UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION

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

Appellants in 15-2217

(E.D. Pa. No. 2-12-md-02323)

APPELLANTS' REPLY BRIEF

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
Anita B. Brody, District Judge

John J. Pentz
19 Widow Rites Lane
Sudbury, MA 01776
T: 978.261.5725
F: 978.405.5161
jjpentz3@gmail.com

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ARGUMENT

I. Appellants Did Not Cite To *Community Bank* Because It Is Entirely Distinguishable From This Case.

Plaintiffs suggest that the Appellants' failure to discuss the July 2015 case *In re: Community Bank of Northern Virginia Mortgage Lending Practices Litig.*, 795 F.3d 380 (3rd Cir. 2015) is a deliberate attempt to conceal relevant authority from this Court, which authored *Community Bank* just 2 months ago. The true reason for its omission from the briefs, however, is that nothing about *Community Bank* is remotely similar to the facts of this case.

First, as Plaintiffs concede, *Community Bank* involved the certification of a litigation class, whereas this appeal involves a settlement-only class certification and a global class settlement that makes essential allocation decisions among various forms of disease. This Court distinguished *Community Bank* from cases "in which subclasses were jockeying for pieces of a limited settlement pie. By contrast, the subclasses here are not competing for limited settlement funds." *Id*. at *29. This is a case in which subclasses *are competing* for limited settlement funds, and Plaintiffs have acknowledged that *there were tradeoffs* between recovery levels for the different diseases, including the elimination of Death with CTE compensation after April 22, 2015 in exchange for increased recoveries

for ALS, Parkinsons and Alzheimers. A. 3860 ("Expanding the settlement to include CTE would have meant making cuts elsewhere, such as abandoning coverage for ALS, Alzheimer's Disease, or Parkinson's Disease."). The settlement is only "uncapped" for class members who develop one of the covered conditions. For everyone else, the settlement provides nothing.

Second, in *Community Bank* the issue of adequacy of representation arose in the context of the timeliness of various legal causes of action for the exact same injuries. Some class members could allege timely RESPA and TILA claims while others arguably could not, making some class members' claims more valuable than others'. That is not the case here. In this case, the *type of injury* suffered by each class member differs from that of each other class member. Kevin Turner currently suffers from ALS, a devastating and fatal condition. Other class members suffer from mild dementia or other symptoms of CTE that do not rise to the level of compensation under the settlement. Still others have not yet developed any disease associated with head trauma and have an interest in securing the broadest form of compensation going forward.

Class members who have already developed a disease associated with head trauma have an interest in ensuring the highest compensation possible for their disease, while limiting compensation to the fewest number of

diseases possible. *Cf. Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 187 (3rd Cir. 2012)(named plaintiffs had incentive to minimize number of class members in reimbursement group, giving themselves best chance of full compensation). Class members who have not yet developed a disease have an interest in including as many potential diseases as possible in the settlement, including the disease they are most likely to develop, CTE. 87 out of 91, or 96%, of former NFL players whose brains have been studied after their deaths were found to have signs of CTE. This exceeds the next most prevalent disease, Alzheimer's, by a factor of 3. Less than 1% of all former NFL players will develop ALS. Fewer than 5% will develop Parkinson's Disease. Almost all of them will develop CTE.

Plaintiffs also fault Appellants for failing to discuss *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220 (3rd Cir. 2002). In that case, the Court explicitly found that there were no trade-offs between the subclasses, *id*. at 231, whereas, here, those tradeoffs were expressly conceded by the Plaintiffs, and were even used in defense of the settlement. Plaintiffs actually thought it was an argument *in favor* of the settlement to point out that if Death with CTE were compensated for the full 65 years of the settlement term, Alzheimer's, Parkinsons and ALS would have to receive less in compensation. A. 3860 ("Expanding the settlement to include CTE

would have meant making cuts elsewhere, such as abandoning coverage for ALS, Alzheimer's Disease, or Parkinson's Disease.").

Diet Drugs primarily concerned a district court's power under the All Writs Act to enjoin state court actions, and the adequacy issue came up in the context of a competing class counsel's challenge to the adequacy of class counsel's representation of his statewide class. *Diet Drugs* is simply no authority for the discriminatory and conflicted settlement that the district court approved here.

