for retired players, along with supplemental benefits, including further testing, treatment, counseling, and pharmaceutical coverage for those with some objective decline in cognitive function (but not yet constituting early dementia). PA 13a. Another $10 million fund provided for educating former players and promoting safety for football players of all ages. PA 9a, 11a, 81a-82a.

5. District Court Review

In early 2014, the district court denied preliminary approval, expressing concern that the capped fund might be insufficient to pay all claims during the settlement's 65-year life. PA 9a, 71a-72a. The court directed the parties to provide actuarial and scientific information to a special master, Perry Golkin, who oversaw five additional months of negotiations. The NFL then agreed to an uncapped fund for compensating Qualifying Diagnoses. PA 9a, 72a-73a. Thereafter, the district court preliminarily certified a settlement class with two subclasses for those with a Qualifying Diagnosis and those without, and preliminarily approved the settlement. PA 10a, 73a-74a.

6. Class Response

At the end of the 90-day deadline for objections and opt-outs, only about 1% of the more than 20,000 class members had objected, and only about 1% had opted out. PA 40a, 131a. In addition to the extensive publicity garnered by the settlement, the notice program reached over 90% of the class. By the time of the fairness hearing, more than 5,000 class members had already taken initial steps in the settlement's claims administration process, even though that process had not even commenced. PA 40a, 130a-131a. (That number is now over 11,000.)[3]

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[3] *See* Joint Report on Preparation To Implement the Settlement Program after the Effective Date, at 2, *In re NFL Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. Oct. 7, 2016) (ECF No. 6919).

7. Fairness Hearing and Further Modifications

At the November 19, 2014 fairness hearing, the district court heard from class counsel, counsel for the NFL, and counsel for numerous objectors; the court also gave every objector not represented by counsel the chance to speak. PA 10a, 85a. The district court again withheld approval and proposed further changes. The parties accepted all of those additional changes. PA 10a, 85a-86a. The district court granted final approval (and class certification) on April 22, 2015. PA 10a, 60a-212a.

8. The District Court's Opinion

Summary. Judge Brody held that the requirements for class certification under Fed.R.Civ.P. 23(b)(3) were satisfied and that the settlement was fair, reasonable, and adequate under controlling law. PA 86a-115a, 124a-148a. Among other things, the court found that "the maximum awards are in line with other personal injury settlements," PA 170a, and that "[b]ecause [the fund] is uncapped, . . . all class members who receive Qualifying Diagnoses during the next 65 years will receive compensation." PA 144a; *see also* PA 13a, 101a.

The settlement relieved class members of the need to establish that their injuries were caused by playing NFL football (as opposed, *e.g.*, to playing football in earlier years or from a cause unrelated to football). PA 11a, 42a-43a, 77a, 140a-141a. For living retirees, no statute of limitations bar applies, regardless of when they played or were diagnosed. PA 141a. And, for players who died on or after January 1, 2006, the settlement provided a waiver of potentially dispositive statute of limitations defenses. PA 201a-202a. At the

same time, the settlement preserved all claims for worker's compensation and medical and disability benefits under any applicable CBA. PA 15a, 83a, 169a n.65.

CTE. The district court made specific findings on CTE. *See, e.g.*, PA 149a-163a. CTE is "the build-up of 'tau protein' in the brain" that is confirmed through pathological examination of brain tissue. PA 7a, 150a-156a. The court found, based on the undisputed scientific evidence, that CTE can only be conclusively determined upon autopsy; CTE cannot be "diagnosed" in the living. No expert (among more than a dozen who submitted affidavits) disputed that critical fact, which objectors themselves conceded. PA 102a, 150a & n.48, 155a, 162a. Consequently, all former players stand at risk of CTE. PA 25a, 102a-103a.

Further, "[t]he study of CTE is nascent, and the symptoms of the disease, if any, are unknown"; "no diagnostic or clinical profile of CTE exists"; and "[b]eyond identifying the existence of abnormal tau protein in a person's brain, researchers know very little about CTE," "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." PA 149a-151a; *see also* PA 46a.

The court noted that "these uncertainties exist because clinical study of CTE is in its infancy. Only 200 brains with CTE have ever been examined, all from subjects who were deceased at the time the studies began. . . . This is well short of the sample size needed to understand CTE's symptoms with scientific certainty. . . ." PA 151a-152a. Moreover, the studies suffered from selection "biases intrinsic to their design

that make it difficult to draw generalizable conclusions." PA 152a.

Finally, the court found that numerous conditions potentially linked to CTE were compensable under one or more of the Qualifying Diagnoses. PA 155a-157a.

B. Findings Pertinent to Petitioners

Armstrong Petitioners. The Armstrong Petition argues that the settlement fails to provide the structural protection required by this Court's decisions in *Amchem* and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Armstrong Pet. 13-19, 28. The district court addressed that issue in detail, emphasizing that the creation of two subclasses, those with Qualifying Diagnoses and those without, was exactly the structural protection required by *Amchem* and *Ortiz*. PA 27a-30a, 99a-100a. As the court noted, the problem in *Amchem*, not present in *NFL*, was an "undifferentiated" class "containing those with present injuries and those who have not yet manifested injury . . . ." PA 100a. Indeed, the subclasses in *NFL* were created precisely to address that concern. PA 100a.

Apart from the subclasses, structural protection was ensured because of the uncapped fund, the fact that many lawyers for thousands of individual plaintiffs had reviewed and endorsed the settlement, the requirement that the parties meet every 10 years to discuss changes in scientific understanding and the possible impact on the Qualifying Diagnoses, and the presence of the mediator and special master during the negotiations. PA 28a-29a, 48a, 99a, 101a-102a.

The court specifically found that subclass 1 representative Shawn Wooden was fully qualified to represent the subclass. He did not have a Qualifying Diagnosis, and because he "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." PA 100a. Moreover, "Wooden has adequately alleged that he is at risk of developing CTE." PA 102a. The court examined the allegations of the operative class action complaint (which Wooden had authorized), and found that Wooden had clearly sought compensation for CTE: "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 . . . ." Therefore, "the best Subclass representative for CTE is someone in Shawn Wooden's position." PA 102a-103a; *see also* RA 8a-39a.

The court also found that class counsel (including subclass 1 counsel Levin) were adequate. PA 93a. No objector had challenged Levin as having any conflict of interest, and the claimed conflict of Levin's purported representation of class members alleging a Qualifying Diagnosis was raised only on appeal. Thus, the court did not address the issue. PA 23a-24a.

With regard to the special accommodation for retirees who had died before the settlement, the court also rejected the argument that the settlement was flawed because of its limited compensation for death with CTE. That exception "recognized that Retired Players who died before final approval would not have had sufficient notice of the need to obtain Qualifying Diagnoses," whereas, "[b]y final approval, living Retired Players should be well aware of the Settlement and the need to obtain Qualifying Diagnoses if sick." PA 160a-161a.

Gilchrist Petitioners. The district court's opinion does not address the *Daubert* claims raised in the

Gilchrist Petition, given that no objector raised that argument in the district court. Gilchrist Pet. 23-27; PA 49a.

II. THIRD CIRCUIT OPINION

A. Overview

Objectors filed 12 separate appeals, which were consolidated. PA 10a. The Third Circuit unanimously affirmed the district court in an opinion by Judge Ambro. PA 2a-59a. Addressing class certification, Judge Ambro found that the four requirements of Fed.R.Civ.P. 23(a) were satisfied: a class of over 20,000 satisfied numerosity; there were common issues about the risks of concussive and sub-concussive hits, and the NFL's knowledge and conduct; the claims of the representatives were typical of those of the class; and the class representatives and class counsel were adequate. PA 15a-31a. Moreover, the class satisfied the requirements of Fed.R.Civ.P. 23(b)(3): the common issues predominated over the individual issues, and a class action was superior to individual resolution of thousands of claims. PA 31a-33a. The court also approved both the content of the notice and its distribution to the class. PA 34a-35a.

Applying Rule 23(e), the court then approved the settlement's fairness, concluding that the negotiations were at arms' length, the parties had considerable information from informal discovery, class counsel were experienced, and only a small percentage of the class lodged objections. PA 36a-45a.

The opinion specifically addressed CTE, finding that the science regarding CTE was immature and that CTE could only be diagnosed at death. PA 45a-46a. The court also confirmed that various neurological impairments sometimes associated with CTE are

potentially subject to awards as Qualifying Diagnoses. Like the district court, the Circuit noted the difficulty of linking mood and behavioral disorders to NFL football, given the prevalence of such disorders in the general population. PA 46a-47a. And the Circuit confirmed the finding that the settlement provides "significant and immediate relief to retired players." PA 51a.

B. Analysis of Petitioners' Arguments

Armstrong Petitioners. On the issue of conflicted representation, Judge Ambro concluded: "simply put, this case is not *Amchem*." PA 29a. Unlike in *Amchem*, "[t]he subclasses were represented in the negotiations by separate class representatives with separate counsel, and . . . each was an adequate representative." *Id*. "This alone is a significant structural protection for the class that weighs in favor of finding adequacy." *Id*.

Further structural protections were found in the uncapped nature of the fund, the provision requiring the NFL and class counsel to meet every ten years to discuss modifying the Qualifying Diagnoses in light of developing science, and the fact that some 300 lawyers representing about 5,000 players were "reviewing the terms of the settlement." PA 29a-30a. That included 3,900 players with no present Qualifying Diagnosis. PA 30a. Unlike in *Amchem*, these were not individuals with "a nebulous risk of developing injuries [who] would have little or no reason to protect their rights and interests in the settlement." *Id*.

The Circuit found that the record refuted the claims that Wooden (the subclass 1 representative) and Levin (the subclass 1 lawyer) had disqualifying conflicts of interest. PA 23a-25a. The argument that Wooden was not alleging a risk of CTE was "factually incorrect."

PA 25a. The court reviewed the record and found that Wooden had unambiguously asserted personal risk of "'latent brain injuries caused by . . . repeated traumatic head impacts.'" *Id.* (quoting class complaint). It noted, moreover, that "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." *Id*. Like the district court, the Circuit found that Wooden "'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 . . . .'" PA 28a (quoting district court).

Regarding the claim on appeal that subclass counsel Levin was conflicted, the Circuit noted that "objectors failed to raise [the] contention in the District Court and did not meaningfully assert it on appeal until their reply brief." PA 23a.[4]

Despite the procedural waiver, the court considered and rejected the argument based on the facts and pleadings of record: "we do not see how representation by Levin created a conflict of interest." PA 24a. Levin "disclosed his representation of the players to the District Court, and it was still satisfied that he was an adequate representative." *Id*. Moreover, "there is no evidence in the record before us that the players named in the complaints [filed by Levin] have a current Qualifying Diagnosis. Rather, they simply allege current symptoms [such as headaches and mood swings] that are not themselves Qualifying Diagnoses . . . ." *Id*.

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[4] Seeking to overcome their failure to preserve the issue, Armstrong filed (alongside the reply brief) a motion requesting judicial notice of complaints filed with Levin as counsel. The Court found the motion unnecessary and reviewed the underlying complaints. PA 23a-24a & n.7.

Thus, the court concluded, wholly apart from waiver, "this is not a situation where subclass counsel has clients in both subclasses and there is a risk of conflict." PA 24a-25a. When pressed at oral argument for any facts to support his charges against Levin, Armstrong's counsel admitted, "I'm not representing to the court that Mr. Levin is currently representing clients that have a qualifying diagnosis. ***I don't know that.***" RA 43a (emphasis added). Yet, the argument reappears on certiorari, without any acknowledgment by Armstrong's counsel of his prior concession.

With no citations to the record, Petitioners now charge that the subclass strategy was devised "*after* the basic framework of the deal had been hashed out in nearly two months of negotiations." Armstrong Pet. 27 (emphasis in original). In fact, however, the courts below concluded that the creation of the subclasses occurred "*early in the negotiations* . . . ." PA 22a, 23a (emphasis added); *see also* RA 52, ¶7.

