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)

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INTRODUCTION

The briefs of the NFL and Class Counsel miss the mark. They spend pages trumpeting the settlement process, the admirable efforts of the district court, and the benefits the Settlement bestows upon a portion of the class. The Faneca Objectors quarrel with little of that.

Tellingly, neither settling party addresses the elephant in the room — the Settlement's unfair treatment of CTE claims — until late in their briefs. That decision is understandable given they have no good answer for:

- The failure of a class representative to allege or prove he is at risk of developing CTE and the fundamental nature of the intra-class conflict created thereby;
- The Settlement's award of up to $4 million for death with CTE pre-Final Approval and $0 one day later, while still releasing those uncompensated claims;
- The Settlement's compensation of ALS, Alzheimer's, and Parkinson's — all of which occur in the general population — which refutes their contention that the Settlement compensates impairment and not diseases; and
- The Settlement's compensation for dementia does not provide compensation to all class members suffering from CTE and does not provide them the same financial benefit as class members receiving an award for death with CTE.

The Settlement's treatment of CTE, as well as its use of arbitrary set-offs for stroke and non-NFL experienced traumatic brain injuries, renders it legally defective.

These defects can be remedied through relatively simple revisions. Until they are, however, the Settlement violates Rule 23.

ARGUMENT

I. THE ABILITY TO OPT OUT DOES NOT SAVE A SETTLEMENT THAT IS NOT FAIR, ADEQUATE, AND REASONABLE

Unable to defend the structural defects in the Settlement, Class Counsel and the NFL repeat the same refrain: Players shortchanged by the Settlement were given the right to opt out. NFL Br. 33, 58, 62, 64, 75, 77, 78, 81, 87; Class Br. 49, 50, 83. They contend players must accept a flawed settlement or take their chances with individual litigation. This Court has rejected that reasoning. "[T]he right of parties to opt out does not relieve the court of its duty to . . . withhold approval from any settlement that creates conflicts among the class." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 809 (3d Cir. 1995) ("*GM Trucks*"). "[S]ignificant benefits [are] created by settlement classes[,]" but only "so long as [the] courts abide by all of the fundaments of [Rule 23]." *Id*. at 778. Class members are therefore entitled to choose between opting out ***or*** participating in a settlement that is fair, adequate, and reasonable, and otherwise complies with Rule 23. That choice was unavailable.

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

A. The Settlement's Treatment of CTE Demonstrates a Lack of Adequate Representation

The "linchpin of the adequacy requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 183 (3d Cir. 2012). Thus, the court 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.

As the Faneca Objectors have explained (at 29-30), the Settlement's "distribution terms" reveal that it "offers considerably more value to one class of plaintiffs than to another." *GM Trucks*, 55 F.3d at 797. ***All*** individuals suffering from ALS, Alzheimer's Disease, Parkinson's Disease, and severe dementia receive compensation, whether diagnosed before or after Final Approval. A.1465-66. Individuals with CTE, however, receive compensation — up to $4 million — only if their CTE was detected before Final Approval. A.5699. Class members whose CTE was not detected until after Final Approval receive ***nothing***. *Id*. CTE claimants are therefore treated differently from class members with the other Qualifying Diagnoses.

Class Counsel do not dispute that the Settlement treats class members unequally. *See, e.g.*, Class Br. 77.[1] Nor do they deny that independent class representatives are required where "'members of the class have divergent interests.'" Class Br. 61 (quoting *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 272 (3d Cir. 2009)). Instead, Class Counsel argue that representative plaintiff Shawn Wooden provided independent representation because he "'adequately alleged that he is at risk of developing CTE.'" Class Br. 64 (quoting A.94). But that merely repeats the district court's error. The settling parties had the burden of showing that "the ***evidence*** more likely than not establishes . . . the requirements of Rule 23." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) (emphasis added); *see also* Faneca Br. 32-33.

Class Counsel wholly ignore their evidentiary burden, identifying no evidence showing Mr. Wooden adequately represented the interests of current or future CTE claimants. The evidence they did submit — a declaration from Mr. Wooden — establishes that he could not adequately represent those interests. Mr. Wooden stated he is "at increased risk of developing a range of neuromuscular and neurocognitive diseases associated with mild traumatic brain injuries, such as

[1] The NFL does not defend the adequacy of representation, addressing only the *Girsh* factors and the CTE-specific objections. *See* NFL Br. 34-85.

Dementia, Alzheimer's Disease, Parkinson's Disease, and/or Amyotrophic Lateral Sclerosis ('ALS')" — but not CTE. A.3823(¶1).[2]

Mr. Wooden's failure to describe an increased risk of CTE is striking. The Faneca Objectors alerted Class Counsel to their concerns about the adequacy of representation no fewer than ***eight*** times before Mr. Wooden submitted his declaration.[3] Yet his late-in-the-game declaration fails to demonstrate that he shares a risk of CTE "to the same extent" as other class members. *Dewey*, 681 F.3d at 185. He therefore had a "natural inclination" to "exclusively . . . maximiz[e] the compensation" for those diseases he believed himself likely to develop in the future — ALS, Alzheimer's Disease, Parkinson's Disease, and dementia —

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[2] Class Counsel insist that "Shawn Wooden is in the same position as all other Subclass 1 members in terms of all of the conditions and symptoms that could be associated with NFL football." Class Br. 66 n.23; *see also id.* at 29-30 (stating, without citation, that "all former NFL players stand at risk of CTE with no way to distinguish one prospective exposure from another"). Not so. He identified an increased risk of only four diseases — ALS, Alzheimer's Disease, Parkinson's Disease, and dementia. Other Subclass 1 members, like the Faneca Objectors, are at increased risk of ***CTE*** — absent from Mr. Wooden's declaration.

[3] *See* