United States Court of Appeals
for the
Third Circuit

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

IN RE NATIONAL FOOTBALL LEAGUE PLAYERS'
CONCUSSION INJURY LITIGATION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(HON. ANITA B. BRODY, MDL NO. 2323 and NO. 2:14-CV-0029-AB)

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Abbreviation	Denotes References to the Following
ACB	Brief of Appellant Curtis L. Anderson [Appeal No. 15-2230]
ALB	Brief of Appellants L. Patrise Alexander, Charlie Anderson, et al. [Appeal No. 15-2273]
ALS	Amyotrophic Lateral Sclerosis
ARB	Brief of Appellants Raymond Armstrong, Larry Barnes et al. [Appeal No. 15-2272], and Willie T. Taylor [Appeal No. 15-2294]
BAP	Baseline Assessment Program
BIAA	Brief of Amicus Curiae Brain Injury Association of America [filed on Aug. 20, 2015]
CBA	Collective Bargaining Agreement
CDB	Brief of Appellant Darren Russell Carrington [Appeal No. 15-2234]
CTE	Chronic Traumatic Encephalopathy
FB	Brief of Appellants Alan Faneca, Roderick "Rock" Cartwright, Jeff Rohrer, and Sean Considine [Appeal No. 15-2304]
GB	Brief of Appellant Scott Gilchrist [Appeal No. 15-2290]
HB	Brief of Appellants Craig Heimburger and Dawn Heimburger [Appeal No. 15-2206]

JA	The 16-volume Joint Appendix
JJB	Brief of Appellants Jimmie Jones, Ricky Ray, and Jesse Solomon [Appeal No. 15-2291]
MAF	Monetary Award Fund
MCB	MCB Brief of Appellants Cleo Miller et al. [Appeal No. 15-2217
MJB	Brief of Appellant James Mayberry [Appeal No. 15-2305]
MAF	Monetary Award Fund
MTBI	Mild Traumatic Brain Injury
NFL	National Football League
PC	Brief of Amicus Curiae Public Citizen, Inc. [filed on Aug. 26, 2015]
SB	Brief of Appellant Andrew Stewart [Appeal No. 15-2292]

CROSS-REFERENCE INDEX

Pursuant to Third Circuit L.A.R. 28.2, the arguments presented in the brief of the Consolidated Brief of Class Plantiffs-Appellees respond to the questions raised and arguments presented by the Objector-Appellants and *Amici Curiae* supporting them on the following pages:

Argument	**Question Presented**	**Appellant Group Brief Page Numbers**
I	Whether the District Court Erred in its Extraordinary Oversight of the Class Settlement	Alexander, pp. 29-30, 37, 44, 50 Armstrong/Taylor, p. 21 Anderson, pp. 4-5, 10-11, 18-22, 29-30, 37-40, 43 Carrington, pp. 7-8, 22-23 Faneca, pp. 51-52, 56-57, 61 Gilchrist, pp. 1-5, 12-13, 15-21 Heimburger, pp. 10-17 Jones, pp. 28-29, 50-51
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III	Whether the Settlement is Fair, Reasonable and Adequate	Alexander, pp. 6-7, 22-25, 31, 32-34 Anderson, pp. 4-5, 10-11, 18-22 Armstrong/Taylor, pp. 20-21, 25, 27, 46-54 BIAA, pp. 3-22, 24-32 Carrington, pp. 17-22 Jones, pp. 1-5, 24, 27, 31-34, 36, 44-51 Faneca, pp. 39-46, 47-50 Miller, pp. 17-26 Stewart, pp. 12-24
IV	Whether the Settlement Satisfies all of the *Girsh* and *Prudential* Factors	Alexander, pp. 26-29, 37, 44-50, 51 Armstong/Taylor, p. 21 Carrington, pp. 7-8, 22-23 Faneca, pp. 52-53, 55-60 Heimburger, pp. 10-11 Jones, pp. 29-31

INTRODUCTION

About a decade ago, thousands of retired National Football League ("NFL") players were forced to confront a harrowing truth. The game of football, the dream of innumerable schoolboys and the defining achievement of those few who reach the NFL, had put their lives at risk. Ultimately, the problems of memory loss and neurological failure were not isolated events but a result of the brain injuries that came from many years of violent hits on the gridiron. And, as the evidence mounted of the effects of repeated concussions and even subconcussive hits, the players watched as representatives of their beloved NFL proclaimed before congressional committees and in other fora that the science could not establish that football was in any manner unsafe.

Dismayed, the players took action. More than 5,200 retired players filed more than 300 lawsuits that were ultimately joined in the multidistrict litigation ("MDL") proceedings below. Unfortunately, these lawsuits brought no relief. Some were technically time barred under the applicable statutes of limitations. But mostly the players faced two overwhelming hurdles. First, for almost all relevant periods, the retired football players operated under a collective bargaining

agreement that courts had found to preempt any state tort law liability. Second, every NFL player had played football from a very young age through high school and college. Whatever correlations could be established between football and brain injury could not isolate the years of NFL exposure as the defining sources of injury. To date, the NFL has not compensated a single retired player in any lawsuit for the specific injuries that he suffered.

Until now. In a breakthrough settlement negotiated under the unprecedented supervision of the district court, the settling parties offer compensation and medical screening worth about a billion dollars to the more than 20,000 retired players and their families that make up the class. The settlement compensates the neurocognitive and neuromuscular manifestations that current science establishes are associated with head injury or football. The district court was active from the outset in initiating the settlement process, rejecting the first proposed settlement, and ultimately ensuring that significant benefits were added to the original agreement. The court frontloaded its supervision of the settlement and issued a 132-page opinion analyzing every aspect of the settlement and responding in detail to every

objection. Separate subclasses, with separate counsel, represented the presently injured with a neurocognitive or neuromuscular diagnosis, and those without present injury, thus ensuring structural integrity. An experienced mediator and special master reinforced the structural integrity. In short, this case is a model class action settlement.

The objections challenging the settlement are a laundry list of wishes and claims that disregard the district court's fact finding and this Court's controlling precedent. Despite the outsized rhetoric of the Objectors, the settlement—no doubt the most publicized in American class action history—has been wildly popular with the class. Far from the rationally passive absent class members that populate the annals of class action law, this class is cohesive and knowledgeable. Playing in the NFL defines a life, and the class is unified by that fact. And the class has already spoken, and not only by not opting out. More than 7,000 class members have signed up to receive further information about how to enroll for benefits, though that claims process and actual registration are stalled by the present appeals.

This settlement is a model of what a properly supervised process can deliver in terms of substantial and immediate benefits to the class,

while avoiding the catastrophic risks associated with further litigation. This Court should affirm its final approval in all respects.

STATEMENT OF ISSUES

1. Did the district court act within its considerable discretion in certifying a class for settlement of the claims against the NFL?

2. Did the district court clearly err in finding the settlement fair, reasonable, and adequate?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY LEADING TO SETTLEMENT AND DISTRICT COURT APPROVAL

A. Original Litigation, Creation of the MDL, and Motion Practice in the MDL Court

This litigation began in July 2011 with the filing of a lawsuit in California state court by 73 retired NFL players. In their suit against the NFL, the players alleged that the NFL failed to protect them from the risk of concussive and sub-concussive head injuries and fraudulently concealed the risks of football. JA61.[1] Shortly thereafter, two additional cases were filed in California state court, and another suit was filed in the Eastern District of Pennsylvania. *Id.* The NFL

[1] The abbreviations and acronyms used in this brief are identified in the Table of Abbreviations that follows the Table of Authorities.

removed the three state cases to federal court (the U.S. District Court for the Central District of California) on the ground that the suits were completely preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, thus creating federal question jurisdiction.

With multiple lawsuits in federal court, the Judicial Panel on Multidistrict Litigation consolidated the cases under 28 U.S.C. § 1407 in the Eastern District of Pennsylvania before the Honorable Anita B. Brody. Following consolidation, more than 5,200 players filed approximately 300 similar suits, and virtually all of those cases were transferred to Judge Brody. JA190-588. To manage the cases, the district court appointed executive and steering committees and ordered the filing of master complaints to serve as the operative pleadings in the case. JA62.

Recognizing that the LMRA preemption defense represented a potentially dispositive issue, the district court stayed discovery and granted the NFL's request to file motions to dismiss solely on preemption. JA62. The NFL filed those motions in August 2012, and the court heard oral argument in April 2013. JA64-65.

B. The District Court Orders Mediation

The district court did not rule on the preemption motions. Instead, on July 8, 2013, it ordered the parties to mediation. The court agreed not to rule on preemption during the pendency of the mediation and the discovery stay remained in effect. JA65, 953.

In its July 8, 2013 order, the court appointed retired federal district judge Layn Phillips as the mediator. Judge Phillips came to the task with vast experience: as a federal judge, he had "presided over hundreds of settlement conferences in complex business disputes and class actions," and as a retired judge he has mediated "hundreds of class actions over twenty years." JA1115.

C. The Extensive and Vigorous Mediation Process

Following the district court's order, the parties promptly commenced mediation. During the period between July 8, 2013, and August 29, 2013 (when the parties emerged with an agreed upon term sheet), vigorous negotiation sessions occurred under the supervision of the mediator. Judge Phillips personally "dedicated more than twelve full days to mediate [the] matter" prior to the initial agreement, plus "considerable hours . . . in discussions with parties outside formal

sessions." JA1116. Indeed, there were conversations between Judge Phillips and the parties "almost every day" during the July-August time span. *Id.* In conducting the mediation process, Judge Phillips convened "multiple face-to-face mediation sessions with both sides present, as well as many separate sessions" with only one side. *Id.* Numerous law firms were involved in the negotiations. *Id.*

To ensure that the mediation was based on state-of-the-art knowledge and information, both parties "retained various medical and actuarial/economics experts to assist [the lawyers] in the settlement negotiations." JA1117.[2] Those experts advised the parties, but they also provided information and advice directly to Judge Phillips. *Id.* From his substantial contacts with the experts, Judge Phillips concluded that "both sides had experts that were extremely well-versed

[2] In particular, both prior to and throughout the negotiations, Class Counsel retained and consulted with numerous experts in the fields of neurology, neuropsychology, neuropsychiatry, actuarial science, economics, claims administration, and lien identification. JA3578-79 (¶30). Class Counsel also created and maintained a comprehensive database of claims and symptoms of thousands of individual Plaintiffs. JA3574-75 (¶20). Class Counsel were well-aware of all of the medical literature, including that related to Chronic Traumatic Encephalopathy ("CTE"). JA3573 (¶18).

in the medical literature and issues relevant to arriving at a fair settlement[.]" *Id.*

Judge Phillips praised the seriousness of the negotiations as being "contentious" and "hard fought," and having displayed "an impressive array of legal experience, talent, and expertise." JA1116. Critically, Judge Phillips understood that the negotiations involved not only retired players who were seriously injured but also retired players who had not yet manifested injury. From the outset, Class Counsel were sensitive to the need "to ensure the adequate and unconflicted representation of all of the proposed class members," and accordingly created "two proposed separate subclasses, each represented by separate counsel." JA1116-17; 3578 (¶29), 3900 (¶29), 3916 (¶5). In Judge Phillips' view, having such subclasses – with one representing presently injured and the other representing players without a diagnosis – "would ensure that any final resolution did not favor retired players who are currently suffering from compensable injuries [over] those who have not been diagnosed and who may not develop compensable injuries for years to come, if ever." JA1117.

The two subclasses were represented by separate counsel (Arnold Levin and Dianne Nast, respectively). There were also separate subclass representatives, initially Cory J. Swinson and then, after his sudden death, Shawn Wooden, neither of whom had been diagnosed with what the settlement terms a "Qualifying Diagnosis," for Subclass 1, and Kevin Turner, a retired player with Amyotrophic Lateral Sclerosis ("ALS," also known as Lou Gehrig's Disease), for Subclass 2. Judge Phillips highlighted this feature of the negotiations, specifically, that Subclass counsel, who had conferred regularly with the representative of their respective Subclass, participated in the negotiations, performed their own due diligence, and were otherwise involved throughout the mediation and negotiation process. JA3578 (¶29), 3585-86 (¶¶43-45), 3589 (¶56), 3806-07 (¶7), 3810 (¶17), 3897-3904 (¶¶1-16), 3909-11 (¶¶29-33), 3913-19 (¶¶1-12), 3923 (¶24), 3925-26 (¶¶27-31). In addition, Class Counsel made clear that no deal would be possible unless the settlement included two separate funds, one to pay for testing for those in Subclass 1, and one to compensate those currently in Subclass 2 and those who would subsequently suffer from a

deterioration of their condition that might eventually progress to a Qualifying Diagnosis. JA3578 (¶¶28-30).

Judge Phillips observed that Class Counsel and Subclass counsel "zealously represented the proposed class and subclasses." JA1116-17. With respect to Subclass Counsel specifically, he noted that "Subclass Counsel 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." JA3810. He also observed that Class Counsel were willing to litigate the cases, and risk devastating loss, if they were unable to obtain a fair settlement for the class and subclasses. JA1118, JA3580 (¶32).

In conducting the negotiations, both sides understood the litigation risks involved. As Judge Phillips noted, plaintiffs' counsel were aware of the serious preemption issue that was the subject of the motions to dismiss, and they understood that, even if they survived the motion to dismiss, they faced difficult issues of general and specific causation and a number of affirmative defenses (such as statute of limitations and assumption of risk). JA1118-20. They also faced the prospect of lengthy and expensive litigation. JA1118. By the same

token, the NFL faced substantial risks, including possible rejection of its preemption defense, enormous judgments, harmful precedent going forward, and damaging continued publicity over the concussion issue. JA1120.

