NO. 15-2273

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS
CONCUSSION INJURY LITIGATION

KEVIN TURNER and SHAWN WOODEN, on behalf of themselves and all other similarly situated,
Plaintiffs,
v.
NATIONAL FOOTBALL LEAGUE and NFL PROPERTIES, LLC,
Defendants,

L. PATRISE ALEXANDER, *et al*.,
Appellants.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Hon. Anita B. Brody, No. 2:14-cv-0029-AB and MDL No. 2323

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October 7, 2015

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Appellants L. Patrice Alexander, *et al.*, ("Alexander Objectors") reply to the briefs filed by (i) Counsel to the Settlement Class ("Class Counsel"), and (ii) the National Football League and NFL Properties LLC (together, "NFL"), as follows.[1] With respect to any points not addressed herein, the Alexander Objectors rely upon and reurge the discussion in their opening brief ("Alexander Brief").

INTRODUCTION

The Alexander Brief explained why the district court erred in certifying the Settlement Class, and approving the Settlement. *See* Alexander Brief, at 23-51. In that regard, the Alexander Objectors made three overarching arguments. *First*, the Settlement Class received inadequate representation from both Class Counsel and the class representatives. *Id.*, at 25-37. *Second*, the district court impermissibly abdicated--and otherwise failed in--its role as a fiduciary to the Class. *Id.*, at 37-40. *Third*, the Settlement is not fair, reasonable, and adequate because, *inter alia*, it requires release of future CTE-related claims with no compensation, and fails the test set forth in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975). Neither the Class Counsel Brief, nor the NFL Brief, serves to disarm the force of the Alexander Objectors' arguments in any respect. Again, therefore, the Court should (i) reverse

[1] *See* Consolidated Brief for Class Plaintiffs-Appellees ("Class Counsel Brief"); Response Brief for Defendants ("NFL Brief").

certification of the Settlement Class and approval of the Settlement, (ii) vacate the Judgment, and (iii) remand the case for further proceedings. *Id.*, at 52.

ARGUMENT

I. CLASS COUNSEL DID NOT ADEQUATELY REPRESENT THE CLASS

The Alexander Objectors challenge the district court's finding that Class Counsel provided the Settlement Class with the adequate representation required by Fed. R. Civ. P. 23(a)(4). *See* Alexander Brief, at 25-34. In that regard, this Court has noted that two considerations are paramount, *to wit*: Class Counsel's "experience and performance…." *In re Cmty. Bank of N. Va.*, 795 F.3d 380, 392 (3d Cir. 2015). The Alexander Objectors do not question Class Counsel's experience. Nor do they think that Class Counsel are incapable of providing adequate representation in a given case. *See* Alexander Brief, at 25 n.16. But they did not do so in *this* case, and the district court's contrary conclusion should be rejected for the reasons stated in our opening brief and the briefs of other appellants. The Alexander Objectors respectfully join and incorporate the arguments on this issue advanced by other objector-appellants, adding only the several points below.

A. Class Counsel Settled the Case Without Discovery of the Full Extent of the NFL's Misconduct.

The central allegation of *misconduct* in this case is that the NFL knew of the risk that repetitive head injuries would lead to catastrophic long-terms conditions,

but for decades (i) kept that knowledge from the players, and (ii) through its *faux* "scientific committee," actively sought to undermine medical advancements in the field. Indeed, that allegation is so central to the plaintiffs' claims it factored heavily in the district court's findings of commonality and predominance. Yet as explained in the Alexander Brief, Class Counsel settled the case without taking *any* discovery on the allegations of the NFL's misconduct. *See* Alexander Brief, at 26-29. Though that failure is a flag of the brightest red imaginable, it inexplicably gave the district court no pause for concern.[2] *Cf., e.g., Lane v. Wells Fargo Bank, N.A.,* No. C 12-04026 WHA, 2013 WL 3187410, at *14 (N.D. Cal. June 21, 2013) ("Counsel's failure to diligently pursue discovery and provide…proper evidence in support of class certification does not meet the standard for adequate representation of the class."). This Court should neither accept, nor endorse, that lack of concern.[3]

Not surprisingly, the NFL does not address Class Counsel's abject failure to conduct discovery into its alleged misconduct. Indeed, it is difficult to conjure anything that sensibly *could* be said in this regard. Class Counsel unwittingly prove

[2] One possible explanation is that the district court relied heavily on--and liberally borrowed from--Proposed Findings of Fact and Conclusions of Law gratuitously submitted by Class Counsel and the NFL, which unsurprisingly did not address the failure to conduct discovery in the context of adequate representation *vel non*.