Finally, the Circuit found that it was reasonable to provide recovery for death with CTE for players who died prior to the final approval of the settlement and were diagnosed post-mortem with CTE. The court agreed with the district court that "this compensation . . . is a proxy for Qualifying Diagnoses a retired player could have received while living." PA 47a-48a. *See also* PA 30a-31a (further discussion of settlement CTE provision).

Gilchrist Petitioners. The Third Circuit rejected the *Daubert* argument because "Objectors failed to present this argument to the District Court, and we deem it waived." PA 49a. The court further noted that "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 that "at least one court of appeals has rejected the argument . . . ." PA 49a (citing Sixth Circuit decision).

C. Denial of Rehearing En Banc

Without dissent, the Third Circuit denied rehearing en banc. PA 224a-225a.

REASONS TO DENY THE WRIT

Petitioners raise no substantial grounds for certiorari. Their contentions are based on factual assertions that conflict with the findings of both courts below, and on untimely arguments that have been waived.

I. THE ARMSTRONG PETITION DOES NOT IDENTIFY ANY FAILURE TO COMPLY WITH *AMCHEM* AND *ORTIZ*.

Petitioners' meandering Question Presented ultimately boils down to a claim of conflicted representation and a violation of the structural protections mandated by *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Armstrong Pet. i. At no point does the Petition identify any legal error, but only a competing factual account that would require rejection of the findings by two courts below. The unmistakable facts below demonstrate that *the district court approved precisely the subclassing that the Armstrong Petition claims is required by those decisions.*

The heart of *Amchem* and *Ortiz* is the need to protect absent class members against conflicted representation. Representation cannot be adequate if there are conflicting demands for resources made without adequate protections of the rivalrous claimants. This

Court struck down the asbestos settlement in *Amchem* because the settlement "achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency." 521 U.S. at 627.

Here, by contrast, the settlement was negotiated and structured to provide independent representation across the central divide of those who already had a Qualifying Diagnosis and those who did not. Whatever conflict may arise from the demand for more payments now or later was addressed structurally by subclassing. In further contrast to both *Amchem* and *Ortiz*, the NFL settlement has no fixed pot to be divided, but guarantees the same recoveries to present claimants and future claimants, indexed for inflation. PA 28a-29a.

Both courts below carefully scrutinized the class representatives and class counsel to ensure there was separate representation for those who already manifested Qualifying Diagnoses for compensation and those who did not. PA 29a (subclasses were represented by separate representatives with separate counsel, and "each was an adequate representative"); PA 100a (each subclass was represented by separate counsel and each "Subclass Representative's interests reflect the interests of the Subclass as a whole").

The result, as the Third Circuit noted, is that "this case is not *Amchem*." PA 29a. Centrally, "class counsel here took *Amchem* into account by using the subclass structure to protect the sometimes divergent interests of the retired players." *Id*; *see also* PA 99a (class satisfies *Amchem* by having separate subclasses

and uncapped fund). And, as the district court noted, the presence of the mediator (Judge Phillips) and the special master (Golkin) "helped guarantee that the Parties did not compromise some Class Members' claims in order to benefit other Class Members." PA 101a.

Unable to argue that the subclass structure violated *Amchem* and *Ortiz*, Petitioners invent factual arguments primarily regarding the adequacy of the subclass 1 representative (Wooden) and subclass 1 counsel (Levin). But, a mere factual dispute, where the courts below indisputably applied the correct legal principles, is not grounds for review before the Court. *See, e.g., Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari") (citation omitted). All the more so where the pertinent facts asserted either were not presented to the district court or are squarely contrary to the findings of both courts below.

A. Attacks on Wooden

First, Armstrong attacks subclass 1 representative Wooden, claiming that "he had not alleged a claim for future risk of CTE," and thus could not effectively advocate on behalf of those who do allege such a claim. Armstrong Pet. 13. This disregards that *both courts below rejected this argument and found that Wooden had alleged increased risk of CTE.* PA 25a, 102a-103a.

Specifically, both courts found that Wooden asserted personal risk of "latent brain injuries caused by . . . repeated traumatic head impacts." PA 25a (quoting class complaint). The class complaint alleges that CTE "is associated with repetitive mild traumatic

brain injury," PA 102a, and this forms the heart of Wooden's allegations on behalf of the retired players without a Qualifying Diagnosis.

Further, Shawn Wooden's individual complaint, prior to transfer to the MDL court, emphasizes CTE risk from head traumas, RA 16a-18a, ¶¶37-49, alleges that Wooden is "at heightened risk of developing further adverse neurological symptoms in the future," RA 34a, ¶125, and seeks medical monitoring to address concussion-related ailments, including "*inter alia*, memory loss, early onset dementia, CTE, Alzheimer's-like syndromes, and similar cognition-impairing conditions." RA 35a-36a, ¶136.

Both courts made specific findings that CTE can only be diagnosed after death. PA 7a, 102a. This means that "all players are at risk of CTE." PA 25a, 25a n.8. Further, per the district court, "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 . . . ." PA 102a-103a. Accordingly, "the best Subclass Representative for CTE is someone in Shawn Wooden's position." PA 103a.

Petitioners do not argue that these findings below are wrong. Instead, they simply ignore them and substitute an alternative fact universe not supported by the record. Inventing facts contrary to the record provides no basis for certiorari.

B. Attacks on Levin

Second, Armstrong attacks subclass 1 counsel Levin as conflicted because he "'represented nine players who alleged current symptoms . . . .'" Armstrong Pet. 25, quoting PA 23a. This purported conflict was not presented to the district court and not even raised on

appeal until Petitioners' reply brief. PA 23a. The Third Circuit explained why such matters must be raised timely so they can be resolved by the district court, if any remediation is necessary. *Id.* Likewise, this Court long ago explained why parties "must come to issue in the trial forum," noting that:

> This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556 (1941).

Petitioners' unseemly invective toward Levin presents no issue for certiorari, especially when premised on facts repudiated below. Indeed, Armstrong's counsel conceded at the Third Circuit oral argument that he could not substantiate his factual assertions. *See supra* at 15. Yet, despite that critical concession, the Third Circuit conducted an independent review of the claims and found that Levin's personal clients alleged that they suffered from, *inter alia*, headaches and mood swings, conditions that do not constitute a Qualifying Diagnosis and therefore are not "current symptoms" as defined by the Settlement. PA 24a. Thus, "this is not a situation where subclass counsel has clients in both subclasses and there is a risk of conflict." PA 24a-25a. Petitioners ignore this factual determination.

Having never raised this issue before the district court, or even in the opening brief to the Third Circuit, Petitioners cannot possibly claim that the district

court erred in not addressing the issue of Levin's conflict "until after the fact." Armstrong Pet. 28. What the Petition characterizes as the "laissez-faire" approach of the Third Circuit, Armstrong Pet. 26, is simply respect for procedural order in the legal system. Slash and burn character attacks are no substitute.

C. Timing of Subclassing

Third, the Armstrong Petition claims that the subclasses were created only "*after* the basic framework of the deal had been hashed out in nearly two months of negotiations . . . ." Armstrong Pet. 27 (emphasis in original). The Petition cites nothing in the record to support this contention, which is invented from whole cloth. In fact, the decision to create subclasses occurred "*early in the negotiations*," PA 22a (emphasis added), subclass 1 counsel Levin was selected "*early in the negotiations*," PA 23a (emphasis added), and Levin "by all accounts" was an "active participant[] in the settlement negotiations." PA 23a. *See also* RA 47a, ¶7, 49a, ¶11, 52a, ¶7, 54a, ¶17. Moreover, the Third Circuit noted that the district court had previously "assured itself" that Levin was an adequate representative. PA 23a.

* * *

In short, it is difficult to imagine a weaker case for certiorari – a case where both the district court and the Third Circuit meticulously applied this Court's *Amchem* and *Ortiz* decisions, and where the entire dispute boils down to facts that were not raised in the district court or are squarely contrary to findings of both courts below.

II. THERE IS NO CIRCUIT CONFLICT.

Armstrong alternatively seeks to manufacture a Circuit conflict based on two irrelevant Second Circuit cases: *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 827 F.3d 223 (2d Cir. 2016), and *In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242 (2d Cir. 2011).

Interchange involves a mandatory class under Fed.R.Civ.P. 23(b)(2) in which there was no right to opt out. *Literary Works* concerns a sweeping, amorphous class of all authors, many of whom had never collected any substantial royalties and were indifferent as to the proceedings, and whose unrepresented interests were extinguished with no compensation at all. This was precisely the "nebulous risk" that the Third Circuit distinguished. PA 30a.

Neither looks remotely like this case, which involves what may be the most cohesive, self-aware class ever found in litigation: over 20,000 retired NFL players, all of whom are fully aware of the fact of having played in the NFL, more than 5,000 represented by hundreds of independent lawyers, and all flyspecking one of the most publicized civil settlements in history. Neither Second Circuit case demonstrates a Circuit conflict or raises any concern that the settlement here would have been struck down had it been before that Circuit.[5]

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[5] More far-fetched is the supposed conflict between the Second and Third Circuits on the standards for collateral review. Armstrong Pet. 22-23. Not only was this never presented below, but even the Second Circuit has backed away from the claimed source of the conflict in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001). *See Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 171, 173 (2d Cir. 2006) (rejecting application of *Stephenson*).

A. *Interchange*

Interchange was a proposed settlement of the manner in which fees were charged by credit card companies to virtually all merchants in the U.S. The settlement was structured as a complicated hybrid of one class under Fed.R.Civ.P. 23(b)(3) and another under Fed.R.Civ.P. 23(b)(2). Lucky in the deal was the (b)(3) class whose members stood to profit handsomely. Those class members were represented by counsel, could opt out of the deal if it was unacceptable, and stood to divide a settlement potentially worth billions of dollars. By contrast, a non-opt-out (b)(2) class comprising the vast majority of merchants would have had their potential claims for damages foreclosed in exchange for generally worthless injunctive relief. 827 F.3d at 229-230. Even that injunctive relief would run out in 2021, while all releases would go on in perpetuity. *Id.* at 230. The Second Circuit understandably found that *Interchange* was a horrible deal that took more than it gave, and gave no procedural protection to absent class members. As Judge Leval aptly summarized, "[t]his is not a settlement; it is a confiscation." *Id*. at 241 (Leval, J., concurring).

The Second Circuit blazed no new trail in rejecting mandatory class treatment of individual damages claims. This Court in *Wal-Mart v. Dukes*, 564 U.S. 338 (2011), unanimously held that "individualized monetary claims belong in Rule 23(b)(3)," because the necessary procedural protections, such as predominance and the ability to opt out, were missing in a (b)(2) class. *Id.* at 362. Relying on *Wal-Mart* – a case never cited by Petitioners – the Second Circuit held that in light of the no opt-out cramdown, "it is imperative that the (b)(2) class in fact benefit . . . ." *Interchange*, 827 F.3d at 238. The combination of no right to opt out and no

benefit for the mandatory class made condemnation of the settlement an easy call.

B. *Literary Works*

Literary Works is an even more extreme example of a settlement release foreclosing future claims of unrepresented parties with no connection to the litigation at present. The class divided authors into three categories. The first two were authors who had sold literary works and had registered their intellectual property rights. Those two groups would have claims to a limited recovery of $18 million. The last and largest group consisted of a subclass putatively asserting the right to future damages claims for as yet unregistered literary works.

Following *Amchem*, the court found conflict among the subclasses. There was a capped recovery of $18 million, all of which was devoted to present claimants, and which would provide no monetary remedy to any future claimant. Yet, in contrast to the structural protections in the instant case, the class structure in *Literary Works* provided no independent representation of this last group, what is known as Category C. *Literary Works*, 654 F.3d at 251.

