No. 15-2304

United States Court of Appeals
for the Third Circuit

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, No. 2:14-cv-0029-AB and MDL No. 2323)

BRIEF OF OBJECTORS-APPELLANTS ALAN FANECA; RODERICK "ROCK" CARTWRIGHT; JEFF ROHRER; SEAN CONSIDINE

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PRELIMINARY STATEMENT

This is an appeal of an order finally approving what the parties deem a "historic settlement" of class litigation brought by former NFL players and their families against the League. The gist of their claim is that they were defrauded by the NFL when it failed to disclose risks it knew concerning the effects of head injuries on players' health and safety. The class includes some 20,000 former players — many badly injured.

The district court, Class Counsel, and the NFL — with the assistance of an experienced mediator and a skilled financial advisor — labored hard to achieve a fair resolution. The Faneca Objectors[1] acknowledge and appreciate that effort, as well as that the final Settlement reflects substantial improvements directly responsive to the vigorous and detailed challenges we made to the agreement as preliminarily approved. Much benefit would flow to the class from the Settlement, especially given those improvements.

That said, Final Approval was erroneous. Most significantly, the Settlement's treatment of chronic traumatic encephalopathy ("CTE") — likely the most common injury to the class — is flawed. The Settlement provides up to $4 million to a class member who dies with CTE before Final Approval but nothing if

[1] The district court sometimes referred to the Faneca Objectors as the Morey Objectors. Sean Morey led the group until opting out on October 14, 2014. *See* Dkt.6340-1 at 4.

he dies after Final Approval. Additionally, the Settlement imposes a 75% reduction in awards based on a single instance of stroke or certain non-NFL experienced traumatic brain injuries, notwithstanding that players suffered many head blows playing in the NFL.

Each of those two defects causes the class to fail the "adequacy of representation" requirement of Federal Rule of Civil Procedure 23(a)(4) and renders the Settlement incapable of being "fair, reasonable, and adequate" under Rule 23(e)(2). The Settlement, as presently structured, falls short and must be further improved to satisfy Rule 23.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332(d)(2). It entered a final order on April 22, 2015. This Court has jurisdiction under 28 U.S.C. § 1291. On May 22, 2015, the Faneca Objectors filed a timely notice of appeal. A.33.

STATEMENT OF ISSUES

1. Whether the class satisfied the adequacy requirement of Rule 23(a)(4). (A.90-99; Dkt.6201.)

2. Whether the Settlement is "fair, reasonable, and adequate" pursuant to Rule 23(e)(2). (A.113-89; Dkt.6201.)

3. Whether the district court erred in denying the Faneca Objectors' motion to intervene. (A.57; Dkt.6019.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

This is a consolidated appeal (No. 15-2206). This Court previously heard the Faneca Objectors' petition to appeal from an order preliminarily certifying a settlement class. *In re NFL Players Concussion Injury Litig.*, No. 14-8103. The Court dismissed that petition for lack of jurisdiction. 775 F.3d 570 (3d Cir. 2014).

STATEMENT OF THE CASE

I. BACKGROUND OF THE FANECA OBJECTORS

Alan Faneca, Roderick Cartwright, Jeff Rohrer, and Sean Considine are class members who played, on average, almost ten years in the NFL — each earning many honors. Dkt.6082 at 2-5. Since leaving the League, they have experienced a wide range of symptoms linked to repetitive mild traumatic brain injuries ("MTBI"), including a sensitivity to noise, visuospatial issues, visual impairment, chronic pain, executive function deficit, episodic depression, mood and personality changes, chronic headaches, dysnomia, a decreased ability to multi-task, peripheral nerve dysfunction, sleep dysfunction, attention deficits, memory deficits, and somatic disorders. Dkt.6201 at 17-18.

II. THE ALLEGATIONS AGAINST THE NFL

A. Initial Litigation

In 2011, several retired NFL players and their families filed suit, alleging that the NFL misled them about the risks of repeated MTBI and breached its duty to protect the health and safety of players. Dkt.6073-5 at 4. In 2012, the MDL

Panel consolidated these cases in the Eastern District of Pennsylvania. Dkt.1. After the NFL moved to dismiss on preemption grounds, the court ordered the parties to mediation. A.954-55.

B. The Class Action Complaint

1. *The Class and the Representative Plaintiffs*

In August 2013, the court-appointed mediator announced a settlement. A.956-57. Months later, Class Counsel revealed the specific terms of the settlement when they filed their Class Action Complaint, settlement agreement, and first motion for preliminary approval. Dkt.5634.

The Complaint defines a class consisting of all living players from the NFL, the American Football League, the NFL Europe League, and the World League of American Football who retired before preliminary approval of the proposed settlement (and representatives of deceased or legally incapacitated retired players). A.1129(¶16). It divides the class into two sub-classes. **Subclass 1** consists of all retired players (and their representative and derivative claimants) who "***were not*** diagnosed with dementia, Alzheimer's Disease, Parkinson's Disease, ALS and/or Death with CTE prior to the date of the Preliminary Approval and Class Certification Order." A.1129(¶17(a)) (emphasis added). **Subclass 2** consists of all retired players (and their representative and derivative claimants)

who "***were*** diagnosed" with those conditions. A.1129-30(¶17(b)) (emphasis added).

Shawn Wooden is a representative plaintiff who represents Subclass 1. A.1129(¶17(a)). The Complaint states that Mr. Wooden "has not been diagnosed with any neurocognitive impairment," but does have an "increased risk of developing dementia, Alzheimer's, Parkinson's, or ALS." A.1126(¶4). The Complaint does not allege that Mr. Wooden suffers from or faces an increased risk of developing CTE. *Id.*, A.1129(¶17(a)).

Kevin Turner is the other representative plaintiff. He represents Subclass 2. A.1129-30(¶17(b)). He was diagnosed with ALS in 2010. A.1127(¶7). The Complaint does not allege that Mr. Turner suffers from CTE or faces an increased risk of developing CTE. *Id.*, A.1129-30(¶17(b)).

2. ***CTE and the Effects of Repetitive Head Trauma***

"CTE is a unique neurodegenerative condition that is associated with repetitive mild traumatic brain injury." A.2273. CTE has been found in football players, boxers, hockey players, military veterans exposed to explosions, and domestic violence victims. A.2298. As one study explained, CTE is "a distinct neurodegenerati[ve]" disease different from, for example, Alzheimer's, Parkinson's, or ALS. A.2307. Unlike the other diseases compensated in the

Settlement, CTE "is the only known neurodegenerative dementia" caused directly by repetitive head trauma. A.2344.

Researchers have identified four progressive stages of CTE. A.2262-70. Stage I symptoms include headache, loss of attention, short-term memory difficulties, aggression, depression, suicidality, executive dysfunction, and explosivity. A.2263. Stage II symptoms are similar, but also may include language difficulties. A.2266. Stage III involves further cognitive impairment. A.2267. Stage IV can involve severe memory loss with dementia, profound loss of attention, language difficulties, aggression, paranoia, and gait difficulties. A.2268-70. Significantly, some of the most serious symptoms — suicidality, for example — are present in all four stages. A.2267(tbl. 4).

STAGE I	STAGE II	STAGE III	STAGE IV
Short-term memory difficulties	Short-term memory loss	Memory loss with mild dementia	Severe memory loss with dementia
Executive dysfunction	Executive dysfunction	Executive dysfunction	Executive dysfunction
Loss of attention and concentration	Loss of attention and concentration	Loss of attention and concentration	Profound loss of attention and concentration
Explosivity / aggression	Explosivity / aggression	Explosivity / aggression	Explosivity / aggression
Suicidality	Suicidality	Suicidality	Suicidality
Headaches	Headaches	Headaches	Depression
	Mood swings or depression	Mood swings or depression	Impulsivity
	Impulsivity	Impulsivity	Language difficulties
	Language difficulties	Language difficulties	Visuospatial difficulties
		Visuospatial difficulties	Apathy
		Apathy	Paranoia

A.5103; *see* Dkt.6201 App. B (detailed discussion of CTE).

3. *The Complaint's Allegations Regarding CTE and the NFL's Fraud*

Up until a settlement was reached, CTE was the focus of the plaintiffs' lawyers. Class Counsel proclaimed on its website, "***CTE is believed to be the most serious and harmful disease that results from NFL and concussions.***" A.2237 (emphasis added).[2] Research supports this. The nation's largest brain bank focused on traumatic brain injury found evidence of CTE in ***76 of 79*** brains of former NFL players it examined. A.2370. An earlier study by that same group reported that of 34 deceased NFL retirees whose brains were tested, ***all but one*** had CTE. A.2270.

Unsurprisingly, Class Counsel's Complaint prominently featured CTE. "[F]or decades," the Complaint explained, "the NFL has known . . . that MTBI can and does lead to long-term brain injury, including, but not limited to memory loss, dementia, Alzheimer's Disease, Parkinson's Disease, ALS, depression, and ***CTE and its related symptoms***." A.1154(¶127) (emphasis added); *see* A.1139(¶63) ("The NFL Defendants have known for many years about the reported papers and studies documenting autopsies on over 25 former NFL players. Reports show that over 90% of the players suffered from CTE."). Despite that knowledge, "the NFL

[2] Seeger Weiss removed that language after this Court heard oral argument on the Faneca Objectors' Rule 23(f) petition, where the inadequate representation and the failure to compensate CTE, as well as this language on its website, was raised.

engaged in fraudulent and negligent conduct." A.1154(¶131). Class Counsel further alleged the NFL's fraudulent and negligent conduct "included a campaign of misinformation designed to (a) dispute accepted and valid neuroscience regarding the connection between repetitive traumatic brain injuries and concussions and degenerative brain disease such as CTE; and (b) to create a falsified body of research which the NFL could cite as proof that truthful and accepted neuroscience on the subject was inconclusive and subject to doubt." A.1154-55(¶131).