D. The Mediation Leads to an Initial Settlement Agreement

Class Counsel had a clear vision of how they wanted to structure a deal, and they pressed this approach during the mediation. Mindful of the settlement from *In re Diet Drugs Products Liability Litigation*, No. 1203, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000), Class Counsel recognized that a grid compensating different diseases at different maximum values, and adjusting those values for age, exposure, and other factors, would be a fair means of calculating monetary awards. JA3567 (¶5), 3584 (¶42), 3588 (¶52). They understood that when juries calculate damages awards, they consider a plaintiff's level of impairment, his age, and whether the defendant's conduct or product was the clear cause for plaintiffs' impairment, and they increase or decrease awards depending upon those considerations. JA3567 (¶6). Similarly, in negotiations, the NFL Parties made it clear that they would insist on adjustments; for instance, they were not willing to pay

the same amount to a 40-year old who played NFL football for ten years and developed a condition and to a 70-year old who played for two years and developed the same condition. The parties ultimately agreed to four categories of adjustments, as part of the settlement compensation structure: (i) age at diagnosis, (ii) number of eligible seasons, (iii) stroke or severe traumatic brain injury ("TBI"), such as a car accident, unrelated to NFL play, and (iv) participation in the settlement's medical screening program (designed to encourage early testing). JA3584 (¶42), 3588 (¶52).

The most difficult aspect of the negotiations was attempting to reach agreement upon what diseases and conditions would be compensated, *i.e.*, the Qualifying Diagnoses. Class Counsel pushed the NFL Parties to include compensation for a broad range of injuries, but, ultimately, the NFL Parties held firm in their willingness to compensate only objectively verifiable and serious neurocognitive and neuromuscular injuries supported by the available science. JA3581 (¶35).

Class Counsel and their experts were cognizant of mainstream medical literature linking head injury to an increased risk of early-

onset dementia, Alzheimer's Disease, Parkinson's Disease, and ALS. Further, Class Counsel knew that Chronic Traumatic Encephalopathy ("CTE") could be determined only on autopsy.[3] Although certain mood and behavioral conditions had been associated with the post-mortem diagnosis of CTE in patients, based upon accounts from family members after the patient died, Class Counsel knew that those reports were anecdotal and not yet subject to rigorous scientific scrutiny. Class Counsel also knew that dementia, Alzheimer's Disease, Parkinson's Disease, and ALS were also seen in patients with CTE pathology. Finally, Class Counsel understood that mood and behavioral disorders are derived from a variety of sources and are widely present in the general population. JA3572 (¶¶16-17).

Throughout the negotiations, the NFL Parties were willing to negotiate compensation for only certain objectively verifiable and serious neurocognitive and neuromuscular injuries, *i.e.*, dementia, Alzheimer's Disease, Parkinson's Disease, and ALS, which had been

[3] All of the experts agree, and the medical literature bears out, that further research is needed to determine the clinical presentation of CTE, that is, the clinical profile has not been scientifically established. *E.g.*, JA3197-98, 3420-22 (¶¶24-28), 3490-91 (¶¶66-67), 3496 (¶78), 4087-88 (¶18), 4136-38 (¶¶20-23), 4384-85 (¶¶31-33); *see also,* JA3573 (¶18).

associated with head injury and which manifested in living players. JA3575-76 (¶22). The NFL Parties were unwilling to compensate less objectively verifiable and multifactorial conditions, like depression, anger and other mood and behavioral disorders. Further, the NFL Parties were willing only to compensate manifestation of disease, not the finding of CTE post-mortem. JA3573 (¶18), 3575-76 (¶¶22-23), 3581-82 (¶35). In light of the current status of the science, the risks attendant to further litigation and the significant benefits the settlement would provide to both subclasses, Class Counsel agreed to the basic settlement structure of compensating manifest serious neurocognitive and neuromuscular injuries.

Nevertheless, Class Counsel recognized that the families of those players who had already died and whose brains had been autopsied and determined to have CTE, would have extreme difficulty obtaining retrospectively one of these Qualifying Diagnoses, because the player did not know when he was alive that a settlement would ensue. JA3585-86 (¶45). Therefore, Class Counsel pushed for and were able to secure recoveries for those families through the creation of the Qualifying Diagnosis of "Death with CTE" for those who had already

died and had received a pathological finding of CTE. JA3582-83 (¶37). Counsel for Subclass 1, as well as Co-Lead Class Counsel, determined that such was a fair outcome. JA3585 (¶42), 3906 (¶20).

Only after an agreement to all of the terms relating to the Class members' benefits had been reached, did the parties turn to the issue of attorney's fees. JA3810, 3586 (¶46). Ultimately, 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 did not exceed $112.5 million. JA3588-89 (¶54).

As discussed below, various terms of the settlement changed following the initial settlement agreement. Nonetheless, the original agreement contained "the same basic structure" as the ultimate agreement: "large maximum awards for Qualifying Diagnoses subject to a series of offsets, a separate fund to allow for baseline assessment examinations [*i.e.,* medical screening] for Retired Players, and a fund dedicated to educating former players and promoting safety and injury prevention for football players of all ages." JA68. The fund used to compensate for Qualifying Diagnoses, the Monetary Award Fund ("MAF"), originally was capped at $675 million. The fund used to pay

for medical testing and certain treatment, the Baseline Assessment Program ("BAP"), was set at $75 million. And the Education Fund was set at $10 million. JA956-57; JA1207-08.

E. The Parties Seek Preliminary Approval But Are Sent Back to the Bargaining Table

On January 6, 2014, the parties filed a new class action complaint and sought (1) preliminary certification of a class action and (2) preliminary approval of the settlement reached at the mediation with Judge Phillips. JA67. The proposed settlement included an enthusiastic endorsement from Judge Phillips, who (in a detailed declaration) explained why he believed that the $760 million settlement was "a fair and reasonable [one] given the substantial risks involved for both sides." JA1115.

Approximately one week later the district court denied the preliminary approval motion without prejudice "in light of [its] duty to protect the rights of all potential class members and the insufficiency of the current record." JA1204. The court was "primarily concerned that the capped fund would exhaust before the 65-year life of the settlement" and was "also concerned that the deal released claims" against "collegiate, amateur, and youth football organizations." JA67-68. The

court directed the parties to submit all of their actuarial and scientific information to a special master, Perry Golkin, selected to advise the court on all financial issues associated with the settlement. JA1214-16. Mr. Golkin is a former partner at Kohlberg Kravis Roberts, a founder of Public Pension Capital Management, a trustee of the University of Pennsylvania and an adjunct professor at University of Pennsylvania Law School. *See* www.law.upenn.edu/cf/faculty/golkinp/.

F. Further Negotiations Lead to a Revised Settlement Agreement that the District Court Preliminarily Approves

Five months of additional "hard fought negotiations" ensued, overseen by Special Master Golkin. JA68. The negotiations led to a revised settlement agreement. The most important change, as the district court later noted, was that "this revised deal uncapped the fund to compensate Retired Players with Qualifying Diagnoses; the NFL Parties agreed to pay all valid claims over the duration of the settlement regardless of the total cost." JA68. In addition, "[t]he NFL Parties . . . agreed to narrow the scope of the Releases" so that the collegiate, amateur, and youth football organizations were no longer released parties. JA68. In exchange, "the NFL Parties received

heightened anti-fraud provisions to ensure that funds were only distributed to deserving claimants." JA68. On June 25, 2014, with those changes in hand, the parties filed a revised motion for preliminary class certification and preliminary approval of the settlement.

On July 14, 2014, the court granted the motion. JA68. In its order, it preliminarily certified two subclasses (those with a Qualifying Diagnosis and those without). JA1329-30. The court also set a series of dates that would culminate in a fairness hearing on November 19, 2014, including a time line for notifying the class and receiving objections and opt-out requests.[4] The district court also oversaw the content of all notice to the class. JA1541-63; *see also* JA5534-35 (commenting that the district court edited a significant portion of the notice). Separate

[4] Among the central deadlines were: (1) the Long-Form Notice was to be posted on the Settlement Website (July 14, 2014); (2) the Long-Form Notice was to be mailed to all known Class members and their counsel (July 24, 2014); (3) the Short-Form Notice was to be published (September 15, 2014); (4) the written requests to opt out or to object were to be post-marked (October 14, 2014); (5) any written request to speak at the Fairness Hearing was to be sent to the district court (November 3, 2014); (6) any responses to objections or any papers in support of final approval of the Settlement were to be filed by Class Counsel and Counsel for the NFL Parties (November 12, 2014). JA1331-33.

from the formal Notice Plan's placement of advertisements in major publications and television commercials, the settlement received widespread media attention, as the court recognized. JA111-12, 3597-3695 (over 900 articles published regarding the Settlement from August 2013 through October 2014).

G. Class Members' Response to the Proposed Settlement

At the end of the 90-day deadline that the court provided for class members to decide whether to object to the settlement or to opt out, few class members had raised concerns. In a class of over 20,000 members, fewer than 1% opted out (202 requests to opt out) and fewer than 1% objected (205 objectors). JA119-20, 4026-31, 5762-66. The Notice Program alone reached over 90% of the class and more than 5,000 class members had already signed up with the claims administrator to receive more information at the time the district court ruled on settlement approval, even though the claims administration process has not even commenced. JA119. (That number is now over 7,400.)

H. An Unsuccessful Objector Appeal to this Court, and the Subsequent Fairness Hearing

Shortly after preliminary approval, and months before the fairness hearing, objectors filed a petition for interlocutory review with

this Court, arguing that review was appropriate under Federal Rule of Civil Procedure 23(f). Objectors protested the fairness of the proposed settlement and challenged the preliminary class certification. They maintained that Rule 23(f) allowed appellate review even though there had been no final ruling on class certification. This Court heard oral argument on September 10, 2014, and summarily denied the petition the next day. The Court subsequently issued a written opinion explaining the ruling. *In re NFL Players' Concussion Injury Litig.*, 775 F.3d 570 (3d Cir. 2014). The majority ruled that this Court lacked jurisdiction because the district court had "yet to issue 'an order granting or denying class certification.'" *Id. at* 588-89. Judge Ambro dissented from that rationale but opined that the petition was properly denied because objectors were creating "inefficient (indeed, chaotic) piecemeal litigation that would interfere with the formal fairness hearing on the settlement." *Id.* at 589.

On November 4, 2014, more than two weeks before the fairness hearing, the district court requested that Steven Molo,[5] now

[5] Mr. Molo, on behalf of the then Morey (now Faneca) Objectors, had filed a motion to intervene shortly after preliminary approval, which the district court denied. JA57. He appealed that denial to this Court,

representing the Faneca Objectors on appeal, serve as liaison counsel for all objectors, with specific responsibility for coordinating the presentation of all objections at the fairness hearing. JA3078. Mr. Molo did so, and on November 14, 2014, he filed a letter with the court detailing the speakers, topics, and time allotments for the hearing. JA569. No party or objector filed any opposition to Molo's appointment, the form of the final fairness hearing, to the time allotments for presentations at the hearing, or to the agreement between all the parties and the objectors that expert and other testimony would be received on written submissions. The Alexander Objectors did seek postponement of the hearing, but the district court instead allowed post-hearing briefing to address any issues that objectors needed more time to develop. JA554 (ECF No. 6203).

A day-long hearing was held as scheduled on November 19, 2014. JA79, 570-71. Post-hearing briefing was completed in December 2014. JA571-73. Alexander was the only party to raise an objection to the hearing at the time, though notably, Alexander did not file any post-

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but, ultimately voluntarily dismissed the appeal, as discussed *infra* at n.14.

hearing briefing.[6] At the hearing, the district court heard from fourteen counsel for the objectors and the settling parties, and from five unrepresented objectors. JA5335-86.

I. Post-Fairness Hearing Modifications to the Settlement

Following the fairness hearing and the submission of post-hearing briefing, the district court again withheld approval, and on February 2, 2015, the court "proposed several changes to the Settlement that would benefit Class Members." JA79. These were: (1) providing some "Eligible Season" credit for play in NFL Europe, (2) assuring that despite the $75 million cap on the BAP, all those timely registering will receive a baseline assessment examination, (3) moving the deadline for a "Death with CTE" award from the preliminary approval date to the final approval date, (4) allowing for a waiver of the appeal fee for those showing financial hardship, and (5) providing the opportunity to demonstrate a Qualifying Diagnosis without the required medical

[6] On appeal, Objector Gilchrist for the first time raises issues concerning *Daubert* and other matters about the district court's handling of evidence at the fairness hearing. GB at 19-21. Gilchrist did not raise these issues below (nor did any other party) and submitted no post-hearing briefing on any evidentiary issue.

documentation in instances where such documentation was destroyed by a *force majeure* type event.

After a new round of negotiations, the parties agreed to make every change suggested by the district court, and on February 13, 2015, they submitted a revised settlement agreement. JA80, 5590-5751. The district court granted final approval (and final class certification) on April 22, 2015. JA40. Judge Brody's 132-page opinion – which is discussed in detail in the Argument section of this brief – exhaustively addresses class certification, fairness, and the myriad arguments raised by the objectors. JA58-189.