[3] Class Counsel acknowledge that "[t]he conduct of the NFL in concealing the long-term effects of head blows is *at the heart* of the [plaintiffs'] claims…." Class Counsel Brief, at 41 (emphasis added).

that reality by bizarrely claiming that discovery into the NFL's misconduct would have made no difference in the settlement because "[i]ndependent of what the NFL knew at what point, the claims of…liability turned heavily on the distinctly legal issue of federal labor preemption." Class Counsel Brief, at 52. In other words, the argument effectively is that the settlement value of this case is the same whether or not the allegations of egregious misconduct by the NFL are true.

Really? Do Class Counsel seriously mean to say that they could not have obtained a better settlement for the Class even if armed with discovery verifying the NFL's misconduct? If so, then that acknowledgement should--in and of itself--doom any claim to adequate representation in this case. Whether the NFL's preemption claim is right or wrong, the settlement value of the case could only have increased with hard evidence of its "hotly contested" alleged wrongdoing. *See* NFL Brief, at 39-40 (allegations of the NFL's misconduct were "hotly contested and factually dense."). Yet Class Counsel (i) did not even attempt to discover such evidence before settling the case, and (ii) made no effort to advise the district court that discovery on the issue was crucial.

Moreover, in addressing the third *Girsh* factor, Class Counsel posit that they knew all they needed to, and "did not need formal discovery to understand the

strengths and weaknesses of…[the plaintiffs'] claims." *Id.*, at 98-99.[4] This is so, they insist, because they (i) created and maintained a "comprehensive database" of the plaintiffs' claims and symptoms, and (ii) "conducted extensive factual, legal, medical, scientific, economic, and actuarial research and consulted with numerous experts, both before commencing suit and during settlement negotiations." *Id.* But this is a further (if backhand) acknowledgement that Class Counsel settled the case without *any* discovery--formal or informal--into the core allegations of the NFL's misconduct. Worse, it is a *de facto* admission that Class Counsel did not deem that misconduct germane to the calculus of determining the strengths and weaknesses of the lawsuit. We find that proposition mind-boggling, as should the Court. Class Counsel inadequately represented the Settlement Class by settling the case without taking *any* discovery, and the Court should so hold.

B. Class Counsel Breached Their Fiduciary Duty to the Members of the Settlement Class.

The Alexander Objectors chronicled the efforts expended on behalf of class members to obtain from Class Counsel information underlying--and essential to an

[4] As noted above, the argument that Class Counsel inadequately represented the Settlement Class by settling without discovery is set forth at pages 26-29 of the Alexander Brief. Class Counsel's Cross-Reference Index informs that Argument Point IV responds to, *inter alia*, the argument on those pages. *See* Class Counsel Brief, at xiii. This is not correct. Argument Point IV addresses the *Girsh* factors, which address not the requirements of class certification, but whether a settlement is fair, adequate, and reasonable. *Id.*, at 96-101. Nonetheless, that discussion further demonstrates inadequate representation of the Settlement Class.

informed evaluation of--the Settlement and its predecessors. *See* Alexander Brief, at 10-11, ¶¶ (ix)-(xi); 12-13, ¶ (xiii); 14-15, ¶¶ (xv)-(xvi); 15-16, ¶ (xviii). Without exception, Class Counsel successfully fought those efforts, intentionally keeping the class (i) uninformed, and (ii) without the ability to participate meaningfully in the process. That conduct flies in the face of Class Counsel's fiduciary duties to the class members, and constitutes inadequate representation on its face. *Id.*, at 29-30.