The falsified research goes back decades. As the Complaint explains, by the mid-1990s, the NFL had begun sponsoring research into the effect of head injuries on players. A.1144(¶84). It founded the Mild Traumatic Brain Injury Committee ("MTBI Committee"), a purportedly independent group tasked with studying the issue. A.1155-56(¶¶134-136). However, the NFL appointed a team doctor and rheumatologist with no experience in neurology as MTBI Committee Chair. A.1156(¶138). The other four members also were affiliated with the NFL. A.1156(¶137). Between 2003 and 2009, the Committee published 16 papers — all supporting the NFL's position that concussions present no long-term health risks. A.1157(¶148).

When bona fide experts began to criticize the MTBI Committee's research, the Committee went on the offensive. For example, after Dr. William Barr — a

neuropsychologist for the Jets — presented findings that contradicted the MTBI Committee's findings, he was fired. A.1161(¶168). After Dr. Bennet Omalu — a leading CTE researcher — began identifying cases of the disease in retired football players, the Committee pressured the journal that published those studies to retract them. A.1162(¶173). When Dr. Ann McKee — a groundbreaking CTE researcher at Boston University — identified CTE in two more players in 2008, the Committee dismissed her work as an "isolated incident." A.1166(¶196-197).

The NFL used the MTBI Committee's findings to lie to players about the link between concussions and brain diseases. For example, in 2007, it distributed a pamphlet stating that "[c]urrent research with professional athletes has not shown that having more than one or two concussions leads to permanent problems." A.1163(¶180). The pamphlet ignored numerous studies linking repeated concussions with neurodegenerative brain diseases, such as CTE. A.1163(¶181).

The Complaint also describes how the MTBI Committee's successor admitted that the MTBI Committee's data was "infected" and should be collected anew. A.1170(¶214). It conceded the MTBI Committee's research was "not acceptable by any modern standards." A.1170(¶216).

Throughout this time period, the NFL fostered a culture where "getting your bell rung" was considered a badge of honor — even producing videos of the League's most violent plays. A.1135-36(¶¶41-47).

III. PROCEEDINGS IN DISTRICT COURT

A. Preliminary Approval

1. *The Initial Settlement*

While a motion to dismiss was briefed and argued, Dkt.3589-3591, 4742, no discovery occurred. With the assistance of the mediator, the parties reached a settlement first announced on August 29, 2013, A.956-57, then filed with the court on January 6, 2014, A.964-1112.

The initial settlement compensated only a limited number of diseases — ALS, Parkinson's, Alzheimer's, "Level 2" dementia, "Level 1.5" dementia, and CTE if the claimant died ***before*** preliminary approval — and limited class-wide compensation for these diseases to $675 million. A.1038-41(§§23.1-23.5). ALS claimants were to receive a maximum award of $5 million; for those with Parkinson's Disease or Alzheimer's Disease, the maximum award was $3.5 million. A.1075. And class members exhibiting what the initial settlement labeled "Level 2" or "Level 1.5" dementia were to receive at most $3 million or $1.5 million, respectively. *Id.* The initial settlement would have compensated cases of CTE with a maximum $4 million award, but only if the retired player died before preliminary approval. A.979(§2.1(xxx)), A.996(§6.3), A.1063. A player with CTE who died after preliminary approval would receive nothing. A.1063.

The initial settlement also created a Baseline Assessment Program ("BAP") allowing class members to undergo an examination, which would establish the

class member's baseline neurocognitive functioning and screen for dementia and neurocognitive impairment. A.986-87(§5.2). Class members who were diagnosed with "Level 1" dementia in the baseline assessment examination could receive supplemental benefits partially covering costs of medical treatments for dementia. *Id.*, A.994-95(§5.11). The term of the BAP was to be ten years. A.987(§5.5), A.994-95(§5.11). The initial settlement capped the BAP Fund at $75 million. A.1040-41(§23.3(g)).

The initial settlement contained a series of offsets that reduced a claimant's compensation. For example, it included a 75% offset for a single stroke or certain non-NFL experienced traumatic brain injuries. A.997-98(§§6.5(b)(ii)-(iii), (e)). Additionally, class members who played fewer "Eligible Seasons" in the NFL or who were older at the time of a Qualifying Diagnosis would receive only a percentage of the maximum award for their condition. A.997-98(§6.5(b)), A.1075.

A complex series of administrative procedures governed the distribution of benefits under the initial settlement. For example, class members needed to register with the Claims Administrator within 180 days of Settlement Class Supplemental Notice to receive any benefits. A.984(§4.2(c)). And to appeal a decision of the Claims Administrator denying a Monetary Settlement, they needed to pay one thousand dollars, with no exceptions for financial hardship. A.1008(§9.6(a)).

The initial settlement broadly released all MTBI-related claims of every class member. A.1031-32(§18.1(a)). The release explicitly included, among others, claims ***"arising out of, or relating to, CTE."*** A.1032(§18.1(a)(iv)) (emphasis added).

The initial settlement required attorneys' fees to be paid within 60 days after the Settlement becomes final. A.1037(§§21.1-.2). The NFL agreed not to contest any fee award up to $112.5 million. *Id.* Any fee award would have been in addition to the NFL's other obligations under the Settlement. *Id.*

Eight days after it was filed, the district court, *sua sponte*, denied Class Counsel's motion for preliminary approval, expressing concerns that the settlement was underfunded. A.1204-16.

2. ***The Faneca Objectors' Motion To Intervene***

The Faneca Objectors then moved to intervene on May 5, 2014. Dkt.6019-1. They explained that their interests were not adequately represented during the negotiation of the initial settlement as evidenced by significant class conflicts. Specifically, the motion to intervene raised the issues of: the $4 million award to the families of players who died with CTE before preliminary approval, while players and their families would receive nothing if diagnosed after, *id.* at 13-18; and the 75% offset imposed on any player who suffers a ***single*** stroke or a ***single*** instance of certain non-football related traumatic brain injury ("TBI"), *id.* at 19-20.

While Class Counsel filed an opposition, the NFL did not. The issues of CTE and the 75% offsets — as well as the class conflicts and lack of adequate representation those issues demonstrated — were now before the district court.[3]

3. ***The Revised Settlement***

On June 25, 2014, Class Counsel submitted a Revised Settlement that retained the same structure and almost all of the key provisions of the initial settlement. A.1357-1518 ("Revised Settlement"). Critically, the Revised Settlement continued to award up to $4 million to class members with CTE who died before preliminary approval but nothing if they die after that date — while providing a broad release for CTE. A.1430(§ 18.1(a)(iv)), A.1478. However, unlike the initial settlement, the Revised Settlement did not cap total compensation for ALS, Parkinson's, Alzheimer's, and Levels 1.5 and 2 dementia, but it retained the $75 million cap on the BAP Fund. Dkt.6073-5 at 4. Although they lifted the cap on compensation for the Qualifying Diagnoses, Class Counsel nevertheless stated their belief that total compensation under the Revised Settlement would not exceed the initial settlement's $675 million cap. Dkt. No. 6073-5 at 12-13. Class Counsel moved for "conditional" class certification and preliminary approval of this Revised Settlement. Dkt.6073.

[3] The court did not deny the motion to intervene until after granting preliminary approval. A.57.

4. *Opposition to Preliminary Approval*

One week later, the Faneca Objectors filed an opposition to the motion for preliminary approval arguing, among other things, that the named plaintiffs were inadequate representatives for the class and that the treatment of CTE and the 75% offsets rendered the Revised Settlement incapable of being deemed fair, reasonable, and adequate under Rule 23(e)(2). Dkt.6082 at 19-28. They further argued that the Revised Settlement's failure to credit seasons played in NFL Europe also did not satisfy the requirements of Rule 23. *Id.* at 28-29.

5. *Preliminary Approval*

On July 7, 2014, the district court certified the class for settlement only, preliminarily approved the Settlement, established an opt-out/objection procedure, and scheduled a fairness hearing. A.1306-26, A.1327-35. The Faneca Objectors petitioned to appeal the class certification decision under Rule 23(f). The petition was briefed and argued before this Court on September 10, 2014. This Court denied that petition on September 11, 2014. Dkt.6166.[4]

B. Opposition to the Settlement and the Fairness Hearing

1. *Discovery Requests*

Given the lack of formal discovery, the Faneca Objectors sought access to the information relied upon to reach the Settlement. They filed a motion to

[4] No other class members opposed the motion for preliminary approval or joined in the Rule 23(f) petition.

conduct limited discovery "into the process through which the settlement . . . was negotiated and the strength of the defenses to the core allegations." Dkt.6169-1 at 2. The court denied that motion. A.3077. The Faneca Objectors also moved for production of evidence, requesting "an order that Class Counsel and the NFL produce the evidence they relied on when they agreed to the Settlement and the evidence upon which they intend to rely" at the fairness hearing. Dkt.6252 at 3. That motion was also denied. A.5757-58.

2. ***Objections to the Settlement***

The district court set October 14, 2014 as the deadline for objection, A.1333, and the Faneca Objectors filed their robust objection over a week early. Dkt.6201. That objection exceeded 85 pages and included a scientific appendix describing CTE and its symptoms. *Id.* It was supported by 82 exhibits (over 700 pages), A.2220-2949, including numerous scientific studies from leading academic journals, *e.g.*, A.2254-75. And two leading CTE researchers submitted declarations — without compensation — supporting the objection. A.2950-3010, A.3027-64, A.4416. The objection again raised the issue that the treatment of CTE, the 75% offsets, and the lack of credit for NFL Europe play created intra-class conflicts that demonstrated inadequate representation as well as rendering the Revised Settlement unfair, unreasonable, and inadequate. Dkt.6201 at 20-36, 54-84.

The Faneca Objectors raised several other deficiencies. They noted that the cap on the Baseline Assessment Program could be reached long before the Revised Settlement expires. Dkt.6201 at 72-73. They stated that the process for appealing an adverse claims determination was unfair because class members were subject to a $1,000 fee while the NFL was not. *Id.* at 76-77. They addressed how the class notice was deficient because it did not clearly explain that current and future cases of CTE would not be compensated. *Id.* at 37-53. The Faneca Objectors also argued the Revised Settlement was not fair, reasonable, and adequate because: Class Counsel never engaged in formal discovery; the NFL could withstand a far greater judgment; many class members reacted negatively to news of the Settlement; and the NFL faced a substantial risk of liability. *Id.* at 54-84.