As the Second Circuit subsequently explained, Category C would "exclusively bear the risk of oversubscription, *i.e.*, their recovery alone would be reduced to bring the total payout down to $18 million." *Interchange*, 827 F.3d at 232-33. It was insufficient that some class members who stood to gain financially from the privileged claims also had other claims that might be eliminated: "class members with claims only in the third category required separate representation because their interests were antagonistic to the others

on a matter of critical importance—how the money would be distributed." *Id.* at 233.

* * *

There is no analytic gap between the Second Circuit decisions and the Third Circuit review of the NFL settlement. Applying a rigorous search for faithful representation of absent class members, different courts came to different conclusions on wildly different facts. That is not a Circuit conflict.

III. THE NARROW DEATH WITH CTE BENEFIT IS NOT A BASIS FOR REVIEW.

Armstrong also complains about accommodation made for the estimated 46 deceased players whose deaths preceded the ability to get the medical proofs required under the settlement. Armstrong Pet. 8, 11-12; PA 31a. The remedy involves a group of retired players "who were living with symptoms associated with one of the other Qualifying Diagnoses, but died before approval of the settlement, who may not have had sufficient notice of the need to be diagnosed." PA 31a. For this discrete group, the settling parties agreed to allow a postmortem diagnosis of CTE to serve as a proxy for the medical assessment no longer available.

Accommodating the particular facts of these deceased players unleashes a torrent of adjectives: a "massive" intraclass disparity, the "most salient conflict," the most "conspicuous evidence," and so forth. Armstrong Pet. 29. This rhetorical overkill reveals a profound misunderstanding of both the nature of a conflict and the aim of this particular settlement.

This Court has never condemned a class action for treating differently situated people in different ways.

Rather a conflict arises from a representative having an incentive to undercut one section of the represented class to the benefit of some other group. In *Ortiz*, for example, the conflict emerged not from the fact that there were different class members with different diseases, or that there were some class members with no present manifestation of disease, but from the incentives for unfaithful representation:

> [S]ome of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims, . . . the full payment of which was contingent on a successful Global Settlement Agreement. . . . Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive . . . , rather than the best possible arrangement for the substantially unidentified global settlement class.

527 U.S. at 852 (internal citations omitted).

Nowhere do Petitioners identify any comparable misalignment of incentives. The subclass representative for players with a Qualifying Diagnosis did not stand to benefit from including the 46 deceased players with post-mortem findings of CTE, nor from keeping them out. Subclass counsel similarly had no ulterior incentives to expand or contract the benefits recipients among this group, unlike in *Ortiz*. Certainly, the NFL defendants had no incentive to expand the possible claimants given the unlimited potential recovery of the class. Far from being a conflict, this is a fair resolution of a discrete problem achieved through capable lawyering. PA 160a-161a (district court fairness findings).

Petitioners and amici further mistakenly assert that there should have been a subclass created for players at risk of CTE. As the district court well understood, "[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 the Objectors concede, CTE can only be diagnosed after death." PA 102a. Prospective risk of a CTE diagnosis was therefore a unifying feature of the entire class, not a distinguishing feature of a subclass. Classes and subclasses are made of people, not claims standing alone. Creating a *sub*class made up of the entire class is nonsensical.

At bottom, Petitioners misunderstand the settlement, which was designed not as a form of life insurance but as a compensation mechanism for specific disabilities and diseases that the retired players suffered while alive. The 46 players who died prior to final approval and who had received findings of CTE upon autopsy were an exception to be addressed compassionately. For the other 20,000 retired players and their family members, the settlement offered immediate compensation if they had a Qualifying Diagnosis, or the guarantee of such payments if and when those conditions manifest during the 65-year period for seeking benefits. That is the deal the class wanted and got, not term life insurance benefits, payable upon death.

IV. PETITIONER GILCHRIST'S *DAUBERT* CHALLENGE IS PROCEDURALLY BARRED AND SUBSTANTIVELY MERITLESS.

A. Waiver

Apart from its lack of merit, the Gilchrist Petition is a procedurally inappropriate argument for certiorari.

No objection was presented to the district court invoking *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Petitioner Gilchrist filed an objection to the settlement that did not raise any evidentiary objections, instead challenging only the levels of compensation for different medical conditions and the specifics of the computation formula. RA 1a-7a. As the Third Circuit held, that issue is waived. PA 49a.

Petitioner does not dispute this. The Petition claims error *on appeal* because the Third Circuit did not vacate the judgment below on grounds not presented below. Gilchrist Pet. at 12. The Circuit cannot have erred in failing to overturn a district court on issues never presented to that court. As this Court has noted, "'litigation is a winnowing process, and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008) (citation omitted). The Petition does not cite a single case (and Respondents know of none) in which this Court has entertained an evidentiary challenge on grounds not presented to the district court.

B. Meritless Invocation of *Daubert*

The Petition suggests that district courts *must* conduct a *Daubert* hearing before approving a class settlement, regardless of whether the issue is raised. The Petition does not spell out the argument, but merely offers a Table, inviting this Court to guess at the cited cases' holdings.[6] Even a cursory examination shows that this effort is futile.

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[6] Some of these cases are wildly off point. *See, e.g., In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016) (rejecting settlement that provides no class relief but substantial attorney's fees).

First, and most tellingly, the Circuits themselves *agree* on the appropriate legal standard:

> [N]o court of appeals, to our knowledge, has demanded that district courts invariably conduct a full evidentiary hearing with live testimony and cross-examination before approving a settlement. Our court, and several others, have instead deferred to the district court's *traditionally broad discretion* over the evidence it considers when reviewing a proposed class action settlement.

Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 636 (6th Cir. 2007) (emphasis added); *see Union Asset Mgmt. Holding A.G. v. Dell, Inc*., 669 F.3d 632, 641-42 (5th Cir. 2012) (quoting Sixth Circuit on uniformity).

Because there is no jury in a fairness hearing, it makes no sense to have a preliminary evidentiary hearing to determine if evidence should be heard. Thus, all Circuits view evidentiary issues as within district court discretion. *See, e.g., Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015) (abuse of discretion standard); *Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010) ("District courts … enjoy great discretion"); *In re BankAmerica Corp. Sec. Litig.*, 350 F.3d 747, 752 (8th Cir. 2003) ("sound discretion of the trial judge"); *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1998) (same); *United States v. Hardage*, 982 F.2d 1491, 1495 (10th Cir. 1993) (same).[7] Per *Int'l Union:*

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[7] Many of the cases cited, Gilchrist Pet. 17-20, have nothing to do with settlement standards. *See, e.g., In re U.S. Foodservice, Inc. Pricing Litig.*, 729 F.3d 108 (2d Cir. 2013); *Messner v. Northshore Univ.*, 669 F.3d 802 (7th Cir. 2012); *Local 703, I.B. of*

> In a trial, the judge must strictly screen expert opinions for "evidentiary relevance and reliability" because a jury often has difficulty assessing such evidence. . . . In 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.

497 F.3d at 636-37 (quoting *Daubert*, 509 U.S. at 594-95). No circuit disagrees with this elementary proposition.

V. AMICI RAISE MERITLESS CONCERNS NOT RAISED BY PETITIONERS.

The three amicus briefs focus on arguments not raised by Petitioners and provide no guidance on whether the questions presented by Petitioners are cert-worthy. Issues raised by amici but not asserted by Petitions should be disregarded. *See, e.g., Kamen v. Kemper Financial Services*, 500 U.S. 90, 97 n.4 (1991) ("we do not ordinarily address issues raised only by amici"); *Knetsch v. United States*, 364 U.S. 361, 370 (1960) ("This argument [raised by amicus] has never been advanced by petitioners in this case. Accordingly, we have no reason to pass upon it.").

On the merits, amici offer little. Public Citizen argues that a multitude of subclasses should have been designated, a position that Public Citizen alone, as amici, raised below and that no party preserved on appeal or before this Court. No court has ever

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T. Grocery & Food Emp's Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248 (11th Cir. 2014); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011).

accepted the bizarre Balkanization that would result from separate subclasses based on age and years of NFL play, as well as for "depression, sleeplessness, memory loss, and personality effects." Public Citizen at 7-8. Public Citizen offers these as only "examples" requiring separate representation for "each of the major subgroups . . . ." *Id.* at 16. As the Third Circuit noted, Public Citizen's approach "risked slowing *or even halting* the settlement negotiations." PA 28a n.9 (emphasis added). *Accord* PA 107a (same reasoning by the district court). Besides, what in the world would a "sleeplessness subclass" even look like?

Moreover, Public Citizen simply ignores the specific findings that, unlike in *Amchem*, (1) all of the class members were fully aware of the settlement proposal; (2) there were hundreds of lawyers representing individual class members, who likewise scrutinized the terms; (3) under the uncapped settlement, every class member who qualifies during the 65-year class period is entitled to benefits (indexed for inflation) if he eventually qualifies; (4) every class member is equally at risk of CTE; and (5) every class member had the opportunity to opt out. PA 25a, 29a-30a, 34a, 84a, 111a, 130a-131a, 144a.

The Brain Injury Association of America (BIAA) filed an amicus brief below, which the Third Circuit understandably disregarded, with the same wish list for settlement recoveries for "headache, fatigue, sleep disorders, vertigo, and dizziness," BIAA, at 11, as well as emotional and behavioral difficulties, and epilepsy and seizure disorders. *Id.* at 7-17. Given the NFL's steadfast refusal to agree to compensate for conditions such as mood disorders, the BIAA's approach would have led to a complete breakdown of settlement talks. This may have been the deal BIAA wanted (on behalf

of no class member), but courts are not free to rewrite proposed settlements beyond the agreement of the parties. *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986) (courts may not "require the parties to accept a settlement to which they have not agreed"). Moreover, as the district court noted, many of the maladies sought by BIAA, such as mood disorders, "are commonly found in the general population and have multifactorial causation." PA 158a.[8]

The amicus brief by 135 Former NFL Players ("135 Players") cannot be taken seriously. The brief's primary argument, that the settlement improperly omitted compensation for CTE, 135 Players at 9, 22-25, was exhaustively and persuasively addressed by both the district court and the Third Circuit, as discussed at length herein. But, the 135 Players are not amici but class members who admittedly did not object below. As "nonnamed class members" they "are parties to the proceedings in the sense of being bound by the settlement." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002). These putative amici disregard this Court's injunction that "the power to appeal is limited to those

[8] BIAA departs from the Petitions in arguing that the Baseline Assessment Program is flawed, BIAA at 23-28, and that various offsets or reductions are unfair. *Id.* at 20-22. Those arguments were thoroughly refuted below. *See* PA 172a-189a. And, the BIAA's assertion that "the proposed settlement" provides "no benefits" to "89.0% of class members," *id.* at 3, is utterly false. All class members are receiving the equivalent of an insurance policy for any Qualifying Diagnosis within the next 65 years, as well as the immediate medical baseline assessment examinations and the supplemental benefits that are part of that program. PA 49a. *See supra* at 6.

nonnamed class members who have objected during the fairness hearing." *Id.* at 11.[9]

VI. THE SETTLEMENT HAS OVERWHELMING SUPPORT.

The bottom line is clear: out of a class of over 20,000 retired NFL players, only 202 initially opted out of this settlement,[10] and only 205 objected. As of the most recent report to the district court, more than 11,000 class members had taken the initial steps to get the benefits the settlement provides, even though the class recovery is being held up until all appeals are exhausted. What thousands of class members affirmatively want, 33 objectors seek to deny. On what basis?

Each Petitioner was free to opt out and pursue a claim separately, despite the many obstacles to recovery, most notably the NFL's labor preemption defense, and the difficulty of establishing specific causation from NFL play and not college or high school or Pop Warner football. PA 42a-43a.

There are certainly times when objectors must speak up for absent class members who are too removed from the matter at stake. Armstrong's Petition is a paean to *Amchem*, but the sweeping proposed class definition in *Amchem* included virtually all residents of the U.S. born before 1993. That was hundreds of millions of

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[9] Moreover, one of the 135 is Cleo Miller, who has already filed a brief as a putative Respondent (making the frivolous argument that no settlement of any kind is permissible because the science of CTE is immature). Both the 135 Players brief and the Cleo Miller brief are improper and should be disregarded.