Class Counsel do not quarrel with the Alexander Objector's recitation of the facts. Nor do they disclaim having fiduciary duties to the class. One would expect, then, at least some explanation as to why their conduct in actively opposing and successfully thwarting class members' efforts to be educated about the Settlement was permissible. But remarkably, there is none. Instead, Class Counsel apparently contend that the overall gestalt of the process overrides and excuses their conduct.[5] For example, they report that, in addition to the notice sent to the class, "thousands of news articles, television broadcasts, and internet postings described the filing of the suits [against the NFL], the court proceedings, the progress of the settlement, and the precise terms." Class Counsel Brief, at 43. Further, they observe that many class members filed suit against the NFL, and the Settlement's web site and toll-

[5] The argument that Class Counsel inadequately represented the Settlement Class by refusing to disclose information is found at pages 29-30 of the Alexander Brief. Class Counsel's Cross-Reference Index informs that Argument Point I responds to, *inter alia*, the argument on those pages. *See* Class Counsel Brief, at xiii.

free hotline have received thousands of "unique visitors" and calls, respectively. *Id.*, at 43-44. And "many of the players were represented by their own individual counsel…and thus had counsel to inform and advise them about the settlement." *Id.*, at 44. Hence, they apparently conclude, the class was informed "well enough" for purposes of class certification and approval of the Settlement.

Class Counsel is wrong. For all the hoopla and falderal they emphasize, Class Counsel point--and can point--to *nothing* that gave class members any clue as to how the Settlement and its predecessors were confected. The media blizzard they cite did *nothing* to inform the class about the rationale for the arbitrary line-drawing that Class Counsel insist was required. Nor could it have, since Class Counsel refused and resisted all efforts by the class--and media including Bloomberg and ESPN--to obtain disclosure of the information and data underlying the Settlement. Thus, the whirlwind of *generalized* information touted by Class Counsel was a vacuum of *specific* information that would have been useful to a meaningful evaluation of the Settlement. And that result is all the worse since--as Class Counsel acknowledge--many class members had counsel who wanted to knowledgably advise their clients about the Settlement but could not. It is more than a little ironic that Class Counsel invoke the presence and attempted participation of counsel with whom they *refused* to share information as evidence that "the process" was sufficient.

Further, there is an additional wrinkle in Class Counsel's veil of secrecy. As the Alexander Objectors noted, the district court appointed a Special Master to assist it in evaluating the financial aspects of the Settlement. *See* Alexander Brief, at 8. The NFL reports that, after *sua sponte* denying preliminary class certification and approval of the proposed settlement in January 2014, the district court assigned the Special Master "to supervise the…efforts to reach a revised settlement." NFL Brief, at 13. The Special Master then "guided" the negotiations that produced the Settlement preliminarily approved by the district court in July 2014. *Id.*, at 14. *See also* Class Counsel Brief, at 16-17 (stating that the negotiations were "overseen" by the Special Master). Thus, the Special Master apparently had a substantive role in shaping the second proposed settlement, yet Class Counsel refused to share with the class the materials that they shared with him. The Court should agree that Class Counsel's calculated effort to keep the class in the dark was improper, and hold that their refusal to share information constituted inadequate representation.[6]

[6] The district court permitted Class Counsel's refusal to share information and data underlying the Settlement (and its predecessors) with the class members and their counsel, thereby breaching its own fiduciary duty to the class. *See* Alexander Brief, at 37-40. That breach speaks, of course, to approval of the Settlement, not to the adequacy of Class Counsel's representation of the Settlement Class. It is no answer to this charge to say that the district court exercised "unprecedented supervision" of the settlement. The simple fact is that class members who wanted to participate in the process in real time--and wanted to understand the basis for the Settlement--were not allowed to do so. No matter how "unprecedented," the district court's "supervision" was not a substitute for class members' informed participation.

C. Class Counsel's Inadequacy is Underscored by the Inadequacy of the Settlement.

As the Alexander Objectors explained, Class Counsel's performance in this case was substantively inadequate because the Settlement is not fair, reasonable, and adequate, either viewed as a whole, or in two specific respects. *See* Alexander Brief, at 31-32. *First*, "Class Counsel extracted no compensation for non-physical injuries [despite alleging such injuries in the pleadings]." *Id.*, at 31. *Second*, the Settlement they champion as fair, reasonable, and adequate requires a full release of all future CTE-related claims with *no* compensation. *Id.*, at 31-32. The argument assails, then, not only the district court's approval of the Settlement, but also its certification of the Settlement Class. This dual focus is directed to both the relief requested herein, and how the case should proceed on remand. Specifically, having demonstrated substantively inadequate representation in this matter, Class Counsel should not be permitted to represent the class (either settlement, or otherwise).