The Faneca Objectors were not the only class members to object. In total, 205 objectors filed 83 written objections. A.78.

3. ***The Fairness Hearing***

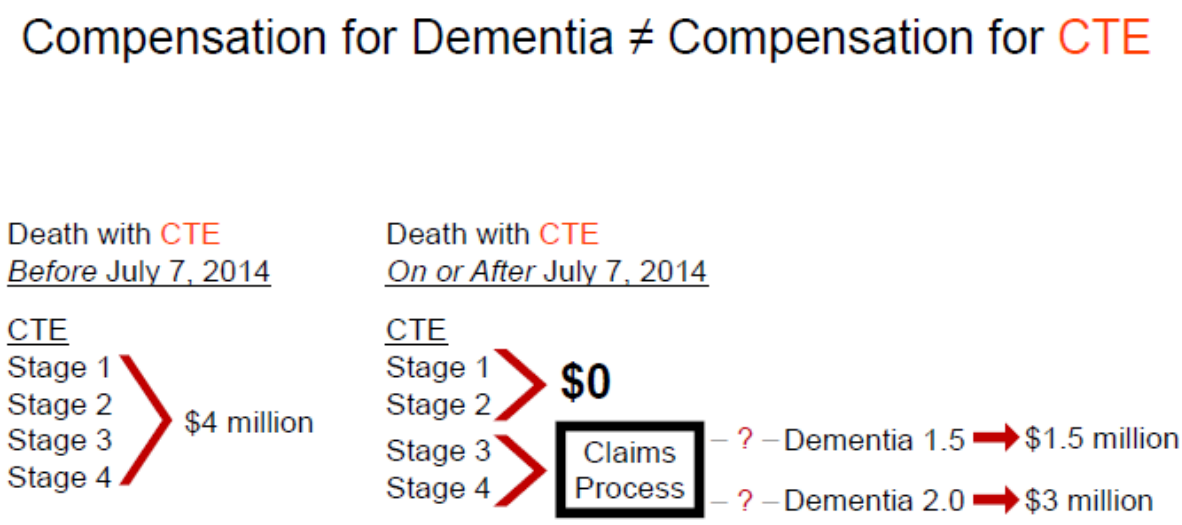
The district court conducted a fairness hearing on November 19, 2014. Class Counsel, the NFL, and counsel for the Faneca Objectors made the primary arguments. The district court also allowed some of the other objectors to make brief presentations. A.79 & n.24; *see also* A.3078 (notice appointing Molo-Lamken).

While each of the points raised by the Faneca Objectors was addressed, as were a number of ancillary issues raised by others, the issue that occupied much of the hearing was CTE. Class Counsel and the NFL challenged the causal link between brain injury and CTE. Dkt.6423-1 at 54-57. Further, they argued, regardless of whether head trauma caused CTE, the Revised Settlement compensated the "most serious neurocognitive and neuromuscular injuries associated with TBI . . . which had been reported in patients determined to have CTE." A.5374-75; *see also* A.5396. They contended class members with Stage 3 and Stage 4 CTE could be compensated — after enduring the uncertainty of the claims process — through an award for dementia. *E.g.*, Dkt.6422 at 81-82. They also dismissed the need for the Revised Settlement to compensate CTE's mood and behavioral symptoms. Those symptoms, Class Counsel said, were reasonably excluded from receiving compensation because they "occur in the general population and are reported independent of concussions." A.5376, A.5396.

The Faneca Objectors pointed to extensive evidence in the record to show that "CTE is the only known neurodegenerative dementia with a specific identifiable cause[:] . . . head trauma." A.2344; *see also* A.5409. The Faneca Objectors also explained why the Revised Settlement's compensation for ***other*** serious neurocognitive disorders, like dementia, did not adequately compensate CTE in the living. Many individuals with CTE never develop those other disorders

and those that do almost always have advanced-stage CTE. A.5418. Thus, compensating those other neurodegenerative diseases does not compensate individuals with early-stage CTE — whose primary symptoms are mood and behavioral. *See* pp. 5-6, *supra*. As Dr. Robert Stern — a leading CTE researcher at Boston University — explained, those mood and behavioral symptoms, such as suicidality, which presents at all four stages of CTE, "are just as important, just as serious, and just as amenable to detection and diagnosis, as cognitive disorders." A.2956(¶32). The Faneca Objectors' other expert, Dr. Sam Gandy — a prominent neurologist at Mt. Sinai — agreed, describing CTE's mood and behavioral symptoms as "serious and devastating." A.3028(¶5).

Finally, those individuals with CTE who ultimately do receive compensation for dementia receive far less than those whose CTE was discovered before approval. Rather than the $4 million maximum award for Death with CTE, individuals compensated for dementia would receive, at most, $1.5 million or $3 million only ***after*** navigating the complexities and uncertainties of the claims process. A chart presented in the district court illustrates the point:



Dkt.6469 at 13. For those reasons, among others, the Faneca Objectors asserted that Class Counsel's and the NFL's justifications for excluding most cases of CTE from the Revised Settlement fell flat.[5]

4. ***Post-Hearing Briefing***

The Faneca Objectors then filed a 31-page post-fairness hearing supplemental brief supported by 27 exhibits exceeding 450 pages. Dkt.6455. The submission included declarations by nine of the most prominent individuals in neuroscience. All nine agreed that CTE is a unique neurodegenerative disease that arises only in persons who experience repetitive brain trauma — unlike ALS, Alzheimer's, and Parkinson's. The nine also agreed that mood and behavioral

[5] After the fairness hearing, the Faneca Objectors filed two more motions — both denied — seeking information from the NFL. One sought documents regarding the fairness and adequacy of the Revised Settlement, including the NFL's plans to fund the Settlement through insurance proceeds. Dkt.6461. The other requested information about the compensation the NFL paid its experts. Dkt.6462.

impairments: appear more frequently in people with CTE than in the general population; present before the onset of CTE-related dementia; and can cause significant disability and distress. Finally, each of these experts expects that a reliable, valid, and clinically accepted diagnosis of CTE in living persons will be available within a decade, and in any event, before the 65-year settlement term expires. Dkt.6455 at 7-8. *None of these experts was compensated for his or her efforts*.[6] The NFL and Class Counsel presented no expert affidavits in their post-hearing submissions to counter this evidence. *See* Dkt.6466, 6467.

[6] These experts are all at the top of their fields. Dr. Patrick Hof is the Regenstreif Professor of Neuroscience and Vice-Chair in the Department of Neuroscience at the Icahn School of Medicine at Mount Sinai in New York. Dr. Jing Zhang is Professor of Pathology at the University of Washington and Chief of Neuropathology Services. Dr. Martha Shenton is Professor of Psychology and Radiology, Brigham and Women's Hospital and Harvard Medical School. Dr. Charles Bernick is the Associate Director, Cleveland Clinic Lou Ruvo Center for Brain Health. Dr. Michael Weiner is Professor in Radiology and Biomedical Engineering, Medicine, Psychiatry, and Neurology at the University of California, San Francisco. Dr. James Stone is Associate Professor of Radiology and Medical Imaging and of Neurological Surgery at the University of Virginia and Co-Director of the University of Virginia Brain Injury and Sports Concussion Institute. Dr. Thomas Wisniewski is Professor of Neurology, Pathology, and Psychiatry at NYU's School of Medicine. Dr. Steven DeKosky is Visiting Professor of Radiology and Neurology at the University of Pittsburgh School of Medicine and Immediate Past Dean and Emeritus Professor of Neurology at the University of Virginia School of Medicine. And Dr. Wayne Gordon is the Jack Nash Professor and Vice Chair of the Department of Rehabilitation Medicine at the Icahn School of Medicine at Mount Sinai in New York. Dkt.6455 at 6-7.

C. The Improvements to the Settlement Proposed by the District Court in Response to the Faneca Objectors' Concerns

On February 2, 2015, the district court issued an order, *sua sponte*, proposing changes that the court believed "would enhance the fairness, reasonableness, and adequacy" of the Settlement. A.5587-89. Almost all of these proposals were responsive to deficiencies first raised by the Faneca Objectors. The court ordered the NFL and Class Counsel to either amend the Revised Settlement to address those proposals or explain why they could not reach agreement on such amendments. *Id.*

The district court stated that "provid[ing] for some Eligible Seasons credit" for play in NFL Europe would enhance the fairness of the Settlement. A.5588.[7] And it advised that a fairer Settlement would also allow qualifying class members to receive a BAP baseline assessment examination "regardless of any funding limitations in the agreement." A.5588.[8] The court also suggested including a "hardship provision with respect to the appeal fee" for class members seeking to

[7] The Faneca Objectors raised that issue in their opposition to preliminary approval, Dkt.6082 at 28; in their motion for discovery, Dkt.6169-1 at 6, and reply in support of that motion, Dkt.6211-2 at 2; in their objection, Dkt.6201 at 34-36; in their supplemental objection, Dkt.6420 at 10; at the fairness hearing, Dkt.6469 at 18-20, 28; and in their post-fairness hearing brief, Dkt.6455 at 20-22, 30.

[8] The Faneca Objectors raised that issue in their opposition to preliminary approval, Dkt.6082 at 13, 15; in their motion for discovery, Dkt.6169-1 at 11; in their objection, Dkt.6201 at 72-73; in their supplemental objection, Dkt.6420 at 10; at the fairness hearing, Dkt.6469 at 31, 33; and in their post-fairness hearing brief, Dkt.6455 at 22, 30.

contest their compensation determination. A.5588.[9] The district court partially responded to the Faneca Objectors' arguments regarding CTE, stating that a fairer settlement would compensate Death with CTE claims for deaths that occur before Final Approval instead of preliminary approval. A.5588. Finally, the district court suggested that the settlement allow "reasonable accommodation" for class members whose medical records are missing "due to *force majeure* type events." A.5588.

D. The Improvements to the Settlement

The NFL and Class Counsel then submitted an Amended Settlement responding to the district court's concerns. A.5590-5751. The amendments substantially enhanced the benefits to the class. While the Amended Settlement falls short of Rule 23's requirements, the value of enhancements responsive to the Faneca Objectors' challenges could exceed $100 million.