II. THE SETTLEMENT TERMS

The settlement has three components: an uncapped MAF; a $75 million medical testing and benefit program, the BAP, with its central function of establishing the neurocognitive conditions of players when they enter the settlement program; and a $10 million education fund "to promote safety and injury prevention for football players of all ages[.]" JA75.

The MAF. The MAF is an uncapped, inflation-adjusted fund that provides cash awards for Retired Players who receive Qualifying

Diagnoses for the next 65 years. JA71. In dollar terms, the MAF constitutes the bulk of the settlement. *Id.* The district court found that, "'the uncapped nature of the proposed settlement . . . indicate[s] that class counsel and the named plaintiffs have attempted to serve the best interests of the class as a whole.'" JA87 (quoting *In re: Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 313 (3d Cir. 1998)). The cash-flow actuarial model projects that the MAF will pay out over $900 million by the end of its 65-year term, with the risk of any additional payment for claims being borne entirely by the NFL. JA1636-95.

The settlement offers monetary awards of up to $5 million for serious medical conditions associated with concussions and other brain traumas associated with NFL play; the medical conditions include Parkinson's Disease, Alzheimer's Disease, ALS, and others. JA131. In terms of the designated dollar amounts, the court found that "[t]he maximum awards are in line with other personal injury settlements." JA152-53. *See also* JA3566-67 (¶¶4-6), 3574 (¶19), 3587-88 (¶51), 3594 (¶73) (noting Class Counsel's assessment, based on years of valuing cases, that these were "full value" awards). The settlement provides

that class members whose condition progresses over time will receive supplemental awards to ensure that they receive the maximum possible compensation for their actual disease manifestation. JA131. As the district court observed, "[u]nlike recoveries achieved after continued litigation, these awards will be promptly available to Retired Players currently suffering." JA131 (citing *Prudential* with parenthetical quote from case). Further, "[b]ecause the MAF is uncapped, it ensures that all Class Members who receive Qualifying Diagnoses within the next 65 years will receive compensation." JA131. Importantly, class members do not need to establish that their injuries were caused by playing NFL football in order to claim a monetary award. JA72. Moreover, the settlement provides a broad waiver of statute of limitations defenses that might otherwise be available to the NFL. JA179-81.

The BAP. The BAP provides Retired Players with an opportunity to be tested for cognitive decline. JA75. Any retired player who has played at least half of what the settlement terms an "eligible season" can receive a baseline assessment examination, even if he has not yet developed any adverse symptoms, nor received a Qualifying Diagnosis. JA75-76. A BAP examination may produce a diagnosis that qualifies

for specified monetary awards under the settlement. JA76. Such an exam may alternatively entitle a retired player to additional medical benefits (such as further testing, treatment, counseling, and pharmaceutical coverage). *Id.* Although the BAP is initially funded at $75 million, a baseline examination is guaranteed by the NFL, even if the initial $75 million is exhausted: the settlement "ensures that all Retired Players with half of an Eligible Season credit have access [during a specified period] to free baseline assessment examinations so that they may monitor their symptoms, and receive Qualifying Diagnoses more easily if their symptoms worsen." JA131, 163-64.

Education Fund. Finally, the parties created a $10 million fund to promote safety and injury prevention for football players of all ages, including youth football players and to educate class members about their NFL CBA Medical and Disability Benefits. JA76.

* * *

Importantly, the settlement preserves each class member's rights to pursue claims for worker's compensation and any and all medical and disability benefits under any applicable CBA. The settlement further ensures that CBA provisions requiring players to release disability or

injury claims as a condition of receiving any outside benefits will not apply. JA77. Thus, the settlement guarantees that the negotiated benefits supplement any benefits the players may have under their collective bargaining agreements with the NFL teams, and ensures that settlement benefits do not in any way compromise pre-existing benefits. The court found that "[t]hese NFL CBA Medical and Disability Benefits provide significant additional compensation. For example, the '88 Plan' reimburses or pays for up to $100,000 of medical expenses per year for qualifying Retired Players with dementia, ALS, and Parkinson's Disease." *Id*. Retired players also retain access to a Neuro-Cognitive Disability Benefit, which provides compensation for those who have mild or moderate neurocognitive impairment. *Id*.

Moreover, the settlement provides for the retention of an expert in negotiating collective resolution of governmental and health benefit liens against any class member recoveries. Absent global resolution, as is common in an individual injury action, such liens can reduce a claimant's gross award by a third or more. As the court found, "the lien resolution process represents a substantial benefit for Class Members"

because the appointed administrator "will be able to negotiate on a class-wide basis" and thereby obtain a "discount" for the class. JA73.

III. FINDINGS REGARDING CHRONIC TRAUMATIC ENCEPHALOPATHY AND THE PROBLEMS OF CAUSATION

Because a central issue on these appeals (and before the district court) involves the settlement's treatment of CTE, the question of CTE and associated evidentiary issues merits separate discussion.

CTE. CTE is "a build-up of tau protein in the brain" that is confirmed through pathological examination of brain tissue. A diagnosis of CTE "can only be made post-mortem." JA136.

The issue of CTE occupies 13 pages of the district court's opinion and the opinion addresses each of the objections raised on appeal. JA135-47. The settling parties and objectors submitted the declarations of over a dozen experts, whose consensus view was that the science of CTE was undeveloped. Based upon this record, the court found that "[t]he study of CTE is nascent, and the symptoms of the disease are unknown"; "no diagnostic or clinical profile of CTE exists, and the symptoms of the disease, if any, are unknown"; 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." JA136-37; *see also* JA139 ("[R]esearchers do not know the symptoms someone with abnormal tau protein in his brain will suffer from during life."). As the court noted, "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. . . . The studies that have occurred suffer from a number of biases intrinsic to their design that make it difficult to draw generalizable conclusions." JA137-39 (citing numerous studies).

The district court found, based on the undisputed scientific evidence, that CTE can only be conclusively determined upon autopsy; CTE ***cannot*** be "diagnosed" in the living. JA3419 (¶21), 3488 (¶55). No expert, including those whose opinions Objectors and amici proffered below, disputes this critical fact. JA2957 (¶38), 3030 (¶12), 4420 (¶9), 4427 (¶10), 4475 (¶8). As a result, all former NFL players stand at risk

of CTE with no way to distinguish one prospective exposure from another. Ultimately, the District Court found that "Shawn Wooden has adequately alleged that he is at risk for developing CTE. . . . A subclass of CTE sufferers is both unnecessary and poses a serious practical problem. . . . [T]he best Subclass Representative for CTE is someone in Shawn Wooden's position." JA94-95.

Some objections to the settlement charged that it did not compensate mood and behavioral symptoms claimed to be associated with CTE, as well as a litany of other ailments.[7] The question for the court was not whether some retired players might suffer from these ailments, but whether the settlement's treatment of the substantial legal and practical issues attendant to proving such claims was reasonable. The court noted the difficulty of establishing the causal link to football: "[m]ood and behavioral symptoms are commonly found in the general population and have multifactorial causation. Even if

[7] *See* JA96 n.34 (citing objections) (referring to depression, mood disorders, emotional distress, personality changes, aggression, agitation, impulsivity, suicidal thoughts, attention disorders, chronic headaches, chronic pain, sleep disorders, fatigue, sensitivity to noise, incessant ringing in ears, visual impairment, anosmia (loss of sense of smell), ageusia (loss of sense of taste), epilepsy, pituitary hormonal dysfunction, atherosclerosis, decreased muscle mass and weakness, and vestibular (balance) disturbances).

head injuries were a risk factor for developing these symptoms, many other risk factors exist." JA143 (citing JA3426-27 (¶39), 3495-96 (¶¶75-76), 4086 (¶14)). Moreover, retired players "tend to have many risk factors for mood and behavioral symptoms." "For example, a typical Retired Player is more likely than an average person to have experienced sleep apnea, a history of drug and alcohol abuse, a high [Body Mass Index], chronic pain, or major lifestyle changes." *Id.* (citing same); *accord* JA98; *see also* JA147 (cognitive and neuromuscular impairments "tend to be more serious and more easily verifiable than mood and behavioral symptoms").[8] Accordingly, "[r]equiring independent representation to address each of these symptoms likely would not have increased the total recovery of Class Members. Instead, negotiations probably would have ground to a halt." JA99.

[8] The Jones Objectors' own evidence demonstrates that these conditions occur frequently in the general population, outside of those who played football, and that they are often rooted in other stimuli and family history. *E.g.*, SA007 (presenting a physician's evaluation that cautions, "CTE at this point remains a neuropathological diagnosis. . . . It is always difficult to determine whether or not anxiety and depression are a result of traumatic brain injury; situational depression from psychosocial stressors and even family history can play a role…").

Causation. The court made further findings regarding issues of causation beyond the question of CTE and emotional distress claims. Players would have to establish both general causation (whether concussions and repetitive blows to the head are capable of causing long-term neurocognitive impairments) and specific causation (whether a player's specific concussions during his NFL career actually caused his long-term injury and whether the NFL's alleged conduct substantially contributed to that injury). JA126-28. The court reviewed the scientific literature and the expert testimony submitted at the fairness hearing pertaining to the challenges of establishing general causation. JA126-27 (citing extensive expert testimony). It noted the acknowledged limitations on the peer-reviewed scientific literature regarding cognitive impairment in athletes who suffered repetitive head trauma; recognized that research into repetitive strikes to the head, leading to concussion or, as is typical of many players, leading to subconcussive injuries, is relatively new with mixed results as to its effects, thereby increasing the risks faced by class members should they proceed with litigation; and that scientists have only recently begun to

standardize criteria to discuss differing levels of the severity of trauma to the brain. JA127.

With respect to specific causation, the court recognized that NFL players had extensive prior football experience in middle school, high school, college or another professional football league, and many played sports and engaged in physical pursuits unrelated to football. Thus, in any individual trial, such alternative causation would be a formidable hurdle, especially given the inability of the science to distinguish which particular head injury was the causal agent. The court found this burden particularly problematic for class members who had relatively brief NFL careers (as compared with their amateur and non-NFL professional football exposure): such players "endured fewer hits, making it less likely that NFL Football caused their impairments," and those who spent substantial time on injured reserve did not play or practice altogether. JA97, 160-61. Further, in a trial against the NFL, a retired player who had suffered a prior stroke or non-football related TBI, such as a car accident or a serious fall from a height, would be vigorously cross-examined on that possible alternative cause.

Moreover, many of the ailments associated with football head injuries, such as dementia, Alzheimer's, and Parkinson's, become more common as people age. Thus, class members who developed their symptoms later in life would likely have difficulties proving that their alleged injuries were not a result of the normal aging process: "[o]lder Retired Players, as well as Retired Players who suffered from Stroke or severe TBI outside of NFL Football, would find it more difficult to prove causation if they litigated their claims." JA97.

SUMMARY OF ARGUMENT

The issue before the Court is whether the district court acted within the ambit of its considerable discretion in approving the class settlement of the NFL concussion litigation. There are two components to this inquiry: (1) whether the class satisfies the requirements for class certification under Rule 23(a) and Rule 23(b)(3), and (2) whether the settlement is fair, reasonable, and adequate under Rule 23(e)(3).

First, with respect to class certification, several objectors and amici argue that the class fails the adequacy of representation requirement of Rule 23(a)(4). They argue, in the alternative, that (1) a separate subclass should have been created for CTE claimants, and (2)

myriad subclasses should have been created that correspond with a lengthy list of alleged injuries and other purported differences among class members. They rely heavily on the Supreme Court's decisions in *Amchem Products*, *Inc. v.* Windsor, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 581 (1999). The short answer, however, is that the structural concerns raised in those cases – a single class involving both present and future claimants without separate representation – is directly addressed by the two subclasses here (each with a separate representative and counsel) – the subclass for those who already have a Qualifying Diagnosis, and the subclass for those who do not. Not one objector addresses the critical observation of the mediator, retired Judge Phillips, on the role of subclass representation:

> [I]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.

JA1116-17.

It is wholly unpersuasive for objectors and amici to rely so heavily on cases that were missing the very subclasses that were created here, and to do so without addressing the facts of record. Moreover, as the district court found, JA95, creation of a CTE class would be impractical because CTE cannot be diagnosed in living class members. And, with respect to the argument for potentially dozens of subclasses, the district court correctly found, JA98, that the creation of multiple subclasses would have been unmanageable and ultimately, would have resulted in "'Balkanization' of the class action." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 271 (3d Cir. 2009) (quoting *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 202 (3d Cir. 2005)).

A few objectors also half-heartedly claim that commonality (Rule 23(a)(2)), typicality (Rule 23(a)(3)), and predominance (Rule 23(b)(3)) were not satisfied. Significantly, the vast majority of objectors and amici (who are not shy about raising every conceivable argument) do not dispute that those requirements were met. Here, as the district court found, JA81-83, there are numerous overarching issues – common

to all class members – that are presented in this case, including the NFL's knowledge of the risks of concussions, questions of whether concussions can cause various types of injuries, whether the claims were preempted by the LMRA, and numerous others. This is a cohesive class that easily satisfies commonality, typicality, and predominance of the common issues.

The most striking thing about the 13 briefs filed by objectors and amici is that, in advancing their class certification arguments, they fail to grapple with this Circuit's two most relevant authorities: *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, 795 F.3d 380 (3d Cir. 2015) (setting forth a comprehensive analysis for when subclassing is required under Rule 23(a)(4)), and *In re Diet Drugs Products Liability Litigation,* 369 F.3d 293, 317 (3d Cir. 2004) ("landmark" mass torts settlement resolved on a class basis). As discussed below, those decisions are squarely on point and establish conclusively that class certification was appropriate here. The failure of objectors and amici, in hundreds of pages of briefing, to address (or, in virtually all instances, even cite) these controlling precedents is simply inexplicable.