Without addressing this issue in the context of adequate representation *vel non*, Class Counsel and the NFL implicitly suggest that the challenge is much ado about nothing because the Settlement is, in fact, fair, reasonable, and adequate. *See generally* Class Counsel Brief, at 75-102; NFL Brief, at 34-84. Moreover, the NFL repeatedly says that the problem is not with the Settlement, but with the appellants' failure to understand it. *See* NFL Brief, at 32, 63, 66, 71. Indeed, it patronizingly asserts that "[t]he vast majority of…[the appellants'] objections are based on a

misunderstanding of the…[Settlement] and what it compensates." *Id.*, at 32. To the contrary, the Alexander Objectors understand perfectly well that the Settlement (i) compensates only four medical conditions on a go-forward basis, (ii) provides payments that, while perhaps facially generous, lessen dramatically over time, (iii) will--and structurally can--provide compensation for only a small fraction of the Settlement Class, and (iv) requires a release of any future CTE-related claims with no compensation. What they now also understand is *why* Class Counsel agreed to a Settlement that so blatantly favors the NFL. That understanding demonstrates the inadequacy of Class Counsel's performance to an even greater degree.

When the district court ordered the parties to mediation on July 8, 2013, it instructed the mediator to report the results of the mediation by September 3, 2013. *See* Order, at 1. (Docket # 5128). On August 29, 2013, the mediator informed the district court that the parties "had signed a Term Sheet incorporating the principal terms of a settlement." Order, at 1. (Docket # 5235). Thus, Class Counsel agreed to the principal terms of the Settlement a mere *52 days* after being sent to mediation.[7] The dynamic at work during the mediation is telling. According to the NFL, it has, and (presumably) had, "unique incentives to provide fairly for the community of

[7] The NFL inflates the time spent in reaching the Settlement's principal terms by claiming that those terms followed "months of negotiations…." NFL Brief, at 12. Class Counsel implicitly confirm that the NFL's recitation of the initial mediation period is wildly exaggerated. *See* Class Counsel Brief, at 6.

retired….players." NFL Brief, at 73. Thus, Class Counsel knew that settlement was in the offing, and should have been poised to take advantage of the NFL's "unique incentives" to provide fairly for the plaintiffs. Instead of doing so, they capitulated from the start to the NFL's dictates as to what it would--and would not--do. Thus, "[f]rom the outset, [C]lass [C]ounsel recognized that the NFL…would negotiate payment only for conditions that were 'objectively verifiable' and 'serious.'" *Id.*, at 74. Rather than push back, Class Counsel simply "agreed [after a few weeks of negotiations] to the basic settlement structure…." Class Counsel Brief, at 14.

The upshot is that the NFL effectively dictated the terms on which it would settle, to which Class Counsel in short order simply capitulated, despite the NFL's "unique incentives" to provide fairly for its former players. Moreover, because the NFL decreed that release of future CTE-related claims was critical, *see* NFL Brief, at 76, Class Counsel readily agreed to what is perhaps the single most offensive aspect of the Settlement, *i.e.*, the release of all future CTE-related claims without monetary compensation.[8] And all of this (i) without discovery into the allegations of the NFL's *decades-long egregious misconduct*, and (ii) in preface to negotiating a clear-sailing fee agreement under which the NFL will pay Class Counsel--

[8] For good measure, Class Counsel also agreed to the release of claims against "'collegiate, amateur, and youth football organizations [none of which were named as defendants].'" Class Counsel Brief, at 16 (citation omitted). The district court forewarned that it would put the kibosh on that requirement, and it disappeared.

without challenge--up to $112.5 million in attorneys' fees as awarded by the district court.[9] Given this performance, it could come as no surprise to any sentient