The Amended Settlement now awards half of an Eligible Season for play in NFL Europe or one of its predecessor leagues. A.5602(§2.1(kk)). Not only does that make retired players from NFL Europe eligible for substantially larger monetary awards, A.5629(§6.7(b)(i)) (describing smaller offsets for more eligible

[9] The Faneca Objectors raised that issue in their opposition to preliminary approval, Dkt.6082 at 33-34; in their motion for discovery, Dkt.6169-1 at 7; in their objection, Dkt.6201 at 76-77; at the fairness hearing, Dkt.6469 at 30, 33; and in their post-fairness hearing briefing, Dkt.6455 at 23, 31.

seasons), but it also makes retirees from NFL Europe eligible to participate in the BAP, A.5613(§5.1) (requiring at least one-half of an eligible season to participate in the BAP). The number of class members affected by this improvement is substantial: One collection of football statistics identifies over 3,600 players who spent time in NFL Europe. *See* NFL Europe/WLAF Player Register, *The Football Database*, http://www.footballdb.com/nfl-europe/nfleplayers.html.

The Amended Settlement also uncaps the BAP with respect to neurological examinations so that every eligible class member can receive a baseline examination. A.5673(§23.1(b)), A.5676(§23.3(d)). This is a tremendous enhancement in terms of ensuring the availability of diagnosis — the first step in any care. The Amended Settlement also includes a hardship provision allowing for waiver of the appeal fee in certain circumstances. A.5641(§9.6(a)(i)). And it accommodates those class members with missing medical records due to *force majeure* events. A.5632-33(§8.2(a)(ii)).

Finally, it extends compensation for Death with CTE — but only to players who died before Final Approval. No other benefit is available for CTE diagnosed before or after death following Final Approval. A.5600(§2.1(aa)), A.5699(¶5).

E. The District Court's Order Granting Final Approval

On April 22, 2015, the district court approved the Settlement, as amended. The court concluded that Rule 23(a)'s numerosity, commonality, and typicality

requirements were met. A.81-84. And it concluded that Rule 23(b)(3)'s predominance and superiority requirements were satisfied. A.99-105. It also concluded notice was adequate. A.106-13.

The district court found that Rule 23(a)(4)'s adequacy-of-representation element had been met. A.85-99. The court determined that Class Counsel's expertise was adequate and that the NFL's acquiescence in a $112.5 million fee award was not evidence of collusion. A.86-90.

The court ruled, moreover, that no fatal conflicts existed between the representative plaintiffs and the rest of the class. A.91-99. It concluded that Kevin Turner, who has a Qualifying Diagnosis of ALS, "is interested in immediately obtaining the greatest possible compensation for his injuries and symptoms." A.93. The court stated that Shawn Wooden, "like all other Retired Players without a Qualifying Diagnosis, is interested in monitoring his symptoms, guaranteeing that generous compensation will be available far into the future, and ensuring an agreement that keeps pace with scientific advances." *Id.*

Although neither Mr. Turner nor Mr. Wooden alleged in the Complaint that he had CTE or was at risk of developing CTE, the district court stated that "Shawn Wooden has adequately alleged that he is at risk of developing CTE." A.94. The court pointed to a complaint that preceded the Class Action Complaint alleging that Mr. Wooden is "'at increased risk of latent brain injuries'" from repeated head

impacts. *Id.* The court also noted that the Class Action Complaint alleges that retired players in general are at risk of developing "'mood swings, personality changes, and the debilitating and latent disease known as CTE.'" A.95.

Without addressing whether 75% (as opposed to any other figure) was a reasonable offset for a single instance of stroke or traumatic brain injury, the district court found the offset reasonable because players who suffer a stroke or traumatic brain injury "would find it more difficult to prove causation if they litigated their claims, justifying a smaller award." A.97.

Applying this Court's multi-factor test from *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the district court also determined that the Settlement is "fair, reasonable, and adequate." A.113-34; *see* Fed. R. Civ. P. 23(e)(2).[10]

With respect to CTE, the court acknowledged the Faneca Objectors' argument "that CTE is the most prevalent, and thus most important, condition affecting Retired Players — 'the industrial disease of football.'" A.135. The court stated, however, that "[t]he study of CTE is nascent." A.136. The court also

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

concluded that, because of the overlap in symptoms between CTE and Qualifying Diagnoses, many players with "late-stage CTE" will be compensated for neurocognitive symptoms by proxy through awards for ***other*** Qualifying Diagnoses. A.141-42.

The district court acknowledged that the Settlement does not compensate the mood and behavioral symptoms associated with CTE, but stated that those symptoms "are commonly found in the general population and have multifactorial causation." A.143. The court also stated that the Settlement appropriately awards "Death with CTE" benefits for those who died before Final Approval but not after because "Death with CTE serves as a proxy for Qualifying Diagnoses deceased retired players ***could*** have received while living." A.145. And the court stated that, although "researchers may learn more about CTE and head trauma," the Settlement's treatment of CTE is reasonable because it "requires the Parties to meet at least every ten years and confer in good faith about possible modifications to the definitions of Qualifying Diagnoses." A.147.[11]

SUMMARY OF ARGUMENT

The Settlement's treatment of CTE — allowing an award of up to $4 million for death with CTE up to the time of Final Approval and nothing afterwards —

[11] The district court later issued two orders slightly modifying the Settlement. *See* A.47-54, A.55-56. The Faneca Objectors do not challenge the substance of those orders.

demonstrates a lack of adequate representation pursuant to Rule 23(a)(4). It also renders the settlement unfair, inadequate, and unreasonable pursuant to Rule 23(e).

Similarly, the Settlement's extreme 75% offset for a single instance of non-NFL experienced traumatic brain injury or stroke demonstrates a lack of adequate representation pursuant to Rule 23(a)(4). It, too, renders the Settlement unfair, inadequate, and unreasonable.

Review of the Settlement under the standard established in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), further demonstrates the Settlement is not fair, adequate, and reasonable in light of the possibility of an extraordinary recovery given the NFL's outrageous, fraudulent conduct and the relative risks of the litigation; the NFL's ability to withstand a far greater judgement with its $10 billion annual revenues — projected to reach $25 billion; the negative reaction of the class; and the relatively straightforward nature of the litigation.

Finally, the district court erred in denying the Faneca Objectors leave to intervene given the timeliness of their motion, their interest in the litigation, and the failure of the named plaintiffs to represent their interests as demonstrated by the CTE and 75% offset conflicts.

ARGUMENT

While there is a "policy preference favoring voluntary settlement in class actions," that policy "cannot alter the strictures of Rule 23." *Rodriguez v. Nat'l*

City Bank, 726 F.3d 372, 378-79 (3d Cir. 2013) (affirming judgment denying certification of the settlement class). "[T]he 'danger of a premature, even a collusive, settlement [is] increased'" when it is negotiated pre-certification. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir. 1995). The exacting analysis required by Rule 23 is intended to protect absent class members who might well see their interests compromised in a push to get a deal done — particularly where the deal could mean a big payday for class counsel and substantial benefits to a limited subset of the class. Among other things, pre-certification negotiations "deny[] other plaintiffs' counsel information that is necessary for them to make an effective evaluation of the fairness of any settlement that results." *Id.*

Consequently, a court must carefully exercise its "judicial duty to act as the guardian of absent class members." *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 134 (3d Cir. 2012) (noting special guardian role for courts in class context). The settling parties bear the burden of proving both the requirements for class certification under Rule 23(a) and that the settlement is fair, reasonable, and adequate under Rule 23(e). They failed to do so here.

***Standard of Review*:** This Court reviews a district court's decision to certify a class and approve a settlement for an abuse of discretion. *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012). The same standard of review

applies to the denial of a motion to intervene. *Brody v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992).

I. THE SETTLEMENT'S TREATMENT OF CTE PRECLUDES CERTIFICATION AND APPROVAL

A. The Treatment of CTE Demonstrates a Lack of Adequate Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." 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. When assessing adequacy, "a judge must focus on the settlement's distribution terms . . . to detect situations where some class members' interests diverge from those of others in the class." *GM Trucks*, 55 F.3d at 797. A conflict exists where a settlement "offers considerably more value to one class of plaintiffs than to another," indicating the settling parties "may be trading the claims of the latter group away in order to enrich the former group." *Id.* Such intra-class conflicts that are "fundamental" — involving "the specific issues in controversy" — violate Rule 23(a)(4). *Dewey*, 681 F.3d at 184.

The Settlement provides up to $4 million for ***past*** cases of CTE but provides ***no recovery*** to CTE claimants diagnosed one day after Final Approval. That

inequitable treatment of similarly situated class members is the Settlement's central flaw.

To the extent that the settling parties contend CTE cannot be definitively diagnosed in the living,[12] that cannot justify the failure to compensate those with a ***post-mortem diagnosis*** of CTE after Final Approval. The practical outcome demonstrates the absurdity and the gross unfairness of the distribution terms: die on April 21, 2015, receive a post-mortem diagnosis of CTE, and be eligible to receive up to $4 million; die on April 22, 2015, receive a post-mortem diagnosis of CTE, and receive nothing. *See* A.5699. And, of course, those living with the horrible symptoms of CTE — including suicidality at every stage — get nothing even though the Settlement acknowledges the value of their injury by allowing for the $4 million award for Death with CTE before Final Approval.