The second issue is whether the class settlement is fair, reasonable and adequate, as set forth in Rule 23(e). While Objectors offer a wish list of terms they would like added to the settlement, without regard to cost, this Court has given great deference to a properly constructed negotiation process and to vigilant district court oversight of the terms of the settlement. Ultimately, "settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig. ("GM Trucks"),* 55 F.3d 768, 806 (3d Cir. 1995); *accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion."). Here, as noted, the fairness of the settlement is confirmed by the overwhelming approval of class members, the district court's superb management and oversight, the extraordinary relief afforded class members, and the various structural protections put in place to ensure fairness.

Most of the objectors and amici, in attacking the fairness of the settlement, focus on CTE – arguing that CTE should have been

compensated (beyond compensation for those who died before final settlement approval), that the purported mood and behavioral manifestations of CTE (such as depression, anxiety, and aggression) should have been compensated, that the settlement fails to account for the possibility of scientific advances in the study of CTE, and that there is no rational reason to compensate "Death with CTE" only for class members who died before final approval. As discussed below, the district court examined each of the CTE-related arguments in detail and correctly found that the settlement's treatment of CTE was fair, reasonable, and adequate.

Objectors also attack numerous other lines drawn by the settlement, including offsets for stroke and traumatic brain injury, and offsets based on eligible seasons. Again, the district court analyzed every line drawn in the settlement and concluded that the settlement ultimately approved was fair, reasonable, and adequate. Every settlement necessarily involves line drawing, and the district court persuasively explained why the lines drawn here are reasonable. Likewise, the district court properly rejected all of the arguments raised by objectors with respect to the fairness of the administrative process.

Further, there is no order awarding or allocating attorneys' fees, and all arguments on fees are premature.

Finally, the district court carefully examined this Court's factors for assessing the fairness of the ultimate settlement under *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), and *In re Prudential Insurance Company of America Sales Practices Litigation,* 148 F.3d 283, 318 (3d Cir. 1998).

STANDARD OF REVIEW

This Court reviews the district court's findings of fact, its application of law to facts, and its decision regarding class certification only for an abuse of discretion, and reviews only its legal rulings *de novo*. *Reyes v. Netdeposit, LLC*, No. 14-1228, 2015 WL 5131287, at *9 (3d Cir. Sept. 2, 2015) (citing cases); *accord Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 295 (3d Cir. 2011) (en banc) (in reviewing certification of settlement class, Court defers to district court's findings on elements of predominance and superiority) (citing cases); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 604 n.8 (3d Cir. 2010) ("substantial deference to that court's fact-finding"); *In re Pet Food Prods. Liab. Litig.,* 629 F.3d

333, 350 (3d Cir. 2010) ("district court's findings under the *Girsh* test are factual and will be upheld unless they are clearly erroneous").

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ITS EXTRAORDINARY OVERSIGHT OF THE CLASS SETTLEMENT

This class action settlement provides compensation, medical screening, and security in case of defined disabilities for thousands of retired NFL players. Unlike so many class actions formed after the fact by the serendipity of purchasing a defective consumer product, the class here is unified by the singular lifetime achievement of having played in the NFL. Unfortunately, the class is also unified in having been exposed to the tortious conduct of the NFL and in having been exposed to the damages resulting from brain injuries. The conduct of the NFL in concealing the long-term effects of head blows is at the heart of each of the claims and is common to all class members. For purposes of class certification, it does not matter whether the class would ultimately prevail on these issues. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013) ("Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions

will be answered, on the merits, in favor of the class."). As set out below, the class is also unified in having sought relief against the NFL defendants and in its desire to see the terms of the settlement implemented.

A. As Found by the District Court, the Fairness of the Settlement Is Irrefutably Demonstrated by the Overwhelming Support It Received from the Class

The class in this case consists of retired NFL players and their family members. Perhaps unique in the annals of class action law, this is a cohesive group that existed long before the first concussion suit was filed. Reaching the NFL is an arduous and life-defining achievement for all class members, and the ensuing sense of camaraderie and interaction carries forward into their interlaced lives as retirees – where former players routinely interact, gather for events, and stay in close touch. JA102.

The record confirms that this case is far removed from one where the class is unaware that its rights are being litigated in absentia. The progress of this litigation and the terms of the settlement were featured on the front pages of newspapers nationwide, and were extensively discussed on ESPN and multiple news channels and during network

broadcasts of football games. Apart from the formal notice sent individually to almost all class members, JA103 n.46, JA110, the record shows that thousands of news articles, television broadcasts, and internet postings described the filing of the suits, the court proceedings, the progress of the settlement, and the precise terms. JA111.[9]

Nor was the class passive in responding to the perceived NFL misconduct. In most class actions, few if any of the class members are in a position to have filed individual actions. Here, by contrast, more than 5,200 individual retirees – about a quarter of all class members –

[9] Objector Gilchrist makes the absurd argument that class certification should have been denied on grounds of the ascertainability of the plaintiff class. GB at 11, 18-19. Ascertainability requires a plaintiff to show that "(1) the class is defined with reference to objective criteria; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *See Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d. Cir. 2015) (internal quotation marks omitted). The settlement class consists only of former NFL players. The court below found that class membership can be readily discerned from "extensive historical data are available from a variety of authoritative sources" because NFL Football is a "well-catalogued and documented event." JA103. The parties have identified the "entire population of former NFL players, including the deceased," such that the "Class is a closed set." *Id.*; JA110 (master list of class constructed from aggregation of 33 datasets of information from NFL, individual NFL teams, sports statistics databases, and other class actions involving former players). Further, as to subclass ascertainability, a retired player knows whether or not he has been diagnosed with a Qualifying Diagnosis.

had filed suit individually in some of the more than 300 actions that were consolidated in this MDL. Moreover, the class members and others who were following the settlement were proactive, as evidenced by more than 62,000 unique visitors to the settlement web site and more than 4,500 calls to the settlement's toll free hot line. JA119.[10] Many of the players were represented by their own individual counsel, JA120, and thus had counsel to inform and advise them about the settlement.

The ability of a class to make these kinds of informed judgments about the settlement is an important factor in weighing the significance of the class response. *See, e.g.*, *In re Prudential Ins. Co.,* 148 F.3d at 328 (noting that 1.8 million inquiries from among the 8 million class members indicated knowing class engagement); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 526 (3d Cir. 2004) (similarly relying on extensive class access to settlement information).

It is safe to say – based on extensive research – that there has never been a class settlement in U.S. history in which the class

[10] Although not in the district court record, the number of unique visitors to the settlement website has now reached 91,482 and the number of calls to the hot line has climbed to 9,479.

members were more cohesive, more informed, and more invested in the outcome of the litigation.

Given the wide publicity surrounding the settlement and the importance of the outcome to the members of the class, if there was ever a case in which a deficient agreement would be reflected by massive numbers of objections and opt-outs, this was such a case. By the same token, if there was ever a case in which the paucity of opt-outs and objectors would confirm the strength and fairness of the agreement, this was such a case.

Here, the class communicated loudly and clearly by declining the invitation offered to them to object or opt out. The statistics speak for themselves. Only 202 out of the 22,000 estimated class members submitted requests to opt out, and only 205 class members objected.[11] Each figure represents less than one percent of the class.[12] JA78-79.

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[11] The Court noted that of the original 234 requests to opt out, 26 had sought readmission to the settlement by the time of the fairness hearing. JA78 n.22; *see also* JA5759-67. Another six have since asked to be readmitted to the Class since settlement approval. (ECF Nos. 6621, 6642). Of the total opt-out requests, only 169 were filed timely and properly. JA5759-67.

[12] Notably, some of the most well-known and vocal objectors, the family members of the late David Duerson, who committed suicide in 2011, at

Furthermore, far from raising concerns about the settlement, more than 7,000 class members have attempted to preregister for settlement benefits, even though there is no early registration process in effect. The number of class members who are already clamoring to participate in the settlement dwarfs the small number who have objected.[13]

Moreover, this is not a case – unlike a small claims consumer case – in which individual litigation was not an option. The response of the most active section of the class bears emphasis. Out of the 5,200 players who had filed suit, there are only 82 opt-outs who have a pending case on file against the NFL defendants. Only 62 of the Objector-Appellants have cases on file against the NFL. To be concrete, the Faneca Objectors in challenging the fairness of the settlement

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age 50 (ECF No. 6241, at 4), have elected not to appeal final approval. It was Mr. Duerson's death, more than any other player's death, that served as the catalyst for the initial filings of lawsuits in this MDL. *See* www.nytimes.com/2011/05/02/sports/football/02duerson.html. By contrast, among the Alexander Objectors are Mary Dutton Hughes and Barbara Scheer, the daughters of former NFL player William Earl Dutton. Mr. Dutton died in ***1951*** in a car accident. (ECF No. 6633, at 1).

[13] As of October 13, 2014, there were over 5,000 class members who had signed up with the Claims Administrator. JA3799. Although not in the district court record, that number is 7,451 as of the filing of this brief.

stress the "relatively straightforward nature of the litigation," FB at 27.[14] Yet, not one of these objectors has filed suit against the NFL, nor have any of the opt-outs represented by Faneca's group of lawyers. Similarly, the Miller Objectors may prefer not "to lock in the science" of today and await the "benefit for the advances" that are "certain to occur over the next 65 years," MCB at 17, but that can hardly be a meaningful position for the more than 5,200 players who filed suit in the here and now. [15]

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[14] Curiously, although counsel for the Faneca Objectors was named liaison counsel for all objectors and helped negotiate the conduct of the fairness hearing, the Faneca Objectors now appeal, again, the denial of their motion to intervene. Given *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (relieving class members of the need to intervene in order to preserve rights of appeal), it is impossible to see what difference such a formal intervention would have made. Even worse, the appeal is not timely. Intervention was denied on July 29, 2014, JA57, and appealed to this Court on August 21, 2014. JA547. Immediately after this Court's denial of their Rule 23(f) petition, they moved to voluntarily dismiss that appeal, on September 12, 2014. *See* Docket for Appeal No. 14-3693. That dismissal was requested "without prejudice to take an appeal from any *other* appealable order." *See id.* at Doc. No. 003111737548 (emphasis added). On September 18, 2014, this Court granted the motion. *Id.* at Doc. No. 003111742163. The Faneca Objectors' present appeal was filed on May 22, 2015, JA33, making any appeal of the intervention denial untimely even without the bizarre procedural history.

[15] The Miller Objectors are represented by perennial strategic objector John Pentz, who, to the best of Class Counsel's knowledge, has never

The only possible inference from these numbers is that virtually the entire class is satisfied with the settlement and wants it to go forward. The response of the class is one of the controlling *Girsh* factors under this Court's class action jurisprudence. 521 F.2d at 157. As this Court has recognized, "class members' support "creates a strong presumption . . . in favor of the settlement." *In re Cendant Corp. Litig.* 264 F.3d 201, 235 (3d Cir. 2001). An inference that the settlement is fair is especially justified here, given the cohesiveness of the class, the importance of the case to the individual class members, and widespread knowledge about the terms of the settlement.

At bottom, the objectors who have lodged these appeals do not and cannot refute the overwhelming evidence that the class supports the settlement. They are thus left with the argument that they should be allowed to derail a settlement that virtually all of their fellow class members endorse. Put another way, these few objectors apparently believe that they somehow are more capable of assessing the settlement

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filed suit on behalf of any objector, and is unlikely to do so over the next 65 years. *See In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 386 (D. Md. 2006) (noting that "Pentz is a professional and generally unsuccessful objector"); *cf.* John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them*, 39 Fla. St. U. L. Rev. 865 (2012).

than the more than 20,000 class members who do not object. The objectors are, in effect, putting themselves forward as superior representatives of the class – with no support from other class members. And the objectors do so with a track record of having collectively obtained no relief for any retired NFL player. Despite the thousands of cases on file and the cases that have been pressed in individual litigation, the NFL has not paid a dime in any settlement or litigation. The NFL has successfully litigated the preemption defense[16] and has strenuously resisted all individual claims for damages.

More fundamentally, no objector has indicated how he is harmed by the proposed settlement. Given the notice and transparency of the settlement, each objector was free to opt out and to seek whatever legal relief he thought was appropriate – assuming that he filed suit. The decision to opt out "is a fateful one," *In re Diet Drugs Prods. Liab. Litig.,* 369 F.3d at 308, but in this case it is a real one. Unlike the small value consumer cases invoked by objectors and amici, this is not a case where

[16] *E.g*; *Dent v. NFL*, 2014 WL 7205048, at *2-12 (N.D. Ca. Dec. 17, 2014); *Stringer v. NFL*, 474 F. Supp. 2d 894, 903-11 (S.D. Ohio 2007).

the right to opt out is hollow. The fact that more than 5,000 players filed non-class lawsuits demonstrates that opt-out class members would not be left without a meaningful remedy. Nor is this a case, like *Amchem,* where the class sweeps in potentially millions of people who are unaware that their potential claims are at issue.