[10] After several changes of heart, that number now stands at 196. *See* MDL No. 12-2323 (E.D. Pa.), at ECF No. 6924.

persons, most of whom had no idea whether they were ever exposed to asbestos or that they might be at risk. *Amchem*, 521 U.S. at 602 n.5. Here by contrast some 3,900 of the 5,000 players who had filed suit in their own name had no condition that would currently qualify for payment under the settlement. PA 30a. Yet these "future claimants," as they are dismissively labeled (Armstrong Pet. 28), not only support the settlement, they do so with the advice of their private counsel.

As the Third Circuit recognized, this is not the *Amchem* class. Playing in the NFL is a defining achievement of those few who reach that level, and the class is unified by that fact. These players know each other through innumerable interactions from chat rooms to civic functions. They are truly a band of brothers. The proposed settlement is not a secret. Its terms were not only publicized through the normal channels of notice, PA 120a-121a, but subject to extensive scrutiny and discussion in all media, including during nationally televised football games. PA-122a. No one was taken unaware, least of all Petitioners, all of whom are represented by counsel.

When a settlement offers a billion dollars in tangible benefits and the class eagerly wants the relief obtained, with a quarter of the class independently represented by counsel, why should a handful of objectors deny that benefit to the overwhelming majority? Opt-out rights may be insufficient when absent class members have no reason to be aware of the case, as in *Amchem*, or when the settlement is structured to deny opt-out rights altogether, as in *Interchange*, or when the claims being terminated are too inconsequential to pursue independently, as in *Literary Works.* But none of this describes this case of high publicity claims being

settled for potentially millions of dollars, and full opt-out rights. Why did Petitioners not just opt out, if they did not like the deal?

At argument below, one objector, when pressed on this point, candidly admitted that he hoped to obtain more than his claim might be worth by obstructing everyone else. RA 41a-42a. Presumably, Petitioners here would disavow such extortionate aims. But one searches in vain in the two Petitions for an alternative explanation of why these objectors did not just opt out.

CONCLUSION

The Petitions should be denied.

Respectfully submitted,

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Attorneys for Respondents Kevin Turner, et al.

November 4, 2016

APPENDIX

APPENDIX A

October 9, 2014

Scott Gilchrist
59 Royalavon Crescent
Toronto Ontario
Canada
M9A 2E7

To whom it may concern

My father's estate, Carlton Chester Gilchrist, would like to object to the NFL Concussion Settlement for the following reasons.

1. CTE is a direct result of head trauma. I feel it should be ahead of ALS because it has not been proven that ALS is a direct result of head trauma where CTE has been proven to be a direct result from head trauma. My father was in stage 4 of CTE.
2. My father's problems that he had in the last 40 years of his life not only dramatically impacted on his quality of life but affected his children's quality of life as well. I feel that the years that were lost should be compensated for. It was a terrible price to pay for being a football player and to that of his family.
3. I feel that years of service in the CFL should be included for all players.
4. Eligible seasons should not be capped at 4.5 seasons. It should include many more years. My father signed a deal in 1954 when he was 18 with the Cleveland Browns and continued to play for 14 years.

Thank you for considering the above,

Regards,

/s/ Scott Gilchrist
Scott Gilchrist
(Son of the late Carlton Chester Gilchrist)

(416) 234-1966 home, (416) 606-8139 cell

APPENDIX B

Objection to June 25, 2014 Case Settlement in regards to the Players Concussion Injury

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

Civil Action No: 2114-CV-000-29-AB

Hon. Anita B. Brody

October 14, 2014

Scott Gilchrist
59 Royalavon Crescent
Toronto Ontario
Canada
M9A 2E7

I am the administrator of my Father's Estate in which my brother has signed over his rights to me in a Petition for Probate and Grant Letter.

My father's estate, Carlton Chester Gilchrist, would like to object to the NFL Concussion Settlement for the following reasons.

1. CTE is a direct result of head trauma. I feel it should be ahead of ALS because it has not been proven that ALS is a direct result of head trauma where CTE has been proven to be a direct result from head trauma. My father was in stage 4 of CTE. Five players have been diagnosed with ALS where 76 players out of 79 brain donations have been diagnosed with CTE.
2. My father's problems that he had in the last 40 years of his life not only dramatically impacted on his quality of life but affected his children's quality of life as well. I feel that the years that were lost should be compensated for. It was a

terrible price to pay for being a football player and to that of his family.

3. I feel that my fathers' years of service in the CFL should be included. He signed a NFL contract on May 3, 1954 when he was 18 years of age with the Cleveland Browns which was against NFL regulations. He went to Canada shortly thereafter because it was against NFL policy and he didn't make the cut and was told to go to Canada.
4. My father played 56 minutes of football per game in the CFL both offence and defence, field goals and punting hence the more time and longer that you play in a football game the more likely to incur head trauma which was a point noted by Dr. Stern.
5. Eligible seasons should not be capped at all. It should include many more years. My father signed a deal in 1954 when he was 18 with the Cleveland Browns and continued to play for 14 years.

Thank you for considering the above,

Regards,

/s/ Scott Gilchrist
Scott Gilchrist (date of birth: May 7, 1961)
(Son of the late Carlton Chester Gilchrist)

(416) 234-1966 home, (416) 606-8139 cell

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 11/03/14]

No. 2:12-md-02323-AB
MDL No. 2323
Civil Action No. 2:14-cv-00029-AB

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION

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.

THIS DOCUMENT RELATES TO: ALL ACTIONS

OBJECTION TO JUNE 25, 2014
CLASS SETTLEMENT

The undersigned Settlement Class Member hereby objects to the Class Action Settlement Agreement dated as of June 25, 2014 (the "Settlement"). For the substance of my objection, I adopt the content of the Objection of Sean Morey, Alan Faneca, Ben Hamilton, Robert Royal, Roderick "Rock" Cartwright, Jeff

Rohrer, and Sean Considine to Class Settlement, which was filed with the Court on October 6, 2014, Docket No. 6201.

I am a Settlement Class Member, as that term is defined in the Settlement, because I am [check the box that applies]:

☐ A "Retired NFL Football Player" under the Settlement in that I retired before July 7, 2014, from playing for a past or present member club of one or more of the National Football League, the American Football League, the World League of American Football, the NFL Europe League, or the NFL Europa League, as follows [state team, league, and dates played]:_____

☐ A "Representative Claimaint" under the Settlement in that I am the authorized representative of _____ [name of player], who is/was a Retired NFL Football Player under the Settlement, because he retired before July 7, 2014, from playing for a past or present member club of one or more of the National Football League, the American Football League, the World League of American Football, the NFL Europe League, or the NFL Europa League, as follows [state team, league, and dates played]:_____

_____

☑ A "Derivative Claimaint" under the Settlement in that I am a [circle one] spouse, parent, dependent child or otherwise eligible to sue independently under state law because of my relationship to Carlton Gilchrist [name of player], who is/was a Retired NFL Football Player under the Settlement, because he retired before July 7, 2014, from playing for a past or present member club of one or more of the National Football League, the American Football League, the World

League of American Football, the NFL Europe League, or the NFL Europa League, as follows [state team, league, and dates played]:

Buffalo Bills 8/4/1962-1963-1964 Denver Broncos 1965 Miami 1966

Denver 1967 Assigned to Cincinnati 1-16-1968 Retired 3-27-1968

Date: Oct. 14 2014, 2014

Signature: /s/ Scott Gilchrist

Name (printed): Scott Gilchrist

Address: 59 Royalavon Crescent
Etobicoke Ontario
Canada M9A-2E7

Telephone: 416-234-1966

My Date of Birth: May 07 1961

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

[Filed: 01/24/2012]

Case No. _____

SHAWN WOODEN; and RYAN FOWLER; individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

NATIONAL FOOTBALL LEAGUE,

Defendant.

COMPLAINT – CLASS ACTION

COMPLAINT

The Plaintiffs Shawn Wooden and Ryan Fowler (the "Representative Plaintiffs"), individually and on behalf of all others similarly situated, sue the Defendant National Football League (the "NFL" or the "League"), and state as follows:

NATURE OF THE ACTION

1. This action arises from the concussion crisis afflicting former professional football players in the National Football League (the "NFL" or the "League"). For close to a century, evidence has linked concussions and long-term neurological problems, and specialists in brain trauma have been warning about the risks of

permanent brain damage from repetitive concussions for decades. The NFL – as the organizer and purveyor of a professional sport in which head trauma is a regular and repeated occurrence – was aware of these risks but deliberately ignored and concealed them. Rather than warn its players that they risked permanent brain injury if they returned to play too soon after sustaining a concussion, the NFL actively deceived players, resulting in the players' belief that concussions did not present serious, life-altering risks.

2. The NFL, through its own initiative and voluntary undertaking, created the Mild Traumatic Brain Injury Committee (the "MTBI Committee" or the "Committee") in 1994. The Committee was ostensibly created to research and ameliorate the impact of concussions on NFL players.

3. Despite clear medical evidence that on-field concussions led directly to brain injuries and frequently had tragic repercussions for its retired players, the NFL failed to protect other players from suffering a similar fate, and failed to inform players of the true risks associated with such head trauma. Instead, the NFL purposefully misrepresented and/or concealed medical evidence on the issue. While athletes who had suffered concussions in other professional sports were being restricted from returning to play for full games or even seasons, NFL players who had suffered concussions were regularly being returned to play after having suffered a concussion in that same game or practice.

4. The NFL's active and purposeful concealment of the severe neurological risks associated with concussions exposed players to dangers they could have avoided had the League provided them with accurate information. Many of these players, since retired, have

suffered severe and permanent brain damage as a result of the NFL's acts and/or omissions. In fact, the MTBI Committee's concealment of relevant medical evidence over the years has caused an increased risk of life-threatening injury to players who were being kept in the dark.

5. The Representative Plaintiffs, on behalf of themselves and all others similarly situated, are bringing this action for injunctive relief in the form of medical monitoring with respect to brain injuries caused by repeated traumatic brain and head impacts received during the period when they were playing professional football.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because the parties are of diverse citizenship and the amount in controversy in this action exceeds $75,000.00 dollars, exclusive of costs, interest, and attorneys' fees.

7. This Court also has original jurisdiction over this action under the Class Action Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this Court has original jurisdiction because there are more than one hundred (100) class members and because the amount in controversy exceeds $5,000,000.00, exclusive of interest and costs, for the class claim, and at least one of the Plaintiffs is a resident of a different state than the Defendant.

8. This Court has personal jurisdiction over the Defendant because it has substantial and continuous business contacts with the State of Florida, including but not limited to its having three (3) franchises which play in Florida, and derives substantial revenue from its contacts with Florida.

9. Venue is proper pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district, and because under 28 U.S.C. § 1391(c) Defendant is a corporation subject to personal jurisdiction in this District.

PARTIES

10. Plaintiff Shawn Wooden is a resident and citizen of the State of Florida. He played in the NFL from 1996 to 2004 for the Miami Dolphins and Chicago Bears.

11. Plaintiff Fowler is a resident and citizen of the State of Tennessee. He played in the NFL from 2004 to 2009 for the Tennessee Titans, Dallas Cowboys and New York Jets.

12. Defendant NFL, which maintains its principal place of business at 280 Park Avenue, 15th Floor, New York, New York 10017, is an unincorporated association consisting of thirty-two (32) member football teams.

13. The NFL regularly conducts business in Florida, including, but not limited to the organizing and overseeing of games for the Miami Dolphins, Tampa Bay Buccaneers, and Jacksonville Jaguars teams, and selecting Florida cities to host the Super Bowl in Florida in 1968, 1969, 1971, 1976, 1979, 1984, 1989, 1991, 1995, 1999, 2001, 2005, 2007, 2009, and 2010.