1. *The Class Representatives Did Not Allege or Demonstrate a Risk of Developing CTE*

This gross disparity among similarly situated class members is not surprising given that neither named class representative alleged an increased risk of developing CTE. Kevin Turner pleaded that he suffers from ALS, a diagnosed

[12] The Faneca Objectors contest this point and, in any event, the overwhelming weight of medical evidence in the record establishes the diagnosis of CTE in the living is progressing rapidly. A.2957-58(¶38), A.3030-31(¶¶12-14), A.4475(¶8), A.4597(¶8), A.4620(¶8), A.4754(¶8), A.4768(¶8), A.4927(¶8), A.4953(¶8), A.5004(¶8), A.5058(¶8).

medical condition distinct from CTE that receives compensation under the Settlement (and rightly so). A.1127(¶7). He did not plead any increased risk of developing CTE. *Id.* And Shawn Wooden alleged an "increased risk of developing dementia, Alzheimer's, Parkinson's, or ALS," but not CTE. A.1126(¶4). Both class representatives also submitted declarations in support of final approval. Again, Mr. Turner reiterated that he suffered from ALS, not CTE. A.3817(¶2). And Mr. Wooden averred that he is "at increased risk of developing a range of neuromuscular and neurocognitive diseases associated with mild traumatic brain injuries, such as Dementia, Alzheimer's Disease, Parkinson's Disease, and/or Amyotrophic Lateral Sclerosis ('ALS')" — ***but not CTE***.[13] A.3823(¶1). Notably, the conditions compensated under the Settlement are those that Mr. Wooden alleged, and later swore, that he was at increased risk of developing.

The district court, however, stated that "Wooden has adequately ***alleged*** that he is at risk of developing CTE." A.94 (emphasis added). But the court invoked only generalized allegations that pled "latent brain injuries," not CTE, *id.* (quoting A.786(¶7)), or that described diseases confronting the class, not Mr. Wooden's personal medical condition, A.95 (quoting A.1139(¶61)).

[13] Mr. Wooden submitted this declaration ***after*** the Faneca Objectors raised this issue, further demonstrating that he expressly intended to omit CTE.

Moreover, mere allegations are not enough. "Factual determinations supporting Rule 23 findings must be made by a ***preponderance of the evidence***." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008) (emphasis added). "[T]o certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." *Id.* at 320; *see also In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("'[a]ctual, not presumed, conformance' with . . . Rule 23" required). Neither Mr. Turner nor Mr. Wooden submitted ***evidence*** of an increased risk of CTE comparable to their risk of developing any Qualifying Diagnosis. Instead, Mr. Turner stated that he had developed ALS, and Mr. Wooden told the court that he is "at increased risk of developing a range of neuromuscular and neurocognitive diseases associated with mild traumatic brain injuries, such as Dementia, Alzheimer's Disease, Parkinson's Disease, and/or Amyotrophic Lateral Sclerosis ('ALS')" — but not CTE. A.3823(¶1).

The district court's conclusion that Mr. Wooden adequately represented the interests of class members at increased risk of CTE because he "does not know which, if any, condition he will develop" and, as a result, "has an interest in ensuring that the Settlement compensates as many conditions as possible," A.36, is incorrect. As noted, Mr. Wooden neither alleged nor affirmed that he suffers an increased risk of CTE, although he did describe such an increased risk for the four

diseases compensated under the Settlement. *See* pp. 30-31, *supra*. Thus, Mr. Wooden would have strong incentives to pursue recovery for those four diseases he is at risk of suffering to the exclusion of recovery for other diseases.

Class members suffering CTE or at risk of CTE cannot be bound by consents given by named plaintiffs who neither alleged nor demonstrated a shared interest in compensating CTE. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997). Indeed, when presented with the opportunity to broaden or clarify their allegations in their declarations supporting Final Approval, the named plaintiffs remained silent on CTE. The representation was inadequate.

2. ***The Intra-Class Conflict Over CTE Is Fundamental***

"A conflict is fundamental where it touches 'the specific issues in controversy'" or "concern[s] the allocation of remedies amongst class members with competing interests." *Dewey*, 681 F.3d at 184. The conflict presented by the Settlement's treatment of CTE is both. It touches the specific issues in controversy because CTE-related claims are released, yet uncompensated. And the failure to compensate future cases of CTE also creates a substantial conflict in the allocation of remedies between individuals suffering from (or at risk of developing) CTE and individuals suffering from the other Qualifying Diagnoses. *See Dewey*, 681 F.3d at 184, 187 n.15 (conflict concerning allocation of remedies fundamental). Given the prevalence of CTE among the class and the value the Settlement assigns to CTE in

the limited cases it compensates, this is more than mere "line drawing," as the settling parties contend. *E.g.*, A.5374, A.5397.

This Court has rejected this type of allocation of remedies. In *Dewey*, the settlement sorted the class into two groups: a reimbursement group and a residual group, with the reimbursement group receiving "priority access" to the settlement fund. 681 F.3d at 187. All named plaintiffs were in the reimbursement group. *Id.* at 187-88. This Court held that such a fundamental conflict precluded approval of the settlement. *Id.* at 189-90.[14]

In re Literary Works in Electronic Databases Copyright Litigation is similarly instructive. 654 F.3d 242 (2d Cir. 2011). The settlement in that copyright infringement case compensated three types of claims: claims for registered works entitled to statutory damages (Category A); claims for registered works entitled only to actual damages (Category B); and claims for unregistered works, which comprised about 99% of the class (Category C). *Id.* at 246. Category A and Category B were considered more valuable than Category C claims, and the named plaintiffs "collectively h[e]ld all three categories of claim." *Id.* at 246, 251, 253.

[14] In another part of *Dewey*, the Court found no impermissible conflict between past and future claimants because, in that case, past claimants were at risk of continued injury "to the ***same extent*** as a future claimant." 681 F.3d at 185 (emphasis added). Here, by contrast, Mr. Wooden has not alleged and did not state in his affidavit that he shared a risk of CTE "to the same extent" as the rest of the class. He thus "would care little" for benefits that would be valuable to class members at risk of CTE. *Amchem*, 521 U.S. at 611.

Even though the named plaintiffs held a combination of all three types of claims and therefore shared an incentive to bargain for recovery on Category C claims, the named plaintiffs were not adequate representatives. Their "natural inclination would . . . be to favor their more lucrative Category A and B claims," the Second Circuit explained, to the detriment of the less lucrative Category C claims. 654 F.3d at 252. Class members holding "only Category C claims," by contrast, would be "interested exclusively in maximizing the compensation for that one category of claim." *Id.* at 251-52. Those antagonistic interests created a fundamental conflict rendering representation inadequate. *Id.*[15]

Mr. Wooden's position parallels those of the representative plaintiffs in *Dewey* and *Literary Works* — with strong reason to pursue recovery for some claims at the expense of others. He had a "natural inclination" to maximize recovery for the claims based on the four diseases he identified at the expense of

[15] *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999) (conflict where settlement class included claims of different value); *GM Trucks*, 55 F.3d at 801 (intra-class conflict where settlement left one subgroup with "significantly less value" than another); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 782 (7th Cir. 2004) (approval precluded where "one of the classes . . . received absolutely nothing, while surrendering all its members' claims"); *Manual for Complex Litigation* §21.61 (4th ed.) ("releasing claims of parties who received no compensation" is one "recurring potential abuse[]"); *Newberg on Class Actions* §13:59 (5th ed. 2014) ("[C]ourts will reject settlements where part of the class receives relief and another significant part receives no relief.").

other brain diseases like CTE. That incentive created impermissible antagonism and a fundamental conflict involving the allocation of remedies.

3. *Structural Assurances Cannot Cure the Fatal Conflicts*

The district court also referenced several "structural assurances" that supposedly protected the absentee class members. It noted that the monetary award fund is uncapped and that "[e]very Retired Player who receives a Qualifying Diagnosis . . . is entitled to a Monetary Award." A.93. That is true — except for those individuals, like the Faneca Objectors, whose MTBI-related afflictions were not included as a Qualifying Diagnosis. An uncapped monetary award fund provides no structural assurances for claims that were bargained away and have no right to access that fund.

The district court also stated that the involvement of the mediator and the special master provided structural assurances. A.94. Even a "Settlement [that] was the product of an intense, protracted, adversarial mediation" led by a "mediator[ ] [who is] highly respected and capable," however, does not "satisfy Rule 23(a)(4)" when the representative plaintiffs do not adequately represent the interests of all class members. *Literary Works*, 654 F.3d at 252; *see also Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 237, 245-46 (2d Cir. 2007) (named plaintiff inadequate

representative notwithstanding assistance of impartial special master); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (similar).

* * * * *

Rule 23(a) requires that the representative plaintiffs' interests align with those of absentee class members. The inequitable distribution of the Settlement's proceeds — compensating those diseases for which Mr. Wooden is at risk while providing nothing to class members suffering the most common injury — demonstrates a lack of the required alignment. Accordingly, the order certifying the class and approving the Settlement should be vacated.

B. The Settlement's Treatment of CTE Is Unfair, Inadequate, and Unreasonable

1. *The Settlement Treats Similarly Situated Class Members Differently and Releases Claims That Receive No Compensation*

"[C]ourts will reject settlements [as unfair under Rule 23(e)] where part of the class receives relief and another significant part receives no relief." *Newberg on Class Actions* §13:59 (5th ed. 2014). Thus, "judges should be wary of" settlements that "treat[] similarly situated class members differently" or that "releas[e] claims of parties who receive no compensation in the settlement," *Manual for Complex Litigation* §21.61 (4th ed.); *see also Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996) (similar); *GM Trucks*, 55 F.3d at 808

(similar).[16] These are "red flags" that weigh against approval. *Newberg*, *supra*, § 13:56.

Those red flags flew high above the Settlement here. The vast majority of the class members release their claims for CTE — the "industrial disease of football" valued at up to $4 million if the player dies with it before Final Approval — and get essentially nothing in return. Surely, some meaningful consideration is required for the Settlement to be fair, adequate, and reasonable.

Until they settled this case, Class Counsel recognized that CTE was the "most serious and harmful disease" resulting from concussions. A.2237. CTE thus featured prominently in Class Counsel's various complaints. They alleged a causal link between CTE and MTBI, *e.g.*, A.1154(¶127), and pled that the NFL was aware of "[r]eports show[ing] that over 90% of the players suffered from CTE," A.1139(¶63). They did so — after much research and under the obligations of Rule 11 — with good reason. CTE is "the ***only*** known neurodegenerative dementia with a specific identifiable cause; in this case, ***head trauma***." A.3340 (emphasis added). And ***every instance*** of pathologically confirmed CTE has been found in a patient with a ***history of repetitive head trauma***. A.4423-24(¶20).