In a case with significant stakes, with more than a quarter of the class having filed individual suits and represented by counsel, this case poses a question distinct from the consumer cases and other cases of non-viable individual claims. The fundamental question is: Why is the well-publicized opt-out right not sufficient for those objectors? Why would counsel for objectors take the serious risk that, if their appeal fails, their clients will be bound by what these lawyers claim is such a bad settlement? After all, the liaison objectors come before this Court claiming the settlement inadequate because establishing that "the NFL breached [its] duty, and whether those breaches caused injury are straightforward." FB at 59. Assuming that objectors honestly believed – contrary to virtually every other class member – that the settlement was deficient, the answer was, "go forth and prosper" – but they should

have done so on their own. They should not attempt to scuttle the settlement for everyone else.

This Court has repeatedly declined to overturn class action settlements merely because objectors want more – the fact is, they always do. Instead, this case presents an offer of benefits far beyond what anyone has obtained from the NFL, and the class response acknowledges that. The district court's frontloaded inquiry in scrutinizing the settlement ensured "redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality." *Sullivan,* 667 F.3d at 340 (Scirica, J., concurring). Frustrating the strongly expressed desire of the class for this settlement will mean, as Judge Scirica warned, "mass claims will likely be resolved without independent review and court supervision." *Id.*

This Court should decline the objectors' invitation to overturn a settlement that virtually all of the class supports.

B. The District Court's Unprecedented Supervision Strengthened the Settlement and Discharged Its Fiduciary Obligation to the Class

The structure and fairness of the settlement are further confirmed by the district court's rigorous review and oversight of the settlement

process. Members of this Court, in denying an earlier application for Rule 23(f) review, have already noted that the district court "expertly addressed the management of [the] settlement class," *In re NFL*, 775 F.3d at 585 (majority opinion), and that "[o]ur highly experienced and respected District Court colleague knew exactly what she was doing." *Id.* at 592 (Ambro, J., dissenting).

Indeed, the court's involvement in every detail of the settlement – something all of the objectors and amici ignore – is virtually unprecedented. This was not a case where privately held information by the parties would ultimately tip the litigation. Indeed, most of the issues of science were well played out in the public exchanges of medical researchers and the "[p]arties had already retained well qualified medical experts to help determine the merits of the case." JA66; *see also* JA122 (publicly available scientific literature allowed class counsel to catalogue the cognitive impairments of thousands of MDL plaintiffs).

Independent of what the NFL knew at what point, the claims of NFL liability turned heavily on the distinctly legal issue of federal labor preemption. JA121. Moreover, proving causation from ***NFL football*** was challenging for players exposed to head trauma from Pee Wee

League to high school to college, and whose manifestations of potential harm coincided largely with medical conditions shared by the population at large. JA122 (formal discovery would not have enhanced class counsel's "position on causation"). The district court stressed that the case "implicates complex scientific and medical issues not yet comprehensively studied." JA117. Under these circumstances, the district court was uniquely positioned to exercise careful superintendence of the settlement process – and it did.

First, the district court initiated the mediation process itself after determining that an overriding legal issue would likely drive the resolution of the case:

> I was aware that in a number of analogous cases, courts ruled that state law claims brought against the NFL and associated parties [were preempted] …. Because of the importance of this issue, I stayed discovery and granted the request of the NFL Parties to file motions to dismiss on the preemption argument only.

JA64.

After a vigorous and lengthy mediation – ordered by the court and conducted by an experienced mediator (a retired federal judge) – the parties presented the court with a comprehensive settlement agreement, including the NFL's agreement to fund $765 million for

medical exams and compensation. Given the large dollar amounts involved and the problems for plaintiffs if the case were litigated, most courts would have preliminarily approved the settlement, and would have been justified in doing so.

But not this district court. Instead, the court denied the motion for preliminary approval. The court "was primarily concerned that the capped fund would exhaust before the 65-year life of the Settlement." JA67. The court "feared that not all Retired Players who ultimately receive[d] a Qualifying Diagnosis or their related claimants will be paid." *Id.* (citation omitted). The court "was also concerned that the deal released claims against the National College Athletic Association and other collegiate, amateur, and youth football organizations." JA68 (citation omitted). The court thus ordered the parties to share their expert actuarial information with Special Master Perry Golkin, a sophisticated expert in finance. *Id.*

Settlement discussions resumed for five more months under Golkin's supervision. Critically, the new agreement that emerged from the negotiations was revised to uncap the fund that provides compensation for Qualifying Diagnoses, meaning that the NFL would

pay *all* valid claims, even if they vastly exceeded the original $765 million. Also, the parties agreed that class members would not be required to release claims against the collegiate, amateur, and youth football organizations. JA68. The parties made various other improvements as well. *Id.*

Second, after the parties filed extensive briefs regarding the revised settlement, and after the filing of voluminous briefs by objectors and amici, the court conducted a final fairness hearing. After considering the oral arguments and written presentations, the court did not simply approve the settlement. Instead, the court proposed numerous additional terms to benefit the class, including: giving them credit for time played in overseas NFL affiliate leagues; guaranteeing every qualified retired player a baseline medical assessment, regardless of the $75 million allotment for the BAP (for the specified time period); extending the period of coverage for death with CTE from the preliminary approval date to the final approval date; and easing various procedural requirements. JA79-80. The parties subsequently agreed with all of the court's proposed changes. JA80. Only then did the court approve the settlement.

Thus, despite the presence of lead class counsel, counsel for the two subclasses, the two class representatives, the mediator, and the special master, the court provided an extra layer of protection to ensure that the class truly received the best deal possible. In addition, the district court appointed coordinating lead counsel for all objectors who was integrated into the process of structuring the final fairness hearing, including a guarantee that any objector who wished it would have an opportunity to be heard. JA79.[17] Although the objectors and amici repeatedly disparage the district court in their appellate briefs, the court should be commended for its extraordinary oversight. Its rigorous

[17] Certain objectors complain that the district court did not hear live expert testimony. *See* GB at 19-21. However, objectors' liaison counsel, Mr. Molo, did not insist upon live expert testimony and no objector raised the issue at the fairness hearing or otherwise. Additionally, *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015), upon which objectors rely, is inapposite. In that antitrust case, the appellant "consistently challenged" the "reliability" of the plaintiff's expert damages testimony presented to satisfy Rule 23(b)(3)'s predominance requirement, *id.* at 185-86, and this Court held that "a plaintiff cannot rely on *challenged* expert testimony, *when critical to class certification*, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." *Id*. at 187 (emphasis added). Contrary to objectors' claims, a district court does not have a freestanding, independent obligation to conduct a *Daubert* inquiry as to every *unchallenged* expert when evaluating the fairness of a settlement, or the propriety of certifying a litigation class.

efforts made the agreement even stronger than it was before, and its innovations, such as the appointment of a liaison counsel for objectors, allowed for a final hearing with a full evidentiary record already in place.

Finally, in evaluating the settlement, the district court properly noted the availability of class settlement for mass torts where "there are no unknown future claimants and the absent class members are readily identifiable and can be given notice and an opportunity to opt out." JA103 (quoting *Manual for Complex Litigation (Fourth)* § 22.72).

II. THE DISTRICT COURT PROPERLY CERTIFIED THE CLASS

Objectors and amici contend that the district court erred in certifying the class. First, many of the objectors and amici assert that Rule 23(a)'s requirement for adequate class representation was not satisfied. Second, a few objectors claim that the requirements of commonality, typicality, and predominance (Rule 23(a)(2), (a)(3), and (b)(3)), respectively, were not satisfied. As discussed below, those arguments are meritless.

A. The District Court Correctly Found Adequacy of Representation

As set forth above, the district court appointed subclass representatives and separate counsel for class members who already manifest one of the qualifying conditions for compensation, and for those who do not yet manifest such conditions. JA48-49. In doing so, the court was responding directly to the teachings of *Amchem*, *Ortiz*, and several decisions of this Court.

Nonetheless, despite the district court's structure of the subclasses – with the controlling precedents squarely in mind – many of the objectors and amici argue that two subclasses are inadequate and that additional subclasses should have been created. Some contend that a separate subclass is needed for the claims associated with CTE; others maintain that separate subclasses should have been created for all major injuries. All told, the arguments are that potentially dozens of subclasses should have been created, each with separate counsel.

1. Objectors and Amici Ignore Controlling Precedent

Preliminarily, it is critical to note what is missing from all of the objector and amici briefs: A discussion of this Court's two most relevant decisions.

First, it is stunning that in making these extravagant claims of conflicted representation, no objector or amicus has discussed this Court's most recent authority on adequacy of representation and subclasses, *Community Bank*. Twelve briefs ignore the case altogether, and only one brief even acknowledges the case in an anodyne string citation. *Community Bank* is the most recent – and most comprehensive – discussion of adequacy of representation and the need for subclasses. It makes clear that subclassing is a nuanced and fact-specific enterprise, and it underscores prior Third Circuit case law that subclass representation is required only "if subgroups within the class have interests that are *significantly antagonistic* to one another." 795 F.3d at 393 (emphasis added). Relying on *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir. 2012), *Community Bank* defines significant antagonism as a "fundamental" conflict as arising either when one portion of the class has benefitted from the conduct

that has allegedly harmed the rest of the class, or when the "subclasses were jockeying for pieces of a limited settlement fund." 795 F.3d at 393-94.

Community Bank also makes clear that *Amchem* and *Ortiz* must be applied cautiously in light of their unique facts. *Id.* at 393 (quoting *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 646-47 (8th Cir. 2012). As this Court noted in *Community Bank*, "the circumstances that required separate counsel in *Ortiz* simply were not present in *Professional Firefighters,* nor do we think they are present here." 795 F.3d at 393. Of course, objectors and amici here make exactly the same mistake as did the unsuccessful litigants in *Community Bank* and *Professional Firefighters* – they cite *Amchem* and *Ortiz* literally hundreds of times in their 13 briefs without recognizing that the district court here made sure that the problem in those cases – absence of separate subclasses for presently injured and future claimants – did not exist here.

The failure of objectors and amici to grapple with *Community Bank* is significant for another reason: no objector has addressed the significance of the district court's insistence that the settlement be

uncapped as a condition of settlement approval even though this was a critical fact in *Community Bank*. There, the Court relied on "the basic change in circumstance[]" in the uncapping of a previously rejected class settlement: "we are no longer dealing with a settlement class and a fixed sum to satisfy claims." *Id.* at 394. Although *Community Bank* arose in the particular circumstance of a change from a settlement to a litigation class, the removal of any fixed limitation on recovery remained a key issue. This Court concluded:

> [T]he conflict that existed when a settlement class was facing a fixed pool of resources to resolve all claims is, for the time being, no longer a problem that can rightly be called fundamental. Appointing separate counsel, therefore, was not a necessary prerequisite for certification of the subclasses.

Id. at 395.

Community Bank reaffirms the law of this Circuit that "subclasses are only necessary when members of the class have divergent interests." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d at 272. Accordingly, "the linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." *Dewey*, 681 F.3d at 183.

Second, despite their fixation on adequacy of representation in the mass torts context, not one of the briefs addresses this Court's long experience with the approval and enforcement of the class action settlement in the *Diet Drugs* litigation, a "landmark effort to reconcile the rights of millions of individual plaintiffs with the efficiencies and fairness of a class-based settlement." *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d at 317.[18] Remarkably, twelve of the briefs do not cite *Diet Drugs* even once, and the one brief that does cite the case does so merely as boilerplate. ALB at 34 (citing another case that quotes a snippet from *Diet Drugs*). What makes this pervasive omission especially astonishing, not to mention violative of ethical obligations to alert this Court to controlling authority,[19] is that the district court cited

[18] The failure to address *Diet Drugs* is most glaring in the expansive reading of *Amchem* in the brief of amicus Public Citizen. The claim made about the myriad subgroups that each require representation would defeat any personal injury class action, which is in fact the position of this amicus. The putative division of interests is so great that Public Citizen demands a separate subclass even for spouses claiming loss of consortium. PC at 26. This sentimental attachment to the mini-kingdoms of the Balkans does not at all resemble this Court's handling of *Diet Drugs* (there was no consortium subclass there) and, as developed below, wrongfully equates endless partition with the avoidance of conflict.

[19] *See* 3d Cir. R. 28.3(b); ABA Model Rule of Prof'l Conduct 3.3(a)(2).

Diet Drugs no fewer than a dozen times as directing its inquiry into the propriety of the settlement.

In short, the failure of objectors and amici to cite controlling precedent is a red flag: a thorough and honest analysis of the case law confirms the correctness of the district court's ruling on adequacy of representation.[20]

2. The District Court Did Not Err in Failing To Create a Separate Subclass for CTE

The heart of several objections is the demand for a subclass for CTE. This is an extraordinary claim given the finding by the district court – uncontested by any objector – that there is no way of determining whether any living person has CTE. Thus, for example, the Armstrong-Taylor Objectors are reduced to arguing that "[s]cientists predict that methods to reliably diagnose CTE in living patients may emerge within 'the next decade, if not sooner.'" ARB at 11 (citing, *inter alia*, a New York Times op-ed). Leaving aside that such

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[20] No doubt Objectors will fill their reply briefs with claims that *Diet Drugs* and *Community Bank* are inapposite here. There is inherent unfairness in not allowing Appellees to respond to such arguments, which should be deemed waived by the failure to cite controlling authority in Appellants' opening briefs.

musings would not be admissible under *Daubert,* the scientific confidence of an objector does not establish conflict among all class members who, under this logic, are equally at risk of CTE. Nor does such confidence explain why the subclass representative for those without a qualifying disease – Shawn Wooden – is an inadequate representative with respect to CTE.