14. The League is in the business of, among other things, operating the sole major professional football league in the United States. As such, the NFL promotes, organizes, and regulates the sport of professional football in the United States.

CLASS ACTION ALLEGATIONS

15. This action is brought and may properly be maintained as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b).

16. The Representative Plaintiffs bring this action for injunctive relief in the form of medical monitoring on behalf of themselves and all others similarly situated (the "Class"), with respect to which the NFL has acted or refused to act on grounds that apply generally to the class.

17. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Rule 23.

18. The Class is defined as:

> All retired NFL players who played prior to the 2010 NFL season and who, during their NFL careers, suffered a concussion and were returned to contact play within ten (10) days of having suffered the concussion, and who, as of the date of class certification, are neither (a) advancing an individual personal injury claim for money damages against the NFL, nor (b) a salaried employee of the NFL.

19. Any differences in the laws of states that permit medical monitoring can be accommodated through the creation of subclasses, which Plaintiffs shall identify in their motion for class certification.

20. Excluded from the Class is the NFL, its parents, subsidiaries, affiliates, members, officers and directors, any entity in which the NFL has a controlling interest, governmental entities, and all

judges assigned to hear any aspect of this litigation, as well as their immediate family members.

21. The Representative Plaintiffs reserve the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate.

22. The Class is so numerous and geographically so widely dispersed that joinder of all members is impracticable.

23. There are questions of law and fact common to the Class, and those common questions predominate over any questions affecting only individual Class members.

24. The questions of law and fact common to the Class include but are not limited to the following:

i. Whether the Representative Plaintiffs and the Class were exposed to a greater than normal risk of brain injury following a return to contact play too soon after suffering an initial concussion;

ii. Whether that greater than normal exposure level was caused by the NFL's negligent misconduct;

iii. Whether the Representative Plaintiffs and the Class have an increased risk of developing latent neurological disorders as a proximate result of the increased exposure;

iv. Whether a monitoring procedure exists that makes the early detection of those diseases or symptoms possible;

v. Whether that prescribed monitoring regime is reasonably necessary according to contemporary scientific principles; and

vi. Whether the Representative Plaintiffs and the Class are entitled to the medical monitoring relief that they seek herein.

25. The Representative Plaintiffs' claims are typical of the claims of the Class that they represent, and the Representative Plaintiffs will fairly and adequately protect the interests of the proposed Class. The Representative Plaintiffs, like all Class members, have been damaged by the NFL's misconduct related to the concealment of the severe neurological risks associated with concussions. Further, the factual basis of the NFL's misconduct is common to all Class members, and represents a common thread of negligent misconduct resulting in injury to all members of the Class.

26. The Representative Plaintiffs have suffered the harm alleged and have no interests antagonistic to the interests of any other Class member.

27. The Representative Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in the prosecution of class actions. Accordingly, Plaintiffs are adequate representatives and will fairly and adequately protect the interests of the Class.

28. The monitoring is medically reasonable and necessary and will allow the Class to avoid or minimize damages.

29. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court.

30. Individualized litigation would also create the potential for inconsistent or contradictory rulings.

31. By contrast, a class action presents far fewer management difficulties and provides the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

GENERAL ALLEGATIONS APPLICABLE TO ALL COUNTS

The NFL

32. The NFL is a $9,000,000,000.00 dollar-per-year business.

33. The organization oversees America's most popular spectator sport, acting as a trade association for thirty-two (32) franchise owners.

34. The NFL governs and promotes the game of football, sets and enforces rules and League policies, and regulates team ownership.

35. It generates revenue mostly through marketing sponsorships, licensing merchandise, and by selling national broadcasting rights to the games. The teams share a percentage of the League's overall revenue.

36. Owing in part to its immense financial power and monopoly status in American football, the NFL has enormous influence over the education of team physicians, trainers, coaches, and football players at

all levels of the game concerning the assessment and impact of football related injuries.

Concussions and CTE Generally

37. It has been well known for nearly a century that concussions and repetitive head injuries cause a myriad of long-term sequelae.

38. The American Association of Neurological Surgeons defines a concussion as "a clinical syndrome characterized by an immediate and transient alteration in brain function, including an alteration of mental status and level of consciousness, resulting from mechanical force or trauma."

39. The injury generally occurs when the head either accelerates rapidly and then is stopped, or is rotated rapidly. The results frequently include, among other things, confusion, blurred vision, memory loss, nausea, and sometimes unconsciousness.

40. Medical evidence has shown that symptoms of a concussion can reappear hours or days after the injury, indicating that the injured party has not healed from the initial blow.

41. According to neurologists, once a person suffers a concussion, he is up to four (4) times more likely to sustain a second one. Additionally, after suffering even a single concussion, a lesser blow may cause the injury, and the injured person requires more time to recover. This goes to the heart of the problem: players returning to play before allowing their initial concussion to heal fully.

42. Clinical and neuropathological studies by some of the nation's foremost experts have demonstrated that multiple concussions sustained during an NFL

player's career can cause severe cognitive problems such as depression and early-onset dementia.

43. Repeated head trauma can also result in so-called "Second Impact Syndrome," in which re-injury to a person who has already suffered a concussion triggers swelling that the skull cannot accommodate.

44. Repeated instances of head trauma also frequently lead to Chronic Traumatic Encephalopathy ("CTE"), a progressive degenerative disease of the brain.

45. CTE involves the build-up of toxic proteins in the brain's neurons. This build-up results in a condition whereby signals sent from one cell to thousands of connecting cells in various parts of the brain are not received, leading to abnormal and diminished brain function.

46. CTE is found in athletes (and others) with a history of repetitive concussions. Conclusive studies have shown this condition to be prevalent in retired professional football players who have a history of head injury.

47. This head trauma, which includes multiple concussions, triggers progressive degeneration of the brain tissue. These changes in the brain are thought to begin when an athlete's brain is subjected to trauma, but symptoms may not appear until months, years, or even decades after the last concussion or the end of active athletic involvement. The brain degeneration is associated with memory loss, confusion, impaired judgment, paranoia, impulse-control problems, aggression, depression, and eventually progressive dementia.

48. The University of North Carolina's Center for the Study of Retired Athletes published survey-based papers in 2005 through 2007 that found a strong correlation between depression, dementia, and other cognitive impairment in NFL players and the number of concussions those players had received.

49. To date, neuropathologists have performed autopsies on over twenty-five (25) former NFL players. Reports indicate that over ninety percent (90%) of the players had CTE.

The NFL's Knowledge of the Dangers and Risks Associated with Concussions

50. For decades, the NFL has been aware that multiple blows to the head can lead to long-term brain injury, including but not limited to memory loss, dementia, depression, and CTE and its related symptoms.

51. CTE was first addressed in a 1928 article written by pathologist Harrison Martland, discussing "Punch Drunk" syndrome in a group of athletes exposed to repetitive brain trauma (the "Martland study"). The article was published in the *Journal of the American Medical Association*.

52. The Martland study was the first to link sub-concussive blows and "mild concussions" to degenerative brain disease.

53. In or about 1952, the *Journal of the American Medical Association* published a study of encephalopathic changes in professional boxers.

54. That same year, an article published in the *New England Journal of Medicine* recommended a three-strike rule for concussions in football (*i.e.*,

recommending that players cease to play football after receiving their third concussion.)

55. In 1973, a potentially fatal condition known as "Second Impact Syndrome"—in which re-injury to the already-concussed brain triggers swelling that the skull cannot accommodate—was discovered. It did not receive this name until 1984.

56. Upon information and belief, Second Impact Syndrome has resulted in the deaths of at least forty (40) football players.

57. Between 1952 and 1994, numerous studies were published in medical journals including the *Journal of the American Medical Association*, *Neurology*, and the *New England Journal of Medicine*, warning of the dangers of single concussions, multiple concussions, and/or football-related head trauma from multiple concussions. These studies collectively established that:

i. repetitive head trauma in contact sports has dangerous long-term effects on the brain;

ii. post-mortem evidence of CTE was present in numerous cases of boxers and contact-sport athletes;

iii. there is a relation between neurologic pathology and length of career in athletes who play contact sports;

iv. immediate retrograde memory issues occur following concussions;

v. mild head injury requires recovery time without risk of subjection to further injury;

vi. head trauma is linked to dementia; and

vii. a football player who suffers a concussion requires significant rest before being subjected to further contact.

58. By 1991, three distinct medical professionals/entities, all independent from the NFL—Dr. Robert Cantu of the American College of Sports Medicine, the American Academy of Neurology, and the Colorado Medical Society—developed return-to-play criteria for football players suspected of having sustained head injuries.

59. Upon information and belief, by 1991, the National Collegiate Athletic Association ("NCAA") football conferences and individual college teams' medical staffs, along with many lower-level football groups (*e.g.*, high school, junior high school, and pee-wee league) had adopted return-to-play criteria to protect football players even remotely suspected of having sustained concussions.

60. In 1999, the National Center for Catastrophic Sport Injury Research at the University of North Carolina conducted a study involving eighteen thousand (18,000) collegiate and high school football players. The research showed that once a player suffered one concussion, he was three times more likely to sustain a second in the same season.

61. A 2000 study, which surveyed 1,090 former NFL players, found that more than sixty percent had suffered at least one concussion, and twenty-six percent had suffered three or more, during their careers. Those who had sustained concussions reported more problems with memory, concentration,

speech impediments, headaches, and other neurological problems than those who had not been concussed.

62. In 2004, a convention of neurological experts in Prague met with the aim of providing recommendations for the improvement of safety and health of athletes who suffer concussive injuries in ice hockey, rugby, football, and other sports based on the most up-to-date research. These experts recommended that a player never be returned to play while symptomatic, and coined the phrase, "when in doubt, sit them out."

63. This echoed similar medical protocol established at a Vienna conference in 2001. These two conventions were attended by predominately American doctors who were experts and leaders in the neurological field.

64. Upon information and belief, in literally hundreds upon thousands of games and practices, concussed players—including those knocked entirely unconscious—were returned to play in the *same game or practice*.

65. Indeed, while the NFL knew for decades of the harmful effects of concussions on a player's brain, it actively concealed these facts from coaches, trainers, players, and the public.

The NFL Voluntarily Undertakes the Responsibility of Studying Concussions Yet Conceals the Long-Term Effects of Concussions

66. As described above, the NFL has known for decades that multiple blows to the head can lead to long-term brain injury, including, but not limited to, memory loss, dementia, depression, and CTE and its related symptoms.

67. Rather than take immediate measures to protect its players from these known dangers, the NFL instead formed a committee to study the issue in 1994. This Committee, the Mild Traumatic Brain Injury Committee (the "MTBI Committee" or the "Committee"), voluntarily undertook the responsibility of studying the effects of concussions on NFL players.

68. Through its creation of the MTBI Committee, the NFL affirmatively assumed a duty to use reasonable care in the study of concussions and post-concussion syndrome in NFL players, and to use reasonable care in the publication of data from the MTBI Committee's work.

69. Rather than exercising reasonable care in these duties, the NFL immediately engaged in a long-running course of negligent conduct.

70. The MTBI Committee's stated goal was to present objective findings on the extent to which a concussion problem existed in the League, and to outline solutions. The MTBI Committee's studies were supposed to be geared toward "improv[ing] player safety" and for the purpose of instituting "rule changes aimed at reducing head injuries."

71. By 1994, when the NFL formed the MTBI Committee, independent scientists, doctors, and neurologists alike were already convinced that all concussions—even seemingly mild ones—were serious injuries that can permanently damage the brain, impair thinking ability and memory, and hasten the onset of mental decay and senility, especially when they are inflicted frequently and without time to properly heal.

72. The MTBI Committee was intended to be independent from the NFL, consisting of a combination of doctors and researchers.

73. In actuality however, the MTBI Committee was not independent. It consisted of at least five members who were already affiliated with the NFL.