[16] "[C]laims may have a greater than zero net expected value even if their chances of prevailing at trial are slim" so "courts usually find settlements unfair . . . when one part of the class receives relief while another part of the class does not." *Newberg*, *supra*, § 13:60; *see also Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 783 (7th Cir. 2004) (similar).

Thus, the class's CTE claims were not merely colorable — they were strong. Any settlement that releases claims for the core injury associated with the defendants' wrongful conduct without demanding any compensation in return cannot be fair, reasonable, and adequate. *See In re Cmty. Bank of N. Va.*, 418 F.3d 277, 307-08 (3d Cir. 2005) ("[C]lass counsel never asserted colorable TILA and HOEPA claims. However, those claims were part of the settlement release. Failure to pursue such claims may suggest that class counsel subrogated their duty to the class in favor of the enormous class-action fee offered by defendants.").

2. *The District Court's Justifications for Excluding CTE from Compensation Do Not Withstand Scrutiny*

The district court never really addressed the fundamental hole in the adequacy of the Settlement — its release of colorable CTE claims without any compensation. Instead, it offered a number of other explanations for why the Settlement's treatment of CTE was fair, reasonable, and adequate. Those explanations, however, do not withstand scrutiny.

a. *The Settlement Impermissibly Freezes Science in Place*

Attempting to justify the Settlement's treatment of CTE, the district court repeatedly stated that the science surrounding CTE was "nascent" and that CTE cannot currently be diagnosed in living persons. *E.g.*, A.136-47. But the court overstated the extent to which CTE research is in its infancy; there is widespread agreement regarding the fundamental nature and cause of the disease. *See* pp. 5-8,

supra. And recent research has only confirmed what was apparent from the evidence that the Faneca Objectors submitted: tau protein "is a cause of" CTE. *New Antibody Treats Traumatic Brain Injury and Prevents Long-Term Neurodegeneration*, ScienceDaily (July 15, 2015), http://www.sciencedaily.com/releases/2015/07/150715133504.htm. Indeed, that research "provide[s] a direct link from TBI to CTE." Kondo *et al.*, *Antibody Against Early Driver of Neurodegeneration* cis *P-tau Blocks Brain Injury and Tauopathy*, Nature (July 15, 2015).

Class representatives have a duty to press for settlement "provisions that can keep pace with changing science and medicine, rather than freezing in place the science" known at the time of settlement. *Georgine*, 83 F.3d at 630-31.[17] And complexity in proof does not render a claim valueless. "[C]laims may have a greater than zero net expected value even if their chances of prevailing at trial are slim." *Newberg*, *supra*, § 13:60. Thus, even if the scientific understanding of CTE were "nascent," that would not justify releasing those claims altogether without

[17] The district court also stated that "[a] prospective Death with CTE benefit would incentivize suicide because CTE can only be diagnosed after death." A.144. But that statement ignores the record evidence that "within the next five to ten years there will be highly accurate, clinically accepted, and FDA-approved methods to diagnose CTE during life." A.2958. Besides, the court's statement cannot be reconciled with its instruction to move the Death with CTE date from preliminary to Final Approval. Under the court's logic, that, too, would have incentivized suicide during that time period.

any compensation — particularly where researchers are learning more about the relationship between CTE and MTBI everyday.

To defend against the "frozen science" problem, the district court invoked a Settlement provision requiring the settling parties to meet "every ten years and confer in good faith about possible modifications to the definitions of Qualifying Diagnoses." A.147. For any change to take effect, however, the NFL would have to agree to the change. A.5628(§ 6.6(a)). That provision, moreover, only authorizes modifications to the Qualifying Diagnoses that reflect "actual cognitive impairment and/or neuromuscular impairment." A.5628(§ 6.6(b)). In other words, future modifications cannot compensate mood and behavioral conditions — regardless of severity. As a result, even in the highly unlikely event that the NFL agrees to some form of compensation for future cases of CTE, the Settlement categorically bars any compensation for mood and behavioral symptoms. CTE, however, frequently presents first with behavioral and mood symptoms — such as suicidality — that can be just as debilitating as the neurocognitive symptoms. *See* pp. 5-6, *supra*.

In any event, even if it were permissible to freeze in place the science regarding CTE, the Settlement's treatment of CTE still could not be reconciled with Rule 23. Setting aside the overwhelming evidence that CTE will be diagnosed in the living far before the 65-year Settlement ends and accepting the

district court's assertion that the science of CTE is "nascent," the Settlement still treats similarly situated class members differently: It does not compensate players who die with CTE after Final Approval but compensates with up to $4 million the family of a player who dies with CTE before Final Approval. "Nascent" science is no justification.

b. ***The District Court Did Not Consider the Faneca Objectors' Scientific Evidence and Applied an Overly Stringent Evidentiary Standard***

The district court justified the Settlement's treatment of CTE by stating that researchers have not definitively identified CTE's causes and symptoms. But the court neither considered the Faneca Objectors' evidence to the contrary nor weighed the credibility of the settling parties' experts against the credibility of the Faneca Objectors' unpaid experts. A.137-41. The court did not address:

- Numerous scientific publications establishing that CTE is the consequence of repetitive head injury.
- Testimony from eleven world class experts noting that repetitive head trauma is a necessary condition for developing CTE, including testimony that ***every pathologically confirmed case of CTE*** had been exposed to repetitive head trauma.
- Testimony from those same experts describing the significant and debilitating mood and behavioral symptoms that afflict individuals with CTE as well as the fact that those symptoms appear more frequently in individuals with CTE than in the general population.

See pp. 5-6, 17-20, *supra*. Reversal is warranted on this basis alone. *See Sony Corp. v. Elm State Elec., Inc.*, 800 F.2d 317, 321 (2d Cir. 1986) ("Having invited

[a party] to enlarge the record by submitting papers on the damages issue, the court . . . abused its discretion by ignoring the evidence that [was] submitted.").

In any event, the district court clearly erred in its interpretation of the facts it did address. The court addressed only two of the studies offered by the Faneca Objectors, dismissing them as "case reports." A.138-39. But "ethical and practical constraints limit the use of" double-blind, randomized trials in studying exposures thought to be harmful to human beings. Federal Judicial Center, *Reference Manual on Scientific Evidence* 555 (3d ed. 2011). For that reason, epidemiological studies, including retrospective ones like the studies addressing CTE offered by the Faneca Objectors, are the "primary generally accepted methodology for demonstrating a causal relation" in mass-tort cases. *Id.* at 551 n.2.

The district court also demanded too much of the Faneca Objectors when seeking proof of CTE's causes and symptoms. To be entitled to compensation under a class settlement, class members with a particular claim need not have an iron-clad case; merely "colorable" claims suffice. *Community Bank*, 418 F.3d at 307-08; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 783 (7th Cir. 2004). Indeed, settlements that release such claims indicate that class counsel "subrogated their duty to the class" by not pursuing them. *Community Bank*, 418 F.3d at 307-08.

It cannot be that the claims of class members with CTE are anything short of "colorable." Causation in tort requires but-for and proximate causation. *See, e.g.*,

Robertson v. Allied Signal, Inc., 914 F.2d 360, 366-67 (3d Cir. 1990). Unlike ALS, Alzheimer's disease, or Parkinson's disease, repetitive head trauma is always a but-for cause of CTE. *See* pp. 5-6, 17, 19, *supra*.[18]

And the NFL's conduct was plainly a proximate cause of class members' harm. "Proximate cause requires only 'some direct relation between the injury asserted and the injurious conduct alleged,' and excludes only those 'link[s] that are too remote, purely contingent, or indirect.'" *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1192 (2011). Thus, unless the NFL's deceptive conduct regarding the risks of MTBI was only a "trivial contribution" to the class members' "cause of harm," the NFL's conduct is a proximate cause of the class members' injuries. *Restatement (Third) of Torts: Phys. & Emot. Harm* §36 (rev. 2015). The NFL's deception regarding the effects of head injuries sustained in the NFL clearly contributed to the harm that thousands of players have suffered.

c. ***Compensation for Dementia and the Other Qualifying Diagnoses Does Not Substitute for Compensating CTE***

The district court decided that, because individuals with ***late-stage*** CTE have been found to have a high incidence of comorbid diseases (like Alzheimer's) that are compensated under the Settlement, the Settlement reasonably did not

[18] It is wholly illogical to compensate ALS, Parkinson's, Alzheimer's, and dementia — which all occur in the general population absent head trauma — and to refuse to compensate the one disease, CTE, caused directly by head trauma.

compensate CTE at all. A.141-42. That compensation-by-proxy theory falls short for several reasons.

Compensating late-stage CTE when it happens to coincide with another Qualifying Diagnosis still denies compensation for CTE's earliest stages. Early-stage CTE typically presents with debilitating mood and behavioral symptoms but not neurocognitive impairment sufficient to trigger an award under the Settlement. *See* charts and text, pp. 5-6, *supra*. Because CTE presents earlier in life than the other Qualifying Diagnoses, A.3029(¶7), moreover, players with CTE who ultimately receive compensation for another Qualifying Diagnosis will undoubtedly suffer extensive offsets resulting from that delay (which could be several decades). And the "high rates of suicides, accidents, and drug overdoses" among individuals with CTE mean that many die before their disease progresses to compensable dementia. *Id.* ¶9.[19]

Even if this compensation-by-proxy theory had merit in the abstract, it would still fail in this case. Citing Dr. McKee's work, the NFL's experts assert that at least 89% of NFL players with CTE would qualify for some payment under one of the other Qualifying Diagnoses. Dkt.6422 at 81-82. Even assuming the accuracy of that analysis and 100% success in diagnosing dementia in the claims

[19] In fact, Junior Seau and Dave Duerson, two NFL greats with confirmed CTE, committed suicide in such a way as to preserve their brains for further study. *See* Dkt.6201 at A7 n.23; A.2888-2901, A.2957(¶35).

process, more than 1 out of every 10 class members with CTE still would not receive a dime under the Settlement. That is impermissible. *See GM Trucks*, 55 F.3d at 808-09 (settlement unfair where certain groups in class unable to realize full value of settlement benefit and some class members receive no benefit at all).