Objectors would have this Court simply disregard the district court's findings on this issue. The Armstrong-Taylor Objectors, for example, argues that Wooden was inadequate because he did not assert that he was at risk of developing CTE. ARB at 16, 23, 44.[21] The district court, however, squarely found to the contrary:

> Objectors contend that an additional subclass is necessary for Retired Players who suffer from CTE. They argue that Subclass Representative Shawn Wooden does not allege that he is at risk of developing the disease…. *Shawn Wooden has adequately alleged that he is at risk of developing CTE.* In the Master Administrative Class Action Complaint, one of the operative pleadings for this MDL, Wooden alleges he "is

[21] With no factual support, various objectors also seek to disparage the role of the subclass representatives and subclass counsel in the protracted negotiation process yielding the final settlement structure. The district court findings are to the contrary. *See* JA91 (subclass representatives "ably discharged their duties"); JA93 (each subclass had its own independent counsel). Objectors simply ignore this record evidence, including two declarations on point from the mediator, Judge Phillips.

> at increased risk of latent brain injuries caused by [] repeated traumatic head impacts," which, as Objectors point out, include CTE… Moreover, as Subclass Representative, Wooden authorized the filing of the Class Action Complaint, which alleges that Retired Players are at risk for developing "mood swings, personality changes, and the debilitating and latent disease known as CTE."

JA94-95 (emphasis added; citations omitted).

Of equal significance, objectors overlook the fact that classes (or subclasses) are made up of people, not abstract claims. The district court's undisputed finding is that there is presently no test that can identify CTE in the living. In the objectors' view of the world, all retired NFL players are at risk, and therefore a "subclass" of at-risk retired players would include each and every class member. As the district court explained, though:

> A subclass of CTE sufferers is both unnecessary and poses a serious practical problem. It is impossible to have a Class Representative who has CTE because, as Objectors concede, CTE can only be diagnosed after death. . . . Thus, the best Subclass Representative for individuals who will be diagnosed with CTE post mortem is one who alleges exposure to the traumatic head impacts that cause CTE and who has an incentive to negotiate for varied and generous future awards in light of the current uncertainty in his

> diagnosis. In other words, *the best Subclass Representative for CTE is someone in Shawn Wooden's position.*

JA95 (emphasis added; citations omitted).[22]

3. The District Court Correctly Refused To Create a Multitude of Separate Subclasses Based on the Myriad Injuries and Other Differences Among Class Members

Ultimately, the objectors deem the district court findings on lack of conflict irrelevant. Instead, they would have the district court reversed for failing to honor a blanket requirement that there be separate subclass representatives and counsel involved in the negotiation process whenever there are future harms, whenever disease manifestation might differ in the future, or whenever class members differ in the nature of their injuries or in some other way. *See, e.g.,* ARB at 42.[23]

Perhaps the broadest formulation of the argument is by Amicus Public Citizen, which argued below and reiterates here that separate

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[22] The distinct argument about compensation for CTE is addressed in Section IIIA, *infra,* as part of the fairness of the settlement.

[23] As discussed above, Shawn Wooden is in the same position as all other Subclass 1 members in terms of all of the conditions and symptoms that could be associated with NFL football. Thus, Mr. Wooden is an adequate Subclass 1 Representative in all respects.

subclasses (with separate counsel) were required for different types of diseases, ages of class members, length of service in the NFL, and on multiple other grounds. Public Citizen Dist. Ct. Mem. (ECF No. 6214-1), at 2-5; PC at 7-11. Indeed, Public Citizen goes so far as to advocate for a separate subclass (and separate counsel) for spouses asserting loss of consortium and other claims. PC at 11. All told, Public Citizen's approach would require dozens (and perhaps hundreds) of subclasses.

This extraordinary claim is at the heart of other objections, such as the Armstrong-Taylor Objectors' brief. But when it comes time for them to explain why such subclassing is required as a matter of law, the authority for this is none other than a law review article by counsel for the amicus Public Citizen. ARB at 42. This Court's law, however, is to the contrary, and is conveniently ignored by the objectors. In *Diet Drugs*, for example, this Court repeatedly enforced the binding effect of the class settlement and established the model for the findings below:

> That various subclasses in the *Brown* class could find themselves in competition does not by itself establish an actual conflict undermining adequacy of representation. In its final certification order, the District Court made extensive findings supporting the opposite conclusion. In particular, it found (1) there were no trade-offs between the classes; (2) the benefits had been bargained for separately;

> and (3) there was no conflict between those seeking future benefits and those seeking them immediately.

In re Diet Drugs, 282 F.3d 220, 231 (3d Cir. 2002).

Ignoring *Diet Drugs* allows objectors simply to disregard as well the findings of the district court that faithfully adhere to this Court's precedent. The court found that the presence of the mediator and special master ensured equal treatment of those currently suffering and those without a qualifying condition, and that there was no sacrifice of the interests of one for the other. JA94 (citing JA3804 (¶2), 3807 (¶8)). The court further found that the different compensation levels for different conditions reflect the underlying strength of members' claims and the severity of their injuries or symptoms, and that the offsets were based on science-backed risk factors. JA96-97. Further, the court found that the future representatives had every incentive to maximize coverage for future conditions. JA98. And, as mentioned, the settlement is uncapped, an issue highlighted in *Community Bank*.

This Court has long cautioned that subclassing for its own sake risks the "'Balkanization' of the class action" and the consequent "huge obstacle to settlement if each subclass has an incentive to hold out for more money." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d at 271

(quoting *In re Cendant Corp. Sec. Litig.*, 404 F.3d at 202); *see also Sullivan*, 667 F.3d at 326 (en banc) (same); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1146-48 (8th Cir. 1999) (rejecting need for creation of subclasses despite large differences in recovery among class members; "almost every settlement will involve different awards for various class members"); American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.10, Reporter's Notes, cmt. c (2010) ("there are frequently significant costs associated with creating large numbers of subclasses, including the administrative cost of more lawyers and the difficulties of negotiating in the presence of a large number of separately represented parties") (citation omitted).

Moreover, the argument ignores the other structural protections here: the extraordinary oversight of the district court and the active participation of the mediator (a retired federal judge) and the special master. *Esslinger v. HSBC Bank Nevada, N.A.*, No. 10-3213, 2012 WL 5866074, at *8 (E.D. Pa. Nov. 20, 2012) (finding settlement fair, reasonable and adequate where "[s]ettlement discussions included experienced counsel participating in three mediation sessions before a respected and impartial mediator."); *In re Advanta Corp. ERISA Litig.*,

2:09-CV-04974-CMR, 2014 WL 7692446, at *3 (E.D. Pa. Jan. 9, 2014) (Court noting that settlement was reached with assistance of experienced mediator who was "thoroughly familiar with this litigation."). As one court has noted, structural protection may include "*but may not necessarily require*, formally designated subclasses." *Juris v. Inamed Corp.*, 685 F.3d 1294, 1323 (11th Cir. 2012) (emphasis added).

The fatal flaw in the argument for multiple subclasses (each with separate counsel) is the erroneous assumption that every difference among class members requires subclassing and that no other form of structural protection will suffice. As this Court has made clear, subclassing is required only for "fundamental" conflicts. *In re Cmty. Bank,* 795 F.3d at 393-94. No case has taken the approach urged here, and *Diet Drugs* – which did not involve that sort of endless subclassing – squarely refutes it.

B. The Class Satisfied the Commonality, Typicality, and Predominance Requirements

A few objectors half-heartedly challenge certification on grounds of either commonality or typicality, or the predominance requirement of Rule 23(b)(3). Most objectors and amici either do not address those

requirements at all (thus implicitly conceding they were satisfied) or *explicitly* concede that they were satisfied.[24]

The district court correctly found all of these elements satisfied. JA81-83, 99-103. Specifically, all alleged claims arose from the same course of conduct by the NFL defendants: "[T]he NFL Parties allegedly injured Retired Players through the same common course of conduct: refusing to alter league rules to make the game safer, failing to warn of the dangers of head injuries, and establishing the MTBI Committee." JA83. Further, the district court found, "the NFL Parties' alleged conduct injured Class Members in the same way: Retired Players all returned to play prematurely after head injuries and continued to experience concussive and sub-concussive hits. Predominance exists even though these hits resulted in different symptoms with different damages." JA100.

Nonetheless, some objectors invoke *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), to somehow bar class actions whenever

[24] *See, e.g.*, ALB at 22-23 ("the Alexander Objectors do not challenge the district court's findings regarding predominance and superiority"), PC at 25-26 (arguing only adequacy of representation and conceding that, apart from that concern, settlement is not precluded). *See also* Morey (Faneca) Obj. (ECF No. 6201) at 97-98 (explicitly conceding that commonality, typicality, and predominance are satisfied).

there are individual variations in the impact of challenged conduct among class members. This is a frivolous argument. As the Supreme Court confirmed in *Dukes*, commonality can be satisfied by one common question of fact or law. *Id.* at 2556 ("'[e]ven a single [common] question' will do"). The common question must be "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551.[25]

There are several such questions in this case, as the district court recognized, including "whether the NFL Parties knew and suppressed

[25] As this Court has emphasized, the key requirement after *Dukes* is that the "court's focus must be 'on whether the defendant's conduct [is] common as to all of the class members[.]'" *Reyes*, 2015 WL 5131287, at *12 (alteration in original) (citation omitted); *see also Sullivan*, 667 F.3d at 299 (explaining that in *Dukes* the Supreme Court made "clear that the focus is on whether the defendant's conduct was common as to all of the class members, not on whether each plaintiff has a 'colorable' claim"); *In re Cmty. Bank*, 795 F.3d at 398-99 ("Unlike the *Wal–Mart* plaintiffs, the Plaintiffs in this case have alleged that the class was subjected to the same kind of illegal conduct by the same entities, and that class members were harmed in the same way, albeit to potentially different extents."); 2 William B. Rubenstein, *et al.*, *Newberg on Class Actions* § 4:63, at 247 (5th ed. 2012) ("[M]any courts have held that individualized issues may bar certification for adjudication because of predominance-related manageability concerns but that these same problems do not bar certification for settlement.").

information about the risks of concussive hits, as well as causation questions about whether concussive hits increase the likelihood that Retired Players will develop conditions that lead to Qualifying Diagnoses" and legal questions like "the nature and extent of any duty owed to Retired Players by the NFL Parties, and whether LMRA preemption, workers' compensation, or some affirmative defense would bar their claims." JA82. These questions "will drive the resolution of the litigation," *Dukes*, 131 S. Ct. at 2551, and therefore satisfy the commonality requirement. Moreover, these questions also demonstrate that common issues predominate over individual, as the district court explained at length, JA99-103, and as most objectors here explicitly or implicitly concede. As the district court found, "[c]entral to this case are factual questions regarding the NFL Parties' knowledge and conduct." JA100. This is consistent with longstanding law of this Court that predominance is satisfied when a common course of conduct is directed at all class members. *See, e.g.*, *In re Prudential Ins. Co.*, 148 F.3d at 314-15 (common sales practices directed at all class members establish predominance).

Similarly, some objectors argue, contrary to this Court's law, that the class representatives are not typical because there are some distinctions between them and some other players, such as not having played in NFL Europe, or having developed different symptoms or conditions as a result of playing football. But the class representatives' claims do not have to be identical to those of all class members to satisfy the typicality requirement. *See Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) ("[F]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.") (citation omitted); *see also In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009) ("[c]omplete factual similarity is not required"); *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001) (explaining that the important consideration for typicality is whether "the interests of the named plaintiffs align with the interests of the absent [class] members"). Under controlling law, the class representatives satisfy typicality.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

Objectors and amici devote hundreds of pages to the settlement's purported unfairness. But that briefing belies a simple truth: despite dozens of significant opinions from this Court on class action settlements, nearly all turn on structural issues regarding class certification, not the fairness of the settlement standing alone. There are two reasons for this. First, as this Court has noted, under the proper deferential standard of review, a "district court's findings under the *Girsh* test are factual and will be upheld unless they are clearly erroneous." *In re Pet Food Prods. Liab. Litig.*, 629 F.3d at 350. Second, and perhaps more centrally, a properly-certified class action subject to the exacting review under *Girsh/Prudential* is likely to get the matters of class resolution basically right. Thus, in the 20 years since *GM Trucks,* this Court has only twice vacated a class action settlement based on fairness concerns rather than defects in the class certification. *See In re Pet Foods,* 629 F.3d at 352-53 (vacating because district court lacked information to make *Girsh* findings); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173, 179-80 & n.16 (3d Cir. 2013) (adopting ALI

guidelines on *cy pres* distribution and remanding for assessment of the actual class benefit from settlement proceeds).

Nonetheless, a total of 13 briefs have been filed by objectors and amici that argue that this Court should reject the settlement on the basis of what it provides to the class. Given word limitations, Class Counsel cannot respond to all of the arguments. Instead, we address the most substantial (and in some instances, the most misleading) arguments. As we show, none of the arguments, whether taken separately or together, provides any basis for overturning the settlement.

Specifically, this brief addresses four points: the settlement's treatment of CTE; its treatment of various offsets; its administrative process; and the district court's handling of attorneys' fees. As discussed below, these arguments were all thoroughly addressed by the district court, and none raises even the slightest concern about the fairness of the settlement.