Imagine if the settlement in *Diet Drugs* had provided that anyone who had had a heart valve replacement prior to the date of the settlement's approval would receive full reimbursement for the costs of that operation, plus an additional amount for pain and suffering, but that anyone who developed heart valve disease after the date of settlement approval would receive an oxygen tank and a wheelchair, but no reimbursement for valve replacement. That would be the NFL concussion settlement superimposed on *Diet Drugs*. If this Court had approved such a settlement in *Diet Drugs*, then that case would be controlling authority here. But *Diet Drugs*, unlike the settlement currently on appeal, treated class members identically regardless of whether they developed heart disease before or after the settlement's approval.

II. The Parties' Defense of the Treatment of Death With CTE is Contradictory.

There is a fundamental contradiction in the parties' arguments in defense of the discriminatory treatment of Death with CTE in the settlement. On the one hand, they contend that every player who died with CTE prior to the date of the settlement's approval would have qualified for compensation for one of the other conditions if they had only sought out a diagnosis. On the other hand, they assured the district court that no more than 17% of the living class members will qualify for compensation under the settlement. A. 1568, A. 1738. There is no way to square these two assertions.

Living class members are being denied the opportunity to qualify for compensation for a condition that 96% of them will manifest at the time of their deaths. In return, they will receive the "opportunity" to register for BAP and a 17% chance of receiving a diagnosis for one of the other 5 diseases compensated under the settlement. In other words, deceased players are being compensated at a rate that is more than 5 times as high as that for all other players.

The explanation for this discriminatory treatment lies in Plaintiffs' Brief. Class Counsel insisted that the NFL "make an exception" in order to compensate Death with CTE prior to the settlement's approval, because those class members and their families had been at the forefront of the fight

to obtain recognition for CTE and the mood and behavioral problems it causes. Consolidated Brief for Class Plaintiffs at p. 85. Class Counsel knew that if these class members were not compensated as part of this settlement, they would be joining the Appellants on appeal or would have opted out of this settlement like Junior Seau's family has done.

If the deceased class members were being compensated because they "were among those who had highlighted the dangers of concussions in football play and prompted the first lawsuits," then this means that they were not similarly situated to the rest of the class, and are being compensated for something other than their Death with CTE diagnosis. If they are similar and typical, then why was one or more of those player representatives not made a lead plaintiff for the CTE subclass, which would have allowed their dedication to advancing the CTE cause to benefit the entire class, rather than just 100 or so retired players?

The compensation of Death with CTE in players who died prior to the settlement's approval is more accurately viewed as a form of preemptive payoff of prospective objectors or opt outs rather than a principled treatment of those players because they were differently situated. Class Counsel did not want to be facing Mike Webster and Junior Seau as objectors to their proposed settlement. As it is, the family of Dave Duerson objected to the

settlement's discriminatory treatment of Death with CTE through the date of the district court's approval, and only abandoned their appeal at the last moment.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's approval of a settlement that suffers from fatal intra-class conflicts related to CTE.

Appellants Cleo Miller, *et al.*,
By their attorney,

/s/ John J. Pentz
John J. Pentz, Esq.
19 Widow Rites Lane
Sudbury, MA 01776
T: 978.261.5725
F: 978.405.5161
jjpentz3@gmail.com

CERTIFICATION

I, John Jacob Pentz III, hereby certify the following:

(1) I am a member of the Bar of the Court of Appeals for the Third Judicial Circuit.

/s/ John J. Pentz
John J. Pentz

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I hereby certify that this brief was produced in Times New Roman 14-point type and contains no more than 1700 words.

I further certify that the electronic copy of this brief filed with the Court is identical in all respects to the hard copy filed with the Court, and that the electronic version is virus free as confirmed by the McAfee Security Scan program.

/s/ John J. Pentz
John J. Pentz

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2015 I filed the foregoing Brief via the ECF filing system for the United States Court of Appeals for the Third Circuit, and that as a result each counsel of record received an electronic copy of this Brief on October 1, 2015.

/s/ John J. Pentz
John J. Pentz