The district court also stated that CTE did not warrant compensation because the Settlement was intended to compensate "objectively verifiable neurocognitive and neuromuscular impairment." A.142. If that were correct, however, the Settlement's treatment of Alzheimer's[20] would make no sense. Like CTE, Alzheimer's can only be definitively diagnosed through a post-mortem pathological examination of the brain. A.3031(¶15). And, like CTE, Alzheimer's is progressive, ultimately resulting in severe dementia and neurocognitive impairment. A.2958(¶40), A.3031(¶16). Unlike CTE, however, Alzheimer's is compensated separately under the Settlement, with Alzheimer's claimants at any stage of the disease receiving up to $3.5 million in comparison to $3 million for Level 2.0 dementia. CTE claimants, by contrast, receive no separate award after Final Approval. Were the Settlement truly about compensating "neurocognitive impairment" rather than specific diseases, an Alzheimer's award would be unnecessary.[21]

[20] The Faneca Objectors support the Settlement's compensation of Alzheimer's.

[21] Finally, the district court stated that compensation of CTE in claimants who died before Final Approval functioned to compensate the other Qualifying Diagnoses in players who did not obtain a Qualifying Diagnosis before death. A.145. If a CTE

II. THE SETTLEMENT'S HEAD TRAUMA AND STROKE OFFSETS PRECLUDE CERTIFICATION AND APPROVAL

The Settlement independently fails Rule 23(a)(4)'s adequacy requirement because it imposes 75% reductions on awards if a class member suffers a single stroke or single instance of non-football related severe traumatic brain injury. Neither representative plaintiff demonstrated that he had suffered or was at risk of suffering a stroke or traumatic brain injury. The offsets, moreover, render the Settlement unfair, inadequate, and unreasonable under Rule 23(e) because they impose severe reductions with no scientific basis.

A. The 75% Offsets Demonstrate a Lack of Adequate Representation

Neither representative plaintiff alleged or demonstrated that he had suffered or was at elevated risk of stroke or severe traumatic brain injury. Both representative plaintiffs thus had the incentive to allow higher offsets as a bargaining chip for negotiating more favorable terms by which ***they*** could benefit. By contrast, many retired players, especially older ones, may have already suffered strokes.

The district court did not address whether Kevin Turner or Shawn Wooden were adequate representatives for such class members. It instead concluded that

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diagnosis before Final Approval is sufficient evidence of MTBI-related injury such that it can "serve[ ] as a proxy for Qualifying Diagnoses deceased Retired Players ***could*** have received while living," A.136, however, there is no reason why CTE cannot serve as evidence of MTBI-related injury after Final Approval as well.

individuals who suffer strokes and traumatic brain injuries would have a difficult time proving that head injuries suffered in the NFL caused their Qualifying Diagnoses. A.159. That addresses whether the offset is fair, not whether Turner and Wooden were adequate representatives. *Amchem*, however, firmly establishes that fairness and adequacy are separate inquiries. 521 U.S. at 622 (rejecting position that, "if a settlement is 'fair,' then certification is proper" because other Rule 23 requirements must be met). Class members who have suffered a stroke or traumatic brain injury needed representative plaintiffs who had incentive to fight hard to address those challenges. Neither Turner nor Wooden served that role. The conflict is thus "fundamental" because it touches "'the specific issues in controversy.'" *Dewey*, 681 F.3d at 184; *see* CTE discussion, pp. 33-36, *supra*.

Unequal recovery for purportedly weaker claims cannot be justified without structural protection — *i.e.*, an advocate at the bargaining table — for those claimants. Without such protections, the court "[has] no basis for assessing whether the discount applied to . . . [the] recovery appropriately reflects [the] weakness" in those claimants' cases. *Literary Works*, 654 F.3d at 253 (rejecting settlement where purportedly weaker claims received unfavorable treatment, but class members who held only such claims were not independently represented). Without structural protection for class members who have suffered strokes or severe traumatic brain injuries, this Court has no way of assessing whether the

75% offsets appropriately reflect the challenges those retired players would face in proving causation.

B. The Settlement's Treatment of Stroke and Head Trauma Offsets Renders It Unfair, Inadequate, and Unreasonable

The 75% offsets fail to meet the fairness requirement of Rule 23(e). The district court cited, and the settling parties offered, no evidence that someone who suffers a single stroke should be entitled to only one-quarter the recovery of someone who does not. Although this issue is reviewed for abuse of discretion, "[d]iscretion is not whim." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005).

The district court's justification for ruling that ***any*** offset for strokes is necessary also does not withstand scrutiny. The court concluded that "[s]troke is the second most common cause of dementia" and found that offset to be "reasonable" as well. A.158-59. But MTBIs suffered in NFL play ***increase the risk of stroke***. Dkt.6201 at 32. Thus, the offsets allow the NFL to benefit from its own wrongful conduct. *Id*.

The district court rejected that argument, concluding that MTBI does not increase players' risk of suffering strokes. A.158. The court distinguished the Faneca Objectors' evidence — a scientific study suggesting a link between TBI and stroke — by characterizing it as considering only "moderate and severe TBI, not repetitive mild TBI." *Id*. But that study, in fact, concluded that "***[a]ll*** TBI

subtypes had a similar magnitude of association with ischemic stroke." A.2415 (emphasis added). The study considered the kind of injuries suffered in NFL play and concluded that they increase the risk of future strokes. The court's interpretation to the contrary is clearly erroneous.

Moreover, there was no evidence presented to rebut the Faneca Objectors' showing that MTBI causes increased risk of stroke. The settling parties did not even contend otherwise in their Proposed Findings of Fact and Conclusions of Law. Dkt.6497 ¶¶106-109. The district court nonetheless stated that the Faneca Objectors' studies did not pertain to MTBI.

That erroneous finding prejudiced the district court's finding of fairness. If MTBI suffered in NFL play increases the risk of stroke, the purported justification for the 75% offsets disappears. The strokes must be considered as an effect of the NFL's wrongful conduct, not an independent event. If anything, a player who suffers both a stroke and a Qualifying Diagnosis as a result of NFL play should be entitled to more compensation, not less.

III. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE SETTLEMENT WAS FAIR, REASONABLE, AND ADEQUATE UNDER *GIRSH*

Applying this Court's test from *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), the district court concluded that the Settlement was "fair, reasonable, and adequate" under Rule 23(e). To reach that conclusion, the court also applied a presumption of fairness to the Settlement. Both decisions were incorrect.

A. The District Court Improperly Afforded the Settlement a Presumption of Fairness Instead of Applying a "Heightened Standard" Required by This Court

This Court directs "district court[s] to apply an initial presumption of fairness when reviewing a proposed settlement where: (1) the settlement negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) (quotation marks omitted). Here, it is uncontested that Class Counsel conducted no formal discovery. The district court nonetheless applied the presumption. A.115-16.

Doing so was error. The Faneca Objectors are unaware of ***any*** case where this Court applied the presumption despite the absence of any formal discovery. To the contrary, "a decision to settle that occurs at too incipient a stage of the proceedings . . . weighs ***against*** settlement approval." *GM Trucks*, 55 F.3d at 810 (emphasis added); *see Newberg*, *supra*, § 13:50 (discovery is "an indirect indicator that a settlement is not collusive but arms-length"). Although Class Counsel may have conducted some informal discovery, it does not appear that they obtained any information regarding the NFL's knowledge of the harm inflicted on its players and the NFL's fraudulent conduct resulting from that knowledge. That, however, is a central issue in this case. "Without adequate exploration of the absent class

members' potential claims, it is questionable whether class counsel could have negotiated in their best interests." *Community Bank*, 418 F.3d at 307.

Even where that initial presumption applies, moreover, "[j]udicial review must be exacting and thorough." *Manual for Complex Litigation*, *supra*, §21.61. And a court is required "to be even 'more scrupulous than usual' when examining the fairness of the proposed settlement" because it was negotiated ***before*** certification. *Warfarin*, 391 F.3d at 534. The court did not do so here. It thus doubly erred when it both applied a presumption of fairness and did not apply the "heightened standard" required when a settlement is negotiated pre-certification. *Id.* Those errors tainted its application of the *Girsh* factors.

B. The *Girsh* Factors Preclude Approval of the Settlement

1. *The Complete Absence of Discovery Weighs Against Approval*

For the same reason, the district court misapplied the *Girsh* factor that examines the stage of the proceedings and the extent of discovery. A.120-23. Although the Complaint alleged that the NFL sponsored junk science and downplayed actual science about the risks of repetitive head trauma, A.1154-67(¶¶128-199), Class Counsel obtained no discovery on those critical issues. Under the district court's view, the NFL's misconduct appears ***irrelevant*** under this factor. That is not the law.

The district court instead focused on Class Counsel's evaluation of the merits of the preemption and causation claims. A.121-22. In doing so, it overemphasized those issues. Even a successful preemption defense would not dispose of all class members' claims because no collective bargaining agreement was in effect before 1968 and between 1987 and 1993. *See* Dkt.3589-1 at 6 n.2. Class members who played in the NFL only during those times are therefore not vulnerable to the preemption defense. *See, e.g.*, *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 25 (2d Cir. 1988) ("When a complaint alleges a claim based on events occurring after the expiration of a collective bargaining agreement, courts have held that section 301 cannot provide a basis for jurisdiction."). Those class members whose claims were unaffected by the preemption issue were entitled to discovery before their claims were settled.

Discovery would have likewise allowed the class to prove their allegations that the NFL's disinformation campaign ***caused*** players to continue sacrificing their minds and bodies based on the errant, NFL-sponsored belief that head injuries in the NFL did not cause brain diseases.

Because the district court failed to "assur[e] that adequate discovery had been taken" in this case, it "clearly erred in finding that this [*Girsh*] factor weighed in favor of settlement." *GM Trucks*, 55 F.3d at 814; *see Community Bank*, 418 F.3d at 307 (remanding where "no formal discovery was conducted whatsoever").

2. *The Best Possible Recovery and the Risks of Litigation Weigh Against Approval*

This factor examines "the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case." *GM Trucks*, 55 F.3d at 806. It weighs against approval because the Settlement does not compensate current and future CTE cases and will never compensate CTE's debilitating mood and behavioral symptoms. Nor are the 75% offsets defensible. A settlement that both fails to compensate the core class injury and imposes severe offsets without a rational basis is not the best possible recovery, whatever the risks of litigation.