[9] The NFL's agreement to the clear-sailing provision comes as no surprise, given Class Counsel's agreement to no compensation and releases for future CTE claims. The irony, however, is that the NFL's alleged justification for not compensating future CTE claims, *i.e.* the current state of CTE science (or lack thereof), is, in part, a result of what Class Counsel described as a decades-long campaign by the NFL to intentionally obstruct the science linking concussions and CTE. According to Class Counsel, the NFL knew previous scientific studies and testing "established that football players who sustain repetitive head impacts … suffered and continue to suffer brain injuries that result in … the debilitating and latent disease known as [CTE]" (A.882). So, "the NFL publicly inserted itself into the business of head injury research" and engaged in a campaign to "actively suppress" that link (A.868; A.888; A.899 (noting "the NFL … engaged in a long-running course of fraudulent and negligent conduct, which included a campaign of disinformation designed to … dispute accepted and valid neuroscience regarding the connection between repetitive traumatic brain injuries and concussions and degenerative brain diseases such as CTE")). In fact, the NFL created a medical committee to: (i) "advance improper, biased, and falsified industry-generated studies;" (ii) "discredit well-researched and credible studies" (iii) "suppress the findings of other members of the medical communities;" and (iv) "deliberately spread misinformation" (A.870-72; *see also* A.888-89). And, it did all of this, according to Class Counsel, because it knew that any recognition of the link between concussions and neuro-cognitive injury, including CTE, "would impose an economic cost that would significantly and adversely change the profit margins enjoyed by the NFL and its teams" (A.872). The result, then, at least if the settlement stands, is that the NFL's decades-long campaign to obstruct the science associated with concussions and CTE worked; its misconduct rewarded by avoiding liability for future CTE claims. And Class Counsel, for their capitulation on future CTE claims, walk away with a monstrous attorney fee award.

being that the Alexander Objectors cry foul. Class Counsel simply did not provide the Settlement Class with adequate representation, and the Court should so hold.

II. THE SETTLEMENT IS NOT FAIR, REASONABLE, AND ADEQUATE.

The Alexander Objectors explained in detail why the findings underlying the district court's conclusion that the Settlement is fair, reasonable, and adequate are clearly erroneous. *See* Alexander Brief, at 43-51. Class Counsel and the NFL spend many pages addressing the issue, *see* Class Counsel Brief, at 75-102; NFL Brief, at 34-63, but fail to advance any cogent rationale for the proposition that a release of future CTE-related claims *without monetary compensation* is fair, reasonable, and adequate. Class Counsel, for example, say that the Settlement "is not designed to compensate CTE," and leave it at that. Class Counsel Brief, at 77. For its part, the NFL laments that "carving out future CTE-related claims would fundamentally alter the bargain struck by the parties…and deprive…[it] of a comprehensive release that is a critical component of any settlement." NFL Brief, at 76. In other words, releasing future CTE-related claims is fair because "that was the deal."

But that rationale begs the question of how "the deal" is fair, reasonable, and adequate when it releases future CTE-related claims for no compensation, which is, of course, simply the same question restated in a different form. It is, therefore, no answer for Class Counsel and the NFL to say that the Settlement passes muster because it accomplishes what they set out to do. Nor is there another answer that

explains how release of future CTE-related claims with no compensation is fair, reasonable, and adequate. At bottom the Settlement would be fair, reasonable, and adequate in this regard only if it either carved out future CTE-related claims from the release, or provided class members with a back-end opt out allowing pursuit of such claims.

The NFL insists, however, that the Settlement contemplates compensation for *all* CTE-related claims because it "provides benefits for [future] manifested neurocognitive deficiencies associated with CTE." NFL Brief, at 66. Specifically, the Settlement provides compensation for qualifying diagnoses of Levels 1.5 and 2 Neurocognitive Impairment which, it says, some appellants have argued are among the cognitive effects of late-stage CTE. *Id.*, at 67. The result is that (i) the few class members who receive a "Death with CTE" Qualifying Diagnosis are eligible for payments of $4 million, while (ii) all living class members with CTE are eligible for payments of only $1.5 or $3 million, and all deceased class members outside the favored few--whose brains by definition cannot be examined for CTE within the qualifying window--will receive nothing. Thus, the Settlement awards a few class members a *premium* of $1 to $4 million for the happenstance of having died at the right time. This is nothing more than an insipid publicity stunt that inures to the benefit of the NFL through the appearance of generosity (payments of $4

million!), while dramatically reducing the payout under the Settlement. Nothing about this treatment is fair, reasonable, or adequate in the slightest.

The Court should agree with the Alexander Objectors' analysis of the fairness requirement, including their discussion of the *Girsh* factors (supplemented as follows), and hold that the Settlement is not fair, reasonable, and adequate. The Alexander Objectors note just a few points in reply:

(i) With respect to the second *Girsh* factor, Class Counsel and the NFL trumpet statistics showing that (i) there were thousands of visits to the Settlement website, and calls to the Settlement's hotline, and (ii) more than 7000 class members have attempted to "preregister" for benefits. *See* Class Counsel Brief, at 44, 46; NFL Brief, at 41. Based on these statistics, they argue that the percentage of opt-outs and vigorous objections to the Settlement should be ignored because class members are interested and informed, and did not object or opt out *en masse*. The "analysis" is incomplete, however, because it does not disclose how many of these visitors and callers are either (i) clients of (or others otherwise controlled by) Class Counsel, or (ii) persons acting at the behest of the NFL. Since both Class Counsel and the NFL have a vested interest in having more visits and calls, it is not unreasonable to imagine that many visits and calls have been made by captive (or paid) individuals. While there is no record evidence of such a practice, there also is

no record evidence to the contrary, and this factor does not justify approval of the settlement.