74. The Committee was headed by Dr. Elliot Pellman, a rheumatologist who lacked any specialized training or education relating to concussions, and who reportedly had previously been fired by Major League Baseball for lying to Congress regarding his resume. Dr. Pellman would go on to chair the MTBI Committee from 1994-2007, and his leadership of the Committee came under frequent harsh outside criticism related to his deficient medical training, background, and experience.

75. The NFL failed to appoint any neuropathologist to the MTBI Committee.

76. From its inception in 1994, the MTBI Committee allegedly began conducting studies to determine the effect of concussions on the long-term health of NFL players. NFL Commissioner Roger Goodell ("Goodell") confirmed this in June 2007 when he stated publicly that the NFL had been studying the effects of traumatic brain injury for "close to 14 years . . . ."

77. The MTBI Committee did not publish its first findings on active players until 2003. In that publication, the MTBI Committee stated, contrary to years of (independent) findings, that there were no long term negative health consequences associated with concussions.

78. The MTBI Committee published its findings in a series of sixteen papers between 2003 and 2009. According to the MTBI Committee, all of their findings supported a conclusion that there were no long term negative health consequences associated with concussions. These findings regularly contradicted the research and experiences of neurologists who treat sports concussions and the players who endured them.

79. Completely contrary to public findings and conclusions, the NFL's team of hand-picked experts on the MTBI Committee did not find concussions to be of significant concern and felt it appropriate for players suffering a concussion to continue playing football during the same game or practice in which one was suffered. This recommendation and practice by the NFL, promoted by the MTBI Committee, was irresponsible and dangerous.

80. The MTBI Committee's methodology and the conclusions reached in their research were criticized by independent experts due to the numerous flaws in the study design, methodology, and interpretation of the data, which led to conclusions at odds with common medical knowledge and basic scientific protocol.

81 For example, in 2004 the MTBI Committee published a conclusion in which it claimed that the Committee's research found no risk of repeated concussions in players with previous concussions and that there was no "7- to 10- day window of increased susceptibility to sustaining another concussion."

82. In a comment to this publication, one independent doctor wrote that "[t]he article sends a message that it is acceptable to return players while still symptomatic, which contradicts literature published

over the past twenty years suggesting that athletes be returned to play only after they are asymptomatic, and in some cases for seven days."

83. As further example, an MTBI Committee conclusion in 2005 stated that "[t]here was no evidence of any adverse effect" of a player returning to play in the same game after having suffered a concussion. "These data suggest," the Committee reported, "that these players were at no increased risk" of subsequent concussions or prolonged symptoms such as memory loss, headaches, and disorientation.

84. Yet, a 2003 NCAA study of 2,905 college football players found just the opposite: "Those who have suffered concussions are more susceptible to further head trauma for seven to 10 days after the injury."

85. Other contrary conclusions that the MTBI Committee published over several years include but are not limited to the following:

i. an October 2006 article by Drs. Pellman and Viano stated that because a "significant percentage of players returned to play in the same game [as they suffered a concussion] and the overwhelming majority of players with concussions were kept out of football-related activities for less than 1 week, it can be concluded that mild [concussions] in professional football are not serious injuries;"

ii. that NFL players did not show a decline in brain function after a concussion;

iii. that there were no ill effects among those who had three or more concussions or who took hits to the head that sidelined them for a week or more;

iv. that "no NFL player experienced the second-impact syndrome or cumulative encephalopathy from repeat concussions;" and

v. that NFL players' brains responded and healed faster than those of high school or college athletes with the same injuries.

86. The Committee's papers (the "Pellman Papers") received significant criticism in the media from independent doctors and researchers, and were met with skepticism in peer review segments following each article's publication.

87. Renowned experts Dr. Robert Cantu and Dr. Julian Bailes wrote harshly critical reviews of the studies' conclusions.

88. The Pellman Papers were also criticized in the popular press by ESPN and the *New York Times* when repeated inconsistencies and irregularities in the MTBI Committee's data were revealed.

89. An ESPN article described how the MTBI Committee failed to include hundreds of neuropsychological tests done on NFL players in the results of the Committee's studies on the effects of concussions. The article further revealed that Dr. Pellman had fired a neuropsychologist for the New York Jets, Dr. William Barr, after Dr. Barr voiced concern that Dr. Pellman might be picking and choosing what data to include in the Committee's research to get

results that would downplay the negative effects of concussions.

90. As described in the following paragraphs, when faced with studies which implicated a causal link between concussions and cognitive degeneration, the NFL, through the MTBI Committee, continued to produce contrary findings which were false, distorted, and deceiving, all in an effort to conceal and deceive players and the public at large.

91. Between 2002 and 2007, Dr. Bennet Omalu examined the brain tissue of deceased NFL players, including Mike Webster, Terry Long, Andre Waters, and Justin Strzelczyk. Dr. Omalu concluded that the players suffered from CTE. Some of his findings were published in *Neurosurgery* articles.

92. In response to Dr. Omalu's articles, the MTBI Committee wrote a letter to the editor of *Neurosurgery* asking that Dr. Omalu's article be retracted.

93. In 2005, a clinical study performed by Dr. Kevin Guskiewicz found that retired players who sustained three or more concussions in the NFL had a five-fold prevalence of mild cognitive impairment in comparison to NFL retirees without a history of concussions. In doing this research, Dr. Guskiewicz conducted a survey of over 2,550 former NFL athletes. The MBTI Committee attacked and undermined the study, stating: "We want to apply scientific rigor to this issue to make sure that we're really getting at the underlying cause of what's happening. . . . You cannot tell that from a survey."

94. In August 2007, the NFL, in keeping with its deceit, issued a concussion pamphlet to players which stated: "Current research with professional athletes has not shown that having more than one or two

concussions leads to permanent problems if each injury is managed properly. . . . Research is currently underway to determine if there are any long-term effects of concussion[s] in NFL athletes."

95. In a statement made around the time that the concussion pamphlet was released, NFL Commissioner Roger Goodell said, "We want to make sure all NFL players . . . are fully informed and take advantage of the most up to date information and resources as we continue to study the long-term impact on concussions." The NFL decided that the "most up to date information" did not include the various independent studies indicating a causal link between multiple concussions and cognitive decline in later life.

The NFL's Belated Acknowledgement of the Concussion Crisis

96. Facing increasing media scrutiny over the MTBI Committee's questionable studies, Dr. Pellman eventually resigned as the head of the Committee in 2007. He was replaced as head by Dr. Ira Casson and Dr. David Viano, but remained a member of the Committee.

97. Dr. Casson continued to dismiss outside studies and overwhelming evidence linking dementia and other cognitive decline to brain injuries. When asked in a 2007 public interview whether concussions could lead to brain damage, dementia, or depression, Dr. Casson denied the linkage six separate times.

98. In June 2007, the NFL convened a concussion summit for team doctors and trainers. At the summit, Dr. Casson told team doctors and trainers that CTE has never been scientifically documented in football players.

99. When Boston. University's Dr. Ann McKee found CTE in the brains of two more deceased NFL players in 2008, a MTBI Committee representative characterized each study as an "isolated incident" from which no conclusion could be drawn.

100. In 2008, under increasing pressure, the NFL commissioned the University of Michigan's Institute for Social Research to conduct a study on the health of retired players. Over 1,000 former NFL players took part in the study. The results of the study, released in 2009, reported that "Alzheimer's disease or similar memory-related diseases appear to have been diagnosed in the league's former players vastly more often than in the national population---including a rate of 19 times the normal rate for men ages 30 through 49."

101. The NFL, **who commissioned the study**, responded to these results by claiming that the study was incomplete, and that further findings would be needed. Other experts in the field found the NFL's reaction to be "bizarre," noting that "they paid for the study, yet they tried to distance themselves from it."

102. After the results of this study were released, Representative John Conyers, Jr., Chairman of the House Judiciary Committee, called for hearings on the impact of head injuries sustained by NFL players.

103. At the first hearing in October 2009, NFL Commissioner Roger Goodell acknowledged that the NFL owes a duty to the public at large to educate them as to the risks of concussions due to the League's unique position of influence: "In addition to our millions of fans, more than three million youngsters aged 6-14 play tackle football each year; more than one million high school players also do so and nearly

seventy five thousand collegiate players as well. We must act in their best interests even if these young men never play professional football."

104. Also at the October hearing, NFL Players' Association Executive Director DeMaurice Smith stated, "[T]here have been studies over the last decade highlighting [connection between on-field injury and post career mental illness]. Unfortunately, the N.F.L. has diminished those studies, urged the suppression of the findings and for years, moved slowly in an area where speed should have been the impetus."

105. Dr. Casson gave testimony at these hearings, and continued to deny the validity of other non-NFL studies, stating that "[t]here is not enough valid, reliable or objective scientific evidence at present to determine whether or not repeat head impacts in professional football result in long term brain damage."

106. In 2007, in a televised interview on HBO's Real Sports, Dr. Casson definitively and unequivocally stated that there was no link between concussions and depression, dementia, Alzheimer's disease, or "anything like [that] whatsoever."

107. Shortly after the 2009 congressional hearings, however, the NFL announced that it would impose its most stringent rules to date on managing concussions, requiring players who exhibit any significant sign of concussion to be removed from a game or practice and be barred from returning the same day.

108. On or about December 20, 2009, the NFL publicly acknowledged for the first time, through its spokesman Greg Aiello, that "concussions can lead to long-term problems."

109. In January 2010, the House Judiciary Committee held further hearings on football player head injuries. Representative Conyers noted that "until recently, the NFL had minimized and disputed evidence linking head injuries to mental impairment in the future."

110. The NFL's belated change of policy contradicted past recommendations by its MTBI Committee which had recommended as safe the League's practice of returning players to the game after a concussion. In fact, the Committee had published a paper in 2005 that stated "[p]layers who are concussed and return to the same game have fewer initial signs and symptoms than those removed from play. Return to play does not involve a significant risk of a second injury either in the same game or during the season."

111. In 2010, the NFL re-named the MTBI Committee to the "Head, Neck, and Spine Medical Committee" and announced that Dr. Pellman would no longer be a member of the panel. Drs. H. Hunt Batjer and Richard Ellenbogen were selected to replace Drs. Casson and Viano.

112. Under its new leadership, the Committee admitted that data collected by the NFL's formerly appointed brain-injury leadership was "infected," and said that their Committee should be assembled anew.

113. Dr. Batjer was quoted as saying, "[w]e all had issues with some of the methodologies described, the inherent conflict of interest that was there in many areas, that was not acceptable by any modern standards or not acceptable to us. I wouldn't put up with that, our universities wouldn't put up with that, and we don't want our professional reputations damaged by conflicts that were put upon us."

114. In June 2010, scientific evidence linked multiple concussions to yet another degenerative brain disease—Amyotrophic Lateral Sclerosis ("ALS"), commonly referred to as "Lou Gehrig's Disease."

115. In October 2011, Dr. Mitchel Berger of the Head, Neck, and Spine Medical Committee announced that a new study was in the planning process. He admitted that the MTBI Committee's previous long-range study was useless because "[t]here was no science in that." Dr. Berger further stated that data from the previous study would not be used. "We're really moving on from that data. There's really nothing we can do with that data in terms of how it was collected and assessed."

116. Now, the NFL requires its member teams to have concussion experts on the sidelines during games to clear players suspected of concussions prior to their return to play.

117. Notwithstanding this new policy, on October 23, 2011, San Diego Charger Kris Dielman plainly suffered a concussion early in a game and could be seen staggering back to the huddle. Despite the obvious brain injury, Mr. Dielman was neither evaluated by a doctor nor held out for even one play. He suffered grand mal seizures on the team's plane ride home.

118. Ten days later, in November of 2011, the League's injury and safety panel issued a directive telling its game officials to watch closely for concussion symptoms in players.

119. On or about December 21, 2011, the NFL alerted all thirty two teams that, effective immediately, an independently certified athletic trainer would be assigned to monitor all suspected concussion-

related injuries. The independent trainers are paid by the NFL and approved by the NFL Players' Association. The trainers' sole purpose is to oversee the treatment of possible concussions and ensure that medical staff on each sideline are following proper League protocol and testing for any head trauma.