The Settlement also includes a multitude of hurdles that will further decrease the "real value" to class members. *GM Trucks*, 55 F.3d at 808. For example, class members must: opt in to the Settlement within six months, A.5611-12(§4.2); undergo BAP examinations within set time periods or see reduced recoveries, A.5614(§5.3); submit an extensive Claim Package within two years of receiving a Qualifying Diagnosis, A.5632(§8.2(a)), A.5633-34(§8.3(a)(i)); obtain a Qualifying Diagnosis only by an NFL-approved doctor, A.5627(§6.5(a)); and typically pay a fee to appeal an adverse claim determination even though the NFL need not do so, A.5640-41(§§9.5-9.7). These limitations will decrease the number of class members who actually receive any money.

Despite those deficiencies, the district court viewed this factor as supporting approval. A.130-32. The court stated that "[t]he Settlement allows Class Members to choose certainty in light of the risks of litigation." A.131. But certainty cannot cure an otherwise unfair settlement.

3. *The NFL's Ability To Withstand a Greater Judgment Weighs Against Approval*

The NFL has never contested that it could fund a far larger Settlement. In 2013 alone, its revenue reached $10 billion, and it projects annual revenue of $25 billion in twelve years. Dkt.6420 at 3 & n.2. The Settlement resolves all head injury litigation by retired players for a fraction of one year's revenues.

The district court nonetheless ruled that this factor is "neutral" because the Monetary Award Fund is uncapped. A.130. But this factor examines whether a defendant "could withstand a judgment for an amount significantly greater than the Settlement," *In re Cendant Corp. Litig.*, 264 F.3d 201, 240 (3d Cir. 2001) (explaining factor), not whether a Settlement is uncapped. The fund, moreover, is uncapped in name only. Class Counsel and the NFL did not expect the uncapped Settlement to pay out any more than the capped, initial settlement rejected by the district court. Dkt.6073-5 at 2, 12. And the uncapped fund means nothing to class members with current and future CTE cases who will remain uncompensated.

4. ***The Negative Reaction of the Class Weighs Against Approval***

The district court acknowledged that "208 Class Members submitted requests to exclude themselves from the Settlement, and a total of 205 Objectors filed 83 written objections." A.78. But it concluded that this factor favors approval because those figures amount to approximately 2% of the total class members. A.120. According to the court, the class's "silence" demonstrates that it "tacitly consented to this Settlement." A.119.

But "[e]ven where there are no incentives or informational barriers to class opposition, the inference of approval drawn from silence may be unwarranted" where, as here, notice of the class is sent simultaneously with notice of the settlement. *GM Trucks*, 55 F.3d at 812. In *GM Trucks*, for example, this Court ruled that this factor did not weigh in favor of approval even though only .1% of the class objected and an even smaller figure opted out. *Id.* at 813 n.32. ***Ten times*** as many class members opted out or objected here.

Moreover, negative class reaction to the Settlement was muffled due to problematic notice. For example, the long-form notice states that "[m]onetary awards are available for the diagnosis of ALS, Parkinson's Disease, Alzheimer's Disease, Level 2 Neurocognitive Impairment (*i.e.*, moderate Dementia), Level 1.5 Neurocognitive Impairment (*i.e.*, early Dementia) or Death with CTE (the Qualifying Diagnoses)." A.3939. In the next sentence, the notice states that "[a]

Qualifying Diagnosis may occur ***at any time*** until the end of the 65-year term of the Monetary Award Fund." *Id.* That is simply not true. As Judge Ambro asked at oral argument on the Faneca Objectors' Rule 23(f) petition: "How is that consistent with the terms of the settlement agreement," which precludes a class member diagnosed with CTE in the future from obtaining a Death with CTE Qualifying Diagnosis? Dkt.6185-2 at 61-62.

The class's supposedly "tacit" reaction to the settlement thus does not support approval because the class notice "was not neutral and it did not provide a truthful basis for deciding whether to opt out." *Eubank v. Pella Corp.*, 753 F.3d 718, 728 (7th Cir. 2014) (holding small number of objectors did not support fairness); *see also Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 16 (2d Cir. 1981) (lack of objection means "little" where notice is deficient). "The class reaction factor plainly does not, contrary to the district court's conclusion, weigh in favor of approving the settlement." *GM Trucks*, 55 F.3d at 813.

5. ***The Risks of Establishing Liability and Damages Weigh Against Approval***

These two *Girsh* factors "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *Warfarin*, 391 F.3d at 537. The district court cited "stiff challenges" on issues of "preemption and causation" to conclude that this factor favors approval. A.124. But that "over-emphasized the importance

of defenses applicable to only some class members . . . and incorrectly discounted a significant body of evidence pertinent to proving liability." *GM Trucks*, 55 F.3d at 816.

For example, the district court relied heavily on the risk that the NFL's preemption defense would prevail. A.124-26. But many class members' claims are not vulnerable to the preemption defense. *See* p. 53, *supra*. The "district court's failure to distinguish between groups of plaintiffs that did and those that did not confront [the preemption] defense[ ] constitutes an abuse of discretion." *GM Trucks*, 55 F.3d at 816. Even if the preemption defense poses some risk to some class members' claims, moreover, that risk — which does not relate to CTE — cannot justify the fairness of excluding from recovery all present and future claims of CTE — the most common, most significant injury arising from the NFL's wrongful conduct. *See* pp. 37-47, *supra.*

The district court's reliance on causation fares no better. As in *GM Trucks*, the district court "incorrectly discounted a significant body of evidence pertinent to proving liability," 55 F.3d at 816, and ignored "a plethora of other evidence [that] buttressed the class claims," *id.* at 815. And even if a battle of experts would ultimately result, *see* A.118, the court gave no indication why a jury would find the NFL's experts more credible than plaintiffs'. Wholly apart from the scientific debate, the NFL itself has admitted that "'[i]t's quite obvious from the medical

research that's been done that concussions can lead to long-term problems.'" A.2250 (quoting NFL spokesman Greg Aiello).

Regardless, without discovery the district court lacked the information necessary to evaluate causation. With allegations that the NFL concealed medical evidence regarding the neurological risks of MTBI, A.1154-67(¶¶128-199), the district court could not simply rely on the public record. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 352-53 (3d Cir. 2010) (reversing approval where district court "lacked the information necessary to evaluate the value and allocation").

Finally, the district court invoked a number of individualized issues that might present a hurdle to recovery. A.128-29. Such individual issues, however, do not "doom the action to failure" because those defenses can "be the subject of separate proceedings." *GM Trucks*, 55 F.3d at 815. And as with the preemption defense, the court did not consider the applicability of these defenses to the different groups within the class.

6. ***The Potential Complexity, Expense, and Likely Duration of the Litigation Weigh Against Approval***

Settlement would no doubt minimize litigation expenses. But that is true in every settlement. The NFL's "basic liability does not present a difficult or complex issue." *Cendant*, 264 F.3d at 233. The issues of whether the NFL assumed a duty of care, whether the NFL breached that duty, and whether those breaches caused injury are straightforward.

Ironically, the district court ruled that this weighs in favor of settlement because litigation would require extensive discovery. A.118. But discovery is necessary only because ***Class Counsel*** conducted none. The failure to obtain basic information about liability should not immunize from judicial review Class Counsel's decision to settle.

7. ***The Likelihood of Maintaining Class Status***

The district court noted that this factor is "'perfunctory'" for settlement classes because a court can decertify or modify a class at any time and a settlement removes the need for a trial anyway. A.129. The Faneca Objectors do not challenge that finding.

* * * * *

Regardless of whether an initial presumption of fairness applies to the Settlement, the district court abused its discretion in how it weighed this Court's *Girsh* factors. The Settlement should not have been approved as fair, reasonable, and adequate.[22]

[22] The district court also applied factors from *In re Prudential Insurance Co. of America Sales Practice Litigation*, 148 F.3d 283 (3d Cir. 1998). *See* A.132-34 (citing portions discussing *Girsh*). An unreasonable settlement under *Girsh* is also unreasonable under *Prudential*.

IV. THE DISTRICT COURT ERRED BY DENYING THE FANECA OBJECTORS' MOTION TO INTERVENE

"[T]o intervene as a matter right under Rule 24(a)(2) the prospective intervenor must establish that: (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." *Community Bank*, 418 F.3d at 314 (quotation marks omitted). In class actions, "the second and third prongs of the Rule 24(a)(2) inquiry are satisfied by the very nature of Rule 23 representative litigation." *Id.* As a result, "when absent class members seek intervention as a matter of right, the gravamen of a court's analysis must be on the timeliness of the motion to intervene and on the adequacy of representation." *Id.*

The Faneca Objectors met those requirements. The motion was timely because Objectors moved to intervene on May 5, 2014 — a month ***before*** Class Counsel submitted a revised settlement. *See Community Bank*, 418 F.3d at 314-15 (motion to intervene filed ***within opt-out period*** presumptively timely). The Faneca Objectors' interests were not adequately represented because the Settlement does not comply with Rule 23(a)(4). *See* pp. 29-37, *supra*. The court thus erred when it denied the Faneca Objectors' motion.

CONCLUSION

The Faneca Objectors believe all parties would benefit from a settlement of this case. However, that settlement must be fair, adequate, and reasonable, and otherwise meet the exacting standards of Rule 23.

There are many options for the NFL to provide meaningful consideration in exchange for the absolute release it seeks for CTE claims. That consideration need not necessarily take the form of multimillion-dollar cash payments to every class member. Similarly, a negotiated set-off for a non-NFL TBI or stroke could be appropriate, provided it has a rational basis.

Much good work has been done to address a difficult issue, but more work needs to be done to achieve a resolution that comports with the law.

Accordingly, this Court should vacate the district court's order certifying the settlement class and approving the Settlement; reverse the court's order denying the Faneca Objectors' motion to intervene; and remand for further proceedings.

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Respectfully submitted,

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August 19, 2015 s/ Steven F. Molo