(ii) With respect to the third, fourth, and fifth *Girsh* factors, Class Counsel and the NFL repeatedly note the possibility that the NFL might have prevailed on its defense that the plaintiffs' claims are preempted by the LMRA. *See, e.g.*, Class Counsel Brief, at 1-2, 5, 10, 52, 99; NFL Brief, at 48-50. The apparent implication is that Class Counsel were wise to agree to the one-sided settlement offered by the NFL because that settlement was better than nothing. Yet "nothing" is not the result of LMRA preemption. Instead, the result is that while the plaintiffs could not pursue claims in federal court, they could *still* pursue claims in arbitration. *See* NFL Brief, at 9. In other words, the risk was that the plaintiffs faced possible loss of *judicial* redress, not the total loss of *any* redress. *Id.*, at 2, 31, 33, 45, 48, 49, 50 (all stating that preemption would foreclose judicial redress). Class Counsel and the NFL nevertheless treat the preemption defense as an all-or-nothing proposition, thereby skewing the outcome of the third, fourth, and fifth *Girsh* factors.

Moreover, the NFL's assessment of the third *Girsh* factor focuses solely on the downside risks to the plaintiffs, while omitting discussion of the downside risk *it* would have faced from discovery supporting the allegations of its egregious long-term misconduct. Class Counsel likewise ignore those allegations in addressing their assessment of the parties' relative risks. It is manifestly

nonsensical to accord no upside to the allegations of misconduct at the heart of the plaintiffs' case.

(iii) With respect to the eighth and ninth *Girsh* factors, the NFL notes that the question is "whether the settlement is reasonable in light of *the best possible recovery…the class could obtain,* discounted by the risks posed by the litigation." NFL Brief, at 57 (emphasis added). Despite that comparative inquiry, one looks in vain for any assessment of the "best possible recovery" that the class might obtain through either litigation, or arbitration. In other words, the NFL addresses only one side of the equation. Class Counsel mimic that treatment, nowhere assessing in their 102-page filing the "best possible recovery" that the case presents. Indeed, truth to tell, they *sub silencio* disavow any better possible recovery over and above the one-sided settlement terms dictated by the NFL. Further, and most importantly, the district court made no discernible comparative analysis of (i) the plaintiffs' best case scenario, versus (ii) the risks posed by litigation. Instead, it addressed solely the gloom-and-doom of the latter. That treatment was faulty as a matter of law, and certanly did not justify the approval of this deeply flawed settlement.

CONCLUSION

For the reasons set forth above and in the Brief for the Appellants, as well as the additional arguments set forth by the consolidated Appellants/Objectors, which are adopted herein, the Court should (i) reverse certification of the Settlement

Class and approval of the Settlement, (ii) vacate the Judgment, and (iii) remand the case to the district court for further proceedings.

Dated: October 7, 2015

Respectfully submitted,

/s/ Lance H. Lubel

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COMBINED CERTIFICATIONS

Pursuant to 3d Cir. L.A.R. 28.3(d), 31.1(c), and 32.1(c) and Fed. R. App. P. 32(7)(c), I hereby certify the following:

1. *Bar Membership*. Lance Lubel, Adam Voyles, Mickey Washington, and Charles L. Becker are all members in good standing of the Bar of this Court.

2. *Word Count and Typeface*. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 4,418 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This reply brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-styles requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally-spaced typeface using Microsoft Word (2013) in 14 pt. font using Times New Roman type style.

3. *Identical Compliance of Briefs*. The text of the electronic and hardcopy forms of this reply brief are identical.

4. *Virus Check*. This reply brief was scanned using Symantec Endpoint Protection and no virus was found.

Dated: October 7, 2015

/s/ Lance H. Lubel
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CERTIFICATE OF SERVICE

I certify that on October 7, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system upon all attorneys of record.

Dated: October 7, 2015

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