120. Why League policy changes, accurate information sharing, strict fines and warnings were not recommended by the NFL's so called "expert" committee soon after its creation in 1994 is difficult to comprehend. That it took sixteen (16) years to admit that there was a problem and to take real action to address that problem is willful and wanton and exhibits a reckless disregard for the safety of its players and the public at large.

THE REPRESENTATIVE PLAINTIFFS' SPECIFIC FACTUAL ALLEGATIONS

Plaintiff Shawn Wooden's Concussion History in the NFL and Injuries

121. Plaintiff Sean Wooden played in the NFL from 1996 to 2004.

122. Plaintiff Wooden sustained numerous diagnosed and undiagnosed concussions while playing in the NFL.

123. Plaintiff Wooden was returned to play too soon after having suffered his concussions and subsequently suffered other head injuries or blows to the head.

124. At no time did the NFL inform Plaintiff Wooden that he risked severe and permanent brain damage by returning to play too soon after sustaining a concussion. The NFL's failure was a substantial cause of his current injuries.

125. As a result of the numerous concussions suffered during his playing career, Plaintiff Wooden suffers from, *inter alia*, problems with short-term memory and migraine headaches. Plaintiff Wooden is also at heightened risk of developing further adverse neurological symptoms in the future.

Plaintiff Ryan Fowler's Concussion History in the NFL and Injuries

126. Plaintiff Ryan Fowler played in the NFL from 2004 to 2009.

127. Plaintiff Fowler sustained numerous diagnosed and undiagnosed concussions while playing in the NFL.

128. Plaintiff Fowler was returned to play too soon after having suffered his concussions and subsequently suffered other head injuries or blows to the head.

129. At no time did the NFL inform Plaintiff Fowler that he risked severe and permanent brain damage by returning to play too soon after sustaining a concussion. The NFL's failure was a substantial cause of his current injuries.

130. As a result of the numerous concussions suffered during his playing career, Plaintiff Fowler suffers from, *inter alia*, mood swings. Plaintiff Fowler is also at heightened risk of developing further adverse neurological symptoms in the future.

COUNT I—CLASS ACTION CLAIM FOR MEDICAL MONITORING

131. The Representative Plaintiffs adopt and incorporate by reference all prior paragraphs of this Complaint as if fully set forth herein.

132. As a result of the NFL's negligent misconduct, the Representative Plaintiffs and the Class have been exposed to a greater than normal risk of brain injury following a return to contact play too soon after suffering an initial concussion, thereby subjecting them to a proven increased risk of developing the adverse symptoms and conditions described above.

133. The Representative Plaintiffs and the Class have not yet fully begun to evidence many of the long-term physical and mental effects of the concussive injuries they sustained while playing in the NFL, which may remain latent and go undetected for some period of time.

134. These latent brain injuries require specialized testing that is not generally given to the public at large.

135. The available monitoring regime is specific for individuals exposed to concussions, and is different from that normally recommended in the absence of exposure to this risk of harm. The medical monitoring regime includes, but is not limited to, baseline exams and diagnostic exams which will assist in diagnosing the adverse health effects associated with concussions. This diagnosis will facilitate the treatment and behavioral and/or pharmaceutical interventions that will prevent or mitigate the various adverse consequences of the latent neurodegenerative disorders and diseases associated with the repeated traumatic head impacts that these players experienced while playing in the NFL.

136. The available monitoring regime is reasonably necessary according to contemporary scientific principles within the medical community specializing in the diagnosis of head injuries and their potential link

to, *inter alia*, memory loss, early onset dementia, CTE, Alzheimer-like syndromes, and similar cognition-impairing conditions.

137. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Plaintiffs seek certification of a medical monitoring class in this matter, consisting of:

> All retired NFL players who played prior to the 2010 NFL season and who, during their NFL careers, suffered a concussion and were returned to contact play within ten (10) days of having suffered the concussion, and who, as of the date of class certification, are neither (a) advancing an individual personal injury claim for money damages against the NFL, nor (b) a salaried employee of the NFL.

138. By monitoring and testing these former NFL players, the risk of each such player suffering the long term injuries, disease, and losses, as described above, will be significantly reduced.

139. Because the NFL has until now failed to properly, reasonably, and safely monitor, test, and/or otherwise study whether and when a player has suffered a concussion to minimize the risk of long-term injury or illness, medical monitoring is the most appropriate method to determine whether a particular individual is now at risk of long-term injury or illness associated with a concussive event.

140. Accordingly, the NFL should be required to establish a medical monitoring program that includes, *inter alia*:

i. Establishing a trust fund, in an amount to be determined, that will

pay for the medical monitoring, as necessary and appropriate, of all retired NFL players who played prior to the 2010 NFL season and who, during their NFL careers, suffered a concussion and were returned to contact play within ten (10) days of having suffered the concussion, and who, as of the date of class certification, are neither (a) advancing an individual personal injury claim for money damages against the NFL, nor (b) a salaried employee of the NFL; and

ii. Notifying in writing all Class members that they should have frequent medical monitoring.

141. The Representative Plaintiffs and Class members have no adequate remedy at law because monetary damages alone cannot compensate them for the risk of long-term physical and economic losses due to concussive injuries. Without a Court-approved medical monitoring program as described herein, or established by the Court, the Representative Plaintiffs and Class members will continue to face an unreasonable risk of injury and disability, and any potential damages they suffer will be exponentially increased due to a lack of timely diagnosis.

WHEREFORE, the Representative Plaintiffs individually and on behalf of the proposed Class, demand a jury trial on all claims so triable, and pray for judgment as follows:

i. Certification of the proposed Class pursuant to Federal Rule of Civil Procedure 23;

ii. Designation of Plaintiffs as representatives of the proposed Class and designation of the Representative Plaintiffs' counsel as Class counsel;

iii. The establishment of a medical monitoring program/regime which includes, among other things, those measures described above;

iv. Costs and disbursements incurred by the Representative Plaintiffs in connection with this action, including reasonable attorneys' fees and costs pursuant to applicable law; and

v. Such other relief as the Court deems just and proper.

Dated this 24th day of January, 2012.

Respectfully submitted,

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APPENDIX E

[1] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 15-2206/2217/2230/2234/2272/2273/ 2290/2291/2292/2294/2304/2305

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION

Craig Heimburger; Dawn Heimburger,

Appellants in 15-2206

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION

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

Appellants in 15-2217

*Robert Jackson dismissed per Clerk's Order of 10/21/15

(Caption Continues)

Transcript from the audio recording of the oral argument held Thursday, November 19, 2015 at the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania. This transcript was produced by James DeCrescenzo, a Fellow of the Academy of Professional Reporters, a Registered Diplomate Reporter, an Approved Reporter of the United States District Court.

BEFORE:

THE HONORABLE THOMAS L. AMBRO
THE HONORABLE THOMAS M. HARDIMAN
THE HONORABLE RICHARD L. NYGAARD

* * *

[57] MR. BASHMAN: Well, unlike Mr. Gupta who said he doesn't want to explode the settlement, my clients perceive that he does better without having any class action. So my argument to you, just so that there's no doubt, is that this case –

THE COURT: And he did not opt out?

MR. BASHMAN: Correct. He would have been worse off, he would have been marginalized if he had opted out and the settlement went forward instead.

THE COURT: What does that mean? What do you mean marginalized?

MR. BASHMAN: That the value of his –

THE COURT: That he wouldn't have a fair hearing in court?

MR. BASHMAN: What I'm saying is the value of his case is better if there's no settlement than if he had opted out and the settlement goes through.

THE COURT: Why? If he opts out and has his day in court, the sky's the limit. He'll get whatever damages he proves up, would he not?

MR. BASHMAN: The answer to that question is that the number of people that were [58] pursuing these cases before the class action was brought were a distinct group of folks who had counsel, and my client was one of those.

And so I think that as we perceive it, as his counsel and the client himself, it's not the same, if there were individual cases being pursued even through the MDL, which of course is a way that you can coordinate pretrial proceedings –

THE COURT: That sounds like a roundabout way of saying you'd be able to get a much better settlement if the NFL was getting sued in thousands of cases rather than having to litigate a small number of cases.

Is that your point?

MR. BASHMAN: Right. And I don't think there's anything wrong with coming in here and saying that, because that's my client's interest.

THE COURT: Okay. All right.

A. All right.

MR. BASHMAN: Thank you, Your Honors.

THE COURT: Thank you very much. Mr. O'Brien.

MR. O'BRIEN: Good morning, Your

* * *

[119] THE COURT: They say it's just right, you say it doesn't cover nearly enough.

MR. GUPTA: Right. And you're going to have – when you look at a settlement someone's always going to say you could have done better, someone's going to say this is good enough, and those are hard questions to decide, right?

And that's why I think the case law that's developed, particularly in this circuit, looks at whether there are structural assurances of fairness, because that is something you can sink your teeth into.

And the problem here is that you didn't have truly independent representation for those folks. And there's no good answer for why they couldn't go to the judge and get someone to do that.

And finally, and I just want to make as a point of personal privilege, Mr. Issacharoff said I said something that's not true.

I'm not representing to the court that Mr. Levin is currently representing clients that have a qualifying diagnosis. I don't know that.

We presented to the court in our [120] judicial notice motion those complaints, so you can see he's unquestionably representing people who claimed present injuries, while simultaneously representing the future subclass.

And finally just on the point of fees.

There's no good reason, and I don't think you've heard from the other side, why you couldn't have supplemental fee applications, why you can't do, as this court said in GM Trucks, make the fee application part of any thorough consideration of a supplement, but if there's additional work you can have a mechanism for supplemental fee applications.

That happens all the time.

What you have never seen is a court of appeals approving a complete deferral of any consideration of fees as part of a settlement.

THE COURT: Is there anything that requires that the fees must be considered at the same time of the settlement?

MR. GUPTA: What Judge Posner in the Seventh Circuit has said is that if you read 23(h) –

THE COURT: In dissent, right?

* * *

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 06/25/14]

No. 2:12-md-02323-AB
MDL No. 2323
CIVIL ACTION NO: _____

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION

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.

THIS DOCUMENT RELATES TO: ALL ACTIONS

Hon. Anita B. Brody

DECLARATION OF MEDIATOR AND FORMER UNITED STATES DISTRICT COURT JUDGE LAYN R. PHILLIPS IN SUPPORT OF PRELIMINARY APPROVAL OF SETTLEMENT

Layn R. Phillips declares as follows:

1. I am the Court-appointed mediator in this action and a former United States District Court Judge. I submit this declaration in support of preliminary approval of the proposed class action settlement between the proposed Plaintiff Class and defendants NFL and NFL Properties LLC (collectively, the "NFL Parties").

2. At the request of the Court, I conducted an extensive mediation over the course of the last five months that produced the proposed settlement now before the Court for preliminary approval. The parties negotiated this settlement under my supervision. The talks were vigorous, at arm's length, and in good faith. Based on my extensive experience as a mediator and former judge, my frequent and detailed discussions with the parties, and the information made available to me during the mediation, I believe that the $760 million proposed settlement (plus attorneys' fees and reasonable costs) represents a fair and reasonable settlement given the substantial risks involved for both sides. Without waiver of the mediation privilege, I describe below the reasons for my view.

Qualifications and Experience

3. I am a partner at Irell & Manella LLP. I am a member of the bars of Oklahoma, Texas, California and the District of Columbia, as well as the United States Courts of Appeals for the Ninth and Tenth Circuits. I am the former United States Attorney for the Northern District of Oklahoma and a former United States District Court Judge for the Western District of Oklahoma. I founded the Irell & Manella Alternative Dispute Resolution Center, where I have headed the firm's ADR practice since 1991.

4. I have successfully mediated complex commercial cases, including hundreds of class actions, for over twenty years. Before that, as a federal judge, I presided over hundreds of settlement conferences in complex business disputes and class actions. I have been appointed Special Master by numerous federal courts in complex civil proceedings. It is not uncommon for me to settle billions of dollars of disputes on an annual basis. It is my understanding that I was nominated by the parties and appointed by the Court to mediate this important matter in part because of my extensive experience resolving complex, high-visibility disputes of this kind.

The Mediation Process

5. Under my supervision, beginning immediately upon my appointment by the Court in July of this year, the parties engaged in arm's-length, hard-fought negotiations. As is my practice, I conducted multiple face-to-face mediation sessions with both sides present, as well as many separate caucus sessions where I met only with one side or the other. All of these in-person mediation sessions were conducted in New York City. However, I also engaged in considerable telephonic follow-up work with all of the parties involved. In addition, counsel for the parties conducted extensive negotiations outside my presence pursuant to requests and directions that I gave to them. I dedicated more than twelve full days to mediate this matter in addition to the considerable hours I invested in discussions with the parties outside these formal sessions.

6. At all times, the parties aggressively asserted their respective positions on a host of issues. On occasion, the negotiations were contentious (although both sides were always professional). Because of the

schedule that the Court imposed and the number and complexity of issues to be resolved, members of my mediation team and I sometimes multi-tracked mediation efforts by separately addressing different sets of issues with various counsel and the parties' experts during in-person mediation sessions in New York City, as well as during the telephonic follow-up process. On almost every day between my appointment as mediator and the announcement of the settlement on August 29, the parties and I discussed issues relating to possible settlement.

7. Plaintiffs and the NFL Parties each were represented by highly experienced, effective and aggressive counsel. I was satisfied throughout the negotiations that the parties' positions were thoroughly explored and advanced. Multiple law firms and individual counsel were involved on behalf of both sides. These counsel presented an impressive array of legal experience, talent, and expertise. Moreover, in order to ensure the adequate and unconflicted representation of all of the proposed class members, Plaintiffs agreed during the negotiations to create two proposed separate subclasses, each represented by separate counsel. Generally speaking, one subclass is composed of retired NFL players who have diagnosed cognitive impairments; the other subclass is composed of retired players without a diagnosis of cognitive impairment. Plaintiffs believed—and I agreed—that having these two separate subclasses would ensure that any final resolution did not favor retired players who are currently suffering from compensable injuries from those who have not been diagnosed and who may not develop compensable injuries for years to come, if ever.

8. In addition to highly experienced counsel, both Plaintiffs and the NFL Parties retained various

medical and actuarial/economics experts to assist them in the settlement negotiations. The medical experts advised the parties on the multiplicity of medical definition issues and other medical aspects of the settlement. The parties' economists and actuaries assisted in modeling the likely disease incidence and adequacy of the funding provisions and benefit levels contained in the proposed settlement. I met personally with certain of the parties' experts during the mediation to satisfy myself that the parties were being expertly advised and were considering the relevant issues. The parties' experts also answered many of the questions I had about how the proposed settlement would operate, as well as any underlying considerations they had made and their analysis and conclusions. It was clear to me that both sides had experts that were extremely well-versed in the medical literature and issues relevant to arriving at a fair settlement that would function efficiently over the course of the settlement period.

9. During the course of the mediation and at my request, the parties submitted various mediation materials to me and made multiple presentations regarding their positions on various factual and legal issues. I was assisted in my work and analysis by colleagues at my law firm, who independently reviewed the materials and the relevant law. During the mediation sessions, there were extensive discussions of the strengths and weaknesses of the parties' various positions and of possible settlement structures.

10. As would be expected, the proposed terms of the settlement changed substantially over the course of time. On numerous occasions, although the parties shared a common goal, they proposed very different

visions of how to achieve that goal. I worked constructively with counsel to offer possible compromises and solutions.

11. At all times, Plaintiffs' counsel zealously represented the proposed class and subclasses. They regularly and passionately expressed the need to protect the interests of the retirees and their families and fought hard for the greatest possible benefits in the context of a settlement that the NFL Parties could accept. It was evident throughout the mediation process that Plaintiffs' counsel were prepared to litigate and try these cases, and face the risk of losing with no chance to recover for their labor or their expenses, if they were not able to achieve a fair and reasonable settlement result for the proposed class.

12. At the same time, Plaintiffs' counsel recognized—correctly in my judgment—the significant legal and factual hurdles Plaintiffs faced if they proceeded with the litigation. First and foremost, a litigation of this size and complexity can take many years to litigate. By resolving the litigation at this time, Plaintiffs' counsel, in part, sought to compensate impaired retired NFL players who need money now in order to address their medical conditions. They also ensured that compensation and medical testing will be available for retired NFL players who are not impaired at present, but may become so in the future.

13. Second, Plaintiffs faced the serious risk that the Court would find that their claims were preempted, in whole or in part, by federal labor law and under the various Collective Bargaining Agreements. I reviewed the parties' briefs on the NFL Parties' motions to dismiss

* * *

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed: 11/12/14]

No. 2:12-md-02323-AB
MDL No. 2323
CIVIL ACTION NO: 2:14-cv-00029-AB

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION

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.

THIS DOCUMENT RELATES TO: ALL ACTIONS

Hon. Anita B. Brody

SUPPLEMENTAL DECLARATION OF MEDIATOR AND FORMER UNITED STATES DISTRICT COURT JUDGE LAYN R. PHILLIPS IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT AND CERTIFICATION OF CLASS AND SUBCLASSES

Layn R. Phillips declares as follows:

1. Shortly after the Court heard oral argument on Defendants' motions to dismiss Plaintiffs' claims in this litigation on grounds of preemption under Section 301 of the Labor Management Relations Act, I was appointed by the Court to serve as the mediator in the negotiations between the Plaintiff Class and the National Football League and NFL Properties, LLC (collectively, the "NFL Parties"). I am a former United States District Court Judge. Previously, I submitted a declaration in support of preliminary approval of the proposed class

* * *

registration for benefits, testing of players for neurocognitive impairment, submission of claims, appeals from monetary award decisions, and lien identification and satisfaction. Plaintiffs worked with a class action notice expert to create a Notice Plan and proposed class notices that met the requirements of Rule 23 and satisfied Due Process. I met with the parties' experts at various times to satisfy myself that the medical, actuarial, or financial aspects of the deal were sound.

6. Early on, the parties agreed that a reasonable and fair settlement structure would encompass (i) a baseline assessment program ("BAP") to medically evaluate retired players for neurocognitive impairment; (ii) a compensation fund to provide cash payments to players diagnosed with neurocognitive or neuromuscular impairment[1]; and (iii) an education fund to

[1] Due to the young age of some of the retired players, the compensation fund needed to be available throughout the projected lifespan of those young players, which from an actuarial standpoint required a 65-year term.

promote safety in the sport of football and to educate retired players about available NFL medical and disability benefits programs and initiatives. The Plaintiffs insisted that independent administrators oversee each component of the settlement program and that independent doctors conduct the baseline tests to determine whether living players suffer from neurocognitive decline.

7. In order to ensure the adequate and unconflicted representation of all of the proposed Class Members, Plaintiffs agreed to create two proposed separate subclasses, each represented by separate subclass counsel – (1) to include those Class Members who were not diagnosed with a qualifying injury; and (2) to encompass Class Members diagnosed with a qualifying injury. Plaintiffs believed – and I agreed – that having these two separate subclasses would ensure that any final resolution did not favor retired players who are currently suffering from compensable injuries from those who have not been diagnosed and who may not develop compensable injuries for years to come, if ever. Subclass Counsel participated in the negotiations on behalf of their respective subclasses and were involved throughout the mediation process.

8. Plaintiffs' Co-Lead Counsel demanded that a range of injuries consistent with those alleged in the Complaints be considered eligible for a monetary award. They were not able to achieve all that they asked for in the negotiations. Plaintiffs' actions throughout the negotiations reflected a sound appreciation of the scientific issues associated with their claims. They were aware of mainstream medical literature linking traumatic brain injury to an increase in the likelihood for developing early-onset dementia, Alzheimer's Disease, Parkinson's Disease,

and ALS. Informed by their experts and based on their investigation, the Plaintiffs concluded that it was fair to compensate retired players for those diagnoses as part of the Settlement.

9. Plaintiffs' Co-Lead Counsel passionately advocated for significant, "full value" awards for dementia, Alzheimer's Disease, Parkinson's Disease, and ALS. Importantly, they also insisted that even though, at present, not every retired player has been diagnosed with a qualifying injury, all retired players must be eligible to seek a monetary award if and when their symptoms progress to a compensable level. In addition, it was very important to the Plaintiffs that players be able to seek a supplemental monetary award if their condition worsens.

10. Each side relied upon their respective independent economists and actuaries to model the sufficiency of funding necessary to compensate Plaintiffs for these injuries at various monetary award levels throughout the life of the Settlement.

11. With limited exception, the Settlement compensates retired players and their families for deficits and diseases that they suffered from while living. Though the pathological diagnosis of CTE is not compensated as an injury prospectively, severe cognitive impairments developed in living retired players, which have been associated with traumatic brain injury in the medical literature as well as more advanced forms of CTE, are compensated (*i.e.*, early and moderate dementia). Plaintiffs also were able to secure recovery for the families of those individuals who were deceased prior to preliminary approval and had a post-mortem diagnosis of CTE, and thus the "Death with CTE" injury definition was agreed to for pre-approval deaths with confirmed CTE from autopsy.

12. Class Counsel also demanded that retired players maintain their rights to pursue claims for worker's compensation and benefits under all applicable Collective Bargaining Agreements and that their participation in the settlement not vitiate these rights. After robust negotiations on these points, the NFL Parties agreed not to enforce the releases and covenants not to sue that were previously executed by Class Members in connection with claims for the Neuro-Cognitive Disability Benefit under Article 65 of the current CBA. This was a major concession for the NFL Parties and a negotiating victory for the Plaintiffs, because these waivers would have deprived many retired players of substantial additional Settlement benefits.

13. As part of their negotiations, the parties agreed that the proposed Settlement will not require Class Members to prove that their injuries were caused by or even related to concussions suffered during NFL football play. Class Members will need only to demonstrate class membership and a qualifying injury in order to receive a monetary award. Appropriately, the parties, in consultation with their medical and actuarial experts, negotiated and agreed to four limited categories of downward adjustments, or offsets, that may be applied to all monetary

* * *

17. Subclass Counsel fulfilled their fiduciary responsibilities and performed their own due diligence to evaluate the deal to determine for themselves whether it was fair and satisfied the needs of their respective Subclass members and Due Process.

18. Notably, the Settling Parties did not discuss the issue of attorneys' fees at any point during the

mediation sessions, except to defer the issue until after an agreement in principal was reached on all material Settlement terms. When the parties executed the Term Sheet there was no fee agreement in place. Class Counsel agreed to settle Plaintiffs' claims on a global basis regardless of whether an agreement could be reached on this issue. In other words, the Plaintiffs' negotiators did not allow the issue of attorneys' fees to impede the resolution of the litigation. They agreed to go forward with this deal, and apply for fees at a later time, subject to Court approval.

19. Eventually, after the Court announced the Settlement on the record, the parties discussed the amount of payment of attorneys' fees separate and apart from all other Settlement benefits, and the NFL Parties agreed not to object to a petition for an award of attorneys' fees and reasonable incurred costs by Class Counsel, provided the amount requested does not exceed $112.5 million. In the event these attorneys' fees and costs are awarded by the Court, the NFL Parties will pay them on top of the other Settlement benefits. Unlike traditional common fund cases where attorneys' fees are obtained directly from the common fund, the Settlement Class is further benefitted by the separate payment of attorneys' fees by the NFL Parties.

20. Ever present in the minds of the parties during the mediation of this Settlement were the potential risks of litigation for both sides. The Court had heard oral argument on Defendants' preemption motions but was awaiting the results of the settlement talks before issuing a ruling. As the Court stated in the Preliminary Approval Order: "Many, if not all, of

* * *