A. The Settlement Is Not Flawed in Its Treatment of CTE

In addition to claiming that a separate subclass should have been created for CTE (a point discussed above), numerous objectors complain

that the settlement's treatment of CTE renders the settlement unfair under Rule 23(e). The argument has several subparts: (1) the agreement should have provided compensation for every class member who is ultimately diagnosed with CTE: (2) the agreement should have compensated for mood disorders that are purportedly caused by CTE; (3) the settlement is flawed because it does not take into account the likely scientific progress in the evaluation of CTE; and (4) compensation for CTE for players who died on or before final settlement approval confirms the unfairness of the settlement. All of these contentions were considered and rejected in the district court's exhaustive analysis.

1. The Settlement's Omission of CTE (Except for Those Who Died before the Date of Final Approval) Does Not Render the Settlement Unfair

A number of objectors complain about the fact that the settlement does not cover death with CTE (except for players who died before the date of final approval). As the district court explained, this omission is deliberate. This settlement is designed to compensate manifestations of neurocognitive and neuromuscular diseases associated with the repeated head trauma sustained during NFL football play. It is not designed to compensate CTE. *See* JA146 ("The Settlement compensates

symptoms that cause Retired Players to suffer, not the presence of abnormal tau protein (or any other irregular brain structure) alone.").

It is important to recognize that CTE is a neuropathological finding, made only upon autopsy, through an examination of brain tissue under a microscope. As the district court correctly noted (JA136), and as all of the experts and amici concede (JA2957 (¶38), 3030 (¶12), 4420 (¶9), 4427 (¶10), 4475 (¶8)), CTE cannot be "diagnosed" in the living.

While reluctantly acknowledging this key fact, objectors attempt to minimize it by assuring this Court (as they similarly assured the district court) that the ability to diagnose CTE in the living is virtually "right around the corner." *E.g.*, ARB at 11; FB at 40 n.17. But as the district court noted, there is no way to know if that is correct. JA137-40. Such guesswork would never be admissible under *Daubert*. More importantly, the design of the settlement is to compensate the manifestation of diseases that can be distinctly attributed to concussive and subconcussive brain injuries sustained during professional football play, not cellular pathology, and not every affliction from which a retired football player might suffer.

Significantly, the fact that CTE itself is not covered (apart from players who died before final approval) does not mean that players with cognitive conditions purportedly associated with prospective CTE are left without a remedy. To the contrary, the district court specifically found as follows: "Assuming *arguendo* that Objectors accurately describe the symptoms of CTE, the existing Qualifying Diagnoses compensate the neurocognitive symptoms of the disease. Levels 1.5 and 2 Neurocognitive Impairment compensate all objectively measurable neurocognitive decline, *regardless of underlying pathology*." JA141 (emphasis in original).

Objectors argue that not all players who develop CTE will ultimately qualify for a dementia diagnosis. But as the district court expressly found, "even if CTE is a unique disease, it inflicts symptoms compensated by Levels 1.5 and 2 Neurocognitive Impairment and is strongly associated with other Qualifying Diagnoses in the Settlement." JA142. Additionally, "CTE studies to date have found a high incidence of comorbid disease. This means that in addition to CTE neuropathology, subjects had other conditions, including ALS,

Alzheimer's Disease, Parkinson's Disease, and frontotemporal dementia." JA141.

Objectors assert that "even if a former player with CTE receives compensation under another Qualifying Diagnosis, he still receives nothing for CTE and receives a fraction of what he would receive for Death with CTE." JJB at 31-32. That contention is erroneous. The district court addressed and refuted this precise point:

> [T]he benefits for Death with CTE are not more generous than the benefits for those who receive Qualifying Diagnoses while alive. . . . Monetary Award values for Death with CTE are higher than awards for Level 1.5 and 2 Neurocognitive Impairment in the same age bracket because the alleged symptoms Death with CTE compensates did not begin when Retired Players died.

JA145-46.

The differences in these award amounts are thus fair, reasonable, and adequate, and amply supported by the scientific evidence considered by the district court. At bottom, as the district court concluded: "The different maximum awards that Class Members receive for different Qualifying Diagnoses reflect the severity of the injury and symptoms suffered by each Retired Player." JA97 (citing *Diet Drugs*, 2000 WL 1222042, at *21-22, which approved a personal

injury class settlement that provided a range of monetary awards based on severity of injury).

2. The Settlement's Omission of Mood Disorders Was Reasonable

Objectors complain that the settlement is flawed because it does not encompass numerous mood and behavioral symptoms that they alleged were linked to CTE, but which the settlement does not compensate. Those conditions include, among many others, depression, mood disorders, emotional distress, personality changes, aggression, agitation, impulsivity, suicidal thoughts,[26] attention disorders, chronic headaches, chronic pain, sleep disorders, and fatigue. *See* JA96 n.34 (listing these and numerous other conditions identified by objectors as improperly excluded under the settlement).

The district court correctly rejected that argument. It found the exclusion of mood and behavior symptoms to be "reasonable because

[26] Contrary to the contentions of certain objectors, *see* JJB at 36-37, MCB at 19-20, the record does not support that NFL players have higher rates of suicidality than the population at-large. In fact, the record before the district court demonstrated that "there are no scientifically established studies . . . show[ing] a relationship between suicide and contact sports." JA3495-96 (¶76). Rather, "the studies until now suggest that NFL players are less likely to die by suicide than men in the general population." JA3203.

Retired Players typically have many other risk factors for these symptoms, such as exposure to lifestyle changes, a history of drug or alcohol abuse, and a high Body Mass Index[.]" JA98. Further, "[m]ood and behavioral symptoms are commonly found in the general population and have multifactorial causation. Even if head injuries were a risk factor for developing these symptoms, many other risk factors exist." JA143. "Retired Players," the court found, "tend to have many risk factors for mood and behavioral symptoms. For example, a typical Retired Player is more likely than an average person to have experienced sleep apnea, a history of drug and alcohol abuse, a high BMI, chronic pain, or major lifestyle changes." *Id*. By contrast, the court noted, the cognitive and neuromuscular impairments compensated under the settlement "tend to be more serious and more easily verifiable than mood and behavioral symptoms." JA147.

Ultimately, the objection that additional maladies should have been compensated is one that "could be made to any class settlement. The essence of settlement is compromise; neither side will achieve a perfect outcome." JA152 (citing *GM Trucks*, 55 F.3d at 806). The objection that the settlement should have covered more maladies is

especially weak "where class members 'not satisfied with the benefits provided in the Settlement may opt out of the Settlement." *Id*. (quoting *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 158 (E.D. La. 2013), *appeal dismissed in part*, No. 13-20221 (5th Cir. Feb. 11, 2014)).

3. The Settlement Is Not Flawed for Its Purported Failure to Accommodate Advances in Science

Objectors criticize the settlement for allegedly failing to include "'provisions that can keep pace with changing science and medicine, rather than freezing in place the science' known at the time of the settlement." FB at 40. But as the district court noted, "the Settlement requires the Parties to meet at least every ten years and confer in good faith about possible modifications to the definitions of Qualifying Diagnoses." JA147; *see also* JA5628 (setting forth the obligation to meet in good faith).

Reality, however, dictates that the science be viewed as it stands today, as to the diseases and conditions that the settlement will compensate, particularly as a quarter of the class had already filed suit against the NFL. For those who wanted to wait and see what the science might eventually uncover – and speculate as to the possible

ramifications that future science might have upon their cases against the NFL – there was the right to opt out.

4. The Settlement Properly Limits "Death with CTE" to Class Members Who Died Prior to Final Approval

Some Objectors assert that the fact that "Death with CTE" prior to final approval is compensated, while "Death with CTE" after final approval is not compensated, evidences unfairness. JJB at 32-37, MCB at 19-26. That argument is incorrect.

As the district court found (JA136), the "Death with CTE" benefit was designed to provide a means for the families of retired players who died prior to the Settlement to obtain compensation where there otherwise would be none, because there was no knowledge of the need of the then-living retired player to seek out or obtain a Qualifying Diagnosis.[27] Class Counsel knew that the families of those who had already died and whose brains had been found to have CTE (*i.e.*, the

[27] In contrast, the living class members have known about the details of the settlement since the initial motion for preliminary approval was filed on January 6, 2014, which included the diagnostic criteria needed for benefits. Therefore, for more than 18 months, there was an opportunity for a living retired player to be examined and to determine whether he would qualify for the benefits, should the settlement ultimately be approved, even though the BAP was not yet implemented.

very players and families who were among those who had highlighted the dangers of concussions in football play and prompted the first lawsuits) did not have sufficient notice that they needed to obtain a Qualifying Diagnosis. Class Counsel fought hard in the negotiations to make sure that these families would be compensated. JA3582-83 (¶37), 3808 (¶11). While the NFL was adamant throughout negotiations that it was not willing to compensate for anything other than the above-described manifestations of neurocognitive and neuromuscular diseases, as to the deceased players, the NFL ultimately was willing to make an exception and to allow CTE to serve as proxy for the manifestation, because those players' families were not similarly situated to living players, who could be tested and could obtain a Qualifying Diagnosis pursuant to the settlement. [28]

Indeed, the story recounted by Objector Eleanor Perfetto illustrates how this difference in the Injury Grid is fair and reasonable. Perfetto's husband, a former player, died at age 69 and was diagnosed

[28] Secondarily, the NFL was unwilling to pay for "Death with CTE" for those who may die in the future and be found, upon autopsy, to have CTE, because such might incentivize suicide. The district court recognized and agreed with this rationale, noting one player had written that "[p]layers diagnosed with CTE (living) today, have to kill themselves or die for their family to ever benefit." JA144.

with CTE. (ECF No. 6371.) He allegedly had been diagnosed with early dementia thirteen years prior (at age 56), and in her view, progressed through Levels 1.5 and 2 Neurocognitive Impairment prior to death. *Id.* Under the Settlement Agreement, assuming the application of no offsets, his Death with CTE Monetary Award would be $828,000. But had he been diagnosed under the Settlement Agreement with Level 2 Neurocognitive Impairment at, for example, age 57, his Monetary Award would have been $950,000. Thus, the Monetary Award that his estate would receive for Death with CTE is a fair approximation of the Monetary Award he may have received for a Level 2 Neurocognitive Impairment diagnosis when living, and is likely somewhat lower. *See* JA5711.

In sum, there is nothing unfair about the Settlement providing for compensation for "Death with CTE" before final approval, but not after.

B. The Settlement Makes Sensible Distinctions

1. Offsets for Age, Stroke, and Other Brain Traumas

Settlement necessarily occurs against the backdrop of what might happen if the case were to have gone to trial. The fourth and fifth *Girsh* factors direct courts to weigh the risks involved in establishing liability

and damages for just this reason. 521 F.2d at 157. While objectors complain about the offsets to the maximum monetary awards for advanced age, strokes, and non-football brain traumas, they once again disregard the district court's findings on why such offsets are reasonable. The simple fact is that strokes and brain traumas occur in the general population and cause harms regardless of whether the individual ever played football, and (unfortunately) everyone ages and there are predictable neurocognitive impairments that afflict an older population.

The district court found that offsets for these conditions were reasonable in light of the undisputed scientific evidence that these are independent factors that may break the causal link to injury from football. "The Stroke, severe TBI, and age offsets all represent scientifically documented risk factors for the Qualifying Diagnoses. Each is strongly associated with neurocognitive illnesses." JA97. Following *Girsh,* the court then tied such offsets to the risks that would ensue at trial for making claims against the NFL in the face of the offset conditions: "Older Retired Players, as well as Retired Players who suffered from Stroke or severe TBI outside of NFL Football, would find

it more difficult to prove causation if they litigated their claims, justifying a smaller award." JA97.

Not only is such an assessment required under *Girsh*, but it is standard fare in class action settlements to stratify award levels based on the strength of an individual claim. *E.g.*, *In re Oil Rig Deepwater Horizon*, 295 F.R.D. at 157 (approving medical benefits class settlement that "provide[d] for a range of potential proof, tying the amount of payments to the amount and quality of evidence presented"; noting that "[p]roviding a spectrum of settlement awards linked to a Class Member's level of proof is entirely appropriate"). Moreover, even these offsets are tailored to the unique circumstances of each claimant. As the district court noted, the settlement provides that if a claimant shows that a qualifying medical condition was not caused by a stroke or other brain trauma, the offset does not apply. JA157.

Objectors once again ignore prior law from this Court approving similar such offsets depending on the strength of individual claims. In *Diet Drugs*, for example, the court overruled objections that the settlement was unfair because awards were determined subject to matrix criteria like age and severity of injury. 2000 WL 1222042, at

*50-51. Likewise, in *Prudential*, this Court affirmed a class settlement in which insurance claims were evaluated and scored to arrive at differing compensation values. 148 F.3d at 296-97.

2. Offsets Based on Eligible Seasons

The district court found "[t]he offset for Retired Players with fewer than five Eligible Seasons is a reasonable proxy for Retired Players' exposure to repetitive head trauma in the NFL." JA97; *see also* JA160. The court further found that, consistent with the *Girsh* analysis, the use of actual play in the NFL was a stand-in for what would be a critical issue at trial in establishing both liability and damages: "Eligible Seasons are a proxy for exposure to concussive hits. Retired players on injured reserve did not play or practice." JA161. "Retired players with brief careers endured fewer hits, making it less likely that NFL Football caused their impairments. Research supports the claim that repeated head trauma has an association with the Qualifying Diagnoses." JA97, 160. Ultimately, Eligible Seasons are a fair proxy for exposure. Furthermore, as the district court found, "[w]hile the Settlement may have been more generous if Retired Players received

Eligible Season credit for training camp and preseason participation, the lack of credit does not render the Settlement unfair." JA162.

C. The Settlement Uses a Time-Tested Administrative Process

With 13 briefs in opposition, it is not surprising to find a laundry-list of objections that have absolutely no grounding in fact or law. Various objectors challenge aspects of the administration and claims process as somehow proving that the district court's finding of fairness is clearly erroneous. There is nothing new or surprising about a settlement's requiring information to assess the entitlement of a claimant to compensation: "[c]lass members must usually file claim forms providing details about their claims and other information needed to administer the settlement." David F. Herr, *Annotated Manual for Complex Litigation (Fourth)* § 21.66, at 441 (rev. ed. 2015). Indeed, similar settlement procedures have been approved and used successfully in class action settlements in this Circuit. *See*, *e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d at 259 n.17; *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 317-18 (3d Cir. 2001) (summarizing similar administrative procedures); *In re Prudential Ins. Co.*, 148 F.3d at 294-96; *In re CertainTeed Corp. Roofing Shingle Prods.*

Liab. Litig., 269 F.R.D. 468, 474-76 (E.D. Pa. 2010); *In re Diet Drugs Prods. Liab. Litig.*, No. 2:99-cv-20593, 2007 WL 433476, at *1-2 (E.D. Pa. Feb. 2, 2007). This objection is simply frivolous.

Finally, the objection that the Class Notice failed to adequately disclose that their monetary awards could be reduced by government liens, is refuted by the district court finding that the notice "discusses possible reductions based on '[a]ny legally enforceable liens on the award.'" JA109. Further, the district court made the specific finding that by "streamlin[ing] this necessary process and ensur[ing] that Class Members receive Monetary Awards as quickly as possible," the Lien Resolution program . . . is a substantial benefit for Class Members." JA 185. This objection is also frivolous.

D. The District Court Followed Established Circuit Precedent in the Fee Process

As part of their fairness attack, several of the objectors challenge the attorneys' fees component of the settlement despite the fact that there is no order awarding any attorneys' fees to class counsel. JA78. All such claims are simply not ripe.

The record establishes that the fee process followed well-established Circuit precedent.[29] The district court found that there was no discussion of fees until after the parties had agreed to the merits of the settlement. JA88. Further, the Class Notice informed that class counsel would be seeking up to $112.5 million from a separate fund and would be applying to the court for an award. JA1351. Finally, the district court found that the requested fee award was about 10 percent of the total class recovery, a figure that was in keeping with fee awards in common fund cases, and that "the uncontested fee award cap is not disproportionate to the compensation provided to the Class." JA90.

Objectors complain that the specifics regarding Class Counsel's fees were secretive, thereby denying class members due process. ARB at 4-5, 49. That argument is baseless. The Class Notice explicitly advised that: (i) the NFL Parties would pay Class Counsel's fees separately from the settlement funds, (ii) the NFL Parties had agreed not to oppose an award of up to $112.5 million, (iii) there could be an

[29] *See In re Prudential Ins. Co.,* 148 F.3d at 335. *See also* Herr, *Annotated Manual for Complex Litigation (Fourth)*, § 32.463, at 718 ("[A]ttorney['s] fees . . . negotiations preferably should not be commenced until the class claims have been resolved by trial or settlement.").

additional set-aside of up to five percent of MAF awards for the purpose of facilitating the settlement program and Class Counsel's efforts in connection with it; (iv) the matter of Class Counsel's fees would be taken up after final approval of the settlement; and (v) class members would have an opportunity to comment or object to a fee application at an appropriate time. JA1352. The short-form Class Notice similarly advised that the NFL Parties had agreed to pay Class Counsel's fees of up to $112.5 million separately from the Settlement funds and that a fee application would be made at a later date. JA1356. Thus, the Class Notice plainly satisfied this Court's instruction that "the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class." *In re Baby Prods. Antitrust Litig.*, 708 F.3d at 180.

Objectors also challenge the fact that the district court did not adjudicate attorneys' fees at the time it adjudicated the fairness of the settlement. *See* ARB at 25, 48-49. They rely for support on Federal Rule of Civil Procedure 23(h). That reliance is misplaced. Rule 23(h) does not mandate simultaneous adjudication of final approval and

attorney's fees.[30] All that it requires is that a fee request be made by motion, that class members be afforded an opportunity to object, and that the district court find facts and state legal conclusions respecting the application. Fed. R. Civ. P. 23(h)(1)-(3). That sequence of events will take place here in due course, as Class members have already been advised.[31]

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[30] Although objectors cite a 2003 Advisory Committee Note, that Note merely indicates that notice of class counsel's fee application will "ordinarily" accompany class notice, not that simultaneous adjudication is mandatory. In any event, the Rule itself does not so state, and "it is the Rule itself, not the Advisory Committee's description of it, that governs." *Dukes*, 131 S. Ct. at 2559. Numerous courts have bifurcated final approval and adjudication of fees. *E.g.*, *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex.*, 910 F. Supp. 2d 891, 918 n.16 (E.D. La. 2012), *aff'd*, 739 F.3d 790 (5th Cir. 2014); *Tennille v. W. Union Co.*, No. 09-CV-00938-JLK-KMT, 2014 WL 5394624, at *1 (D. Colo. Oct. 15, 2014), *appeal pending*, No. 14-1432 (10th Cir. arg. scheduled Sept. 28, 2015); *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184 FSH, 2007 WL 542227, at *5 (D.N.J. Feb. 16, 2007), *aff'd*, 579 F.3d 241 (3d Cir. 2009).

[31] Objectors also rely on *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010), in making their Rule 23(h) argument. ARB at 48. In *Mercury Interactive,* however, the district court had not given class members a chance to object to the actual Rule 23(h) fee motion, only to a notice that such motion would be filed. *Id.* at 993-94. This is exactly the opposite of what the district court did here in making clear that class members would have a full chance to object to any Rule 23(h) motion: "At an appropriate time after the Effective Date of the Settlement, Class Counsel may file a fee petition that Class Members will be free to contest." JA87. More bizarre is the Armstrong-Taylor Objectors' invocation of *Redman v. Radio Shack Corp.*, 768 F.3d 622

Indeed, the negotiation of fees after merits and the agreement to cap the fee request (what objectors deride as a "clear sailing" provision) are standard fare in class settlements, particularly where the settlement is uncapped so that any ultimate fee award does not lessen the class recovery. The reason is quite simple: it is often "essential to completion of [a] settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged." *Malchman v. Davis*, 761 F.2d 893, 905 n.5 (2d Cir. 1985); *accord In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.*, No. CV-07-1825-CAS MANX, 2012 WL 5462665, at *3 (C.D. Cal. Nov. 7, 2012) (noting that "clear sailing" provisions are "a common feature of classwide settlements"). As the New Jersey district court noted in a leading case from this Circuit, agreements to have a class defendant pay fees directly and not to oppose a fee request "particularly should be encouraged where there has been no collusion, fees were not discussed until after the settlement was negotiated, *and* the fees will not reduce

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(7th Cir. 2014), *cert. denied*, 135 S. Ct. 1429 (2015), a case in which a fee award was reversed because the court below had made no effort to value the actual benefit to the class, and then approved a notice that went to less than a third of the class. It is frivolous to compare that case to this one.

the Class fund." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 106 F. Supp. 2d 721, 722 (D.N.J. 2000) (emphasis in original).

Indeed, in a case such as this, having many active class members, the best protection of the Class's interests at the fee adjudication stage will be from class members themselves, rather than to expect the NFL Parties to guard their interests vis-à-vis Class Counsel.

IV. ALL OF THE *GIRSH* AND *PRUDENTIAL* FACTORS ARE SATISFIED

In this Circuit, a court considering a settlement must address all of the nine factors set forth in *Girsh*, 521 F.2d at 157. The court may also consider additional factors set out in *Prudential,* 148 F.3d at 323. Many of those factors have already been touched upon above and will not be discussed extensively here. For the Court's convenience, however, this section discusses all of the *Girsh* and *Prudential* factors in one place.

A. Application of the *Girsh* Factors Demonstrates the Fairness of the Settlement

The District Court meticulously analyzed the nine *Girsh* factors for assessing the fairness of the settlement. JA117-32.[32] These factors are intensely matters of fact that are reviewed only for abuse of discretion. *In re Pet Food*, 629 F.3d at 350.

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

The district court assessed the delays that would be attendant to trial and the difficulty of the proof of causation and the underlying responsibility of the NFL. JA118. The court also found that delay would be particularly harmful to the class because of increasing age and frailty of many class members. *Id.* The court concluded that the "complexity, expense, and likely duration of the litigation weigh in favor of approving the Settlement." JA119.

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[32] The factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Girsh*, 521 F.2d at 157 (internal quotation marks and ellipses omitted).

2. Reaction of the Class to the Settlement

As addressed above, the district court made specific findings with regard to the reaction of the class. First, the court found that, unlike in the broad run of class action, because "so many Class Members were intimately aware of the Settlement that an inference of support from silence is sound." *Id.* Second, the court found that class member access to information in the pre-approval period "confirm Class Members' active engagement." *Id.* Finally, the court found that low rate of objections was "especially impressive considering that about 5,200 Retired Players are currently represented by counsel in the MDL," and that "at least eight times as many Class Members registered to received addition information about the Settlement as expressed formal dissatisfaction with its terms." JA120.

3. Stage of Proceedings and Amount of Discovery Completed

This Court does not require formal discovery, instead insisting that the settling parties should have "an 'adequate appreciation of the merits of the case before negotiating.'" *In re Cendant Corp. Litig.*, 264 F.3d at 235 (quoting *GM Trucks*, 55 F.3d at 813); *In re Prudential Ins. Co.*, 148 F.3d at 319 (same). That was the case here. Plaintiffs did not

need formal discovery to understand the strengths and weaknesses of their claims. Class Counsel created and maintained a comprehensive database of Plaintiffs' claims and symptoms, and conducted extensive factual, legal, medical, scientific, economic, and actuarial research and consulted with numerous experts, both before commencing suit during the settlement negotiations. *See* JA 3574-75, 3578-79 (¶¶20, 30); *see* also JA 3805-07 (¶¶5, 8-10). As the district court noted, "Class Counsel had an adequate appreciation of the scientific issues relating to causation," retained multiple experts, and "constructed a dataset to catalogue the cognitive impairment of thousands of MDL Plaintiffs." JA122.

4. Risks of Establishing Liability and Damages

These two factors assess the risks that the class would have faced had it gone to trial. As noted earlier, the district court made specific findings as to the significant legal barriers presented by federal labor preemption and the issues of general and specific causation. JA123-28.

5. Risks of Maintaining the Class Action Through Trial

The district court found this factor to weigh in favor of the settlement, but only minimally, given that a court always has discretion

to modify a class certification order. JA129. This factor played no role in the court's settlement approval.

6. Ability of Defendants To Withstand a Greater Judgment

This factor does not figure prominently in this Court's case law, and was determined by the district court to be neutral. In cases in which the ability to pay is invoked as a limitation on the settlement recovery, this factor may be of some probative value. As this Court noted in *Sullivan,* "'in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement.'" 667 F.3d at 323 (citation omitted).

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

The district court correctly found, JA130-32, that these two factors weighed in favor of settlement. As the court discussed, and as explained above, the settlement represents an extraordinary accomplishment for the class, especially given all of the risks of litigation.

* * *

Viewed in their totality, the *Girsh* factors clearly support the fairness of the settlement.

B. The *Prudential* Factors Also Weigh in Favor of the Settlement

This Court also instructs district courts to consider a set of additional factors taken from *In re Prudential* that have proven over time to help guide the settlement inquiry.[33] The district court correctly found that the relevant factors weighed in favor of the settlement: "Class Counsel were able to make an informed decision about the probable outcome of trial," "[a]ll Class Members had the opportunity to opt out"; and "the claims process is reasonable in light of the substantial monetary awards available to Class Members, and imposes no more requirements than necessary." JA133-34. The issue of whether

[33] These factors are: (1) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; (2) the existence and probable outcome of claims by other classes and subclasses; (3) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; (4) whether class or subclass members are accorded the right to opt out of the settlement; (5) whether any provisions for attorneys' fees are reasonable; and (6) whether the procedure for processing individual claims under the settlement is fair and reasonable. 148 F.3d at 323-24.

attorneys' fees are reasonable is neutral "because Class Counsel have not yet moved for a fee award." JA134.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: September 22, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and the Court's Order dated September 3, 2015, I hereby certify that:

1. This brief complies with the type-volume limitations prescribed in the Court's September 3, 2015 Order granting each of the two Appellees leave to file a brief in excess of the limit prescribed by Fed. R. App. P. 32(a)(7)(B)(i), but not to exceed 21,000 words. As measured by the word processing system used to prepare this brief, there are 20,614 words in the brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface (Century Schoolbook 14 point) using Microsoft Word 2010.

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Rule 28.3(d), I certify that I am a member of the Bar of this Court.

CERTIFICATION OF VIRUS SCAN

I certify, pursuant to Third Circuit Local Rule 31.1(c), that a virus detection program has been run on this file and that no virus was detected. The virus detection program utilized was Trend Micro OfficeScan, version 11.0.1454.

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I certify that on this date, September 22, 2015, I caused the foregoing Consolidated Brief for Class Plaintiffs-Appellees to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: September 22, 2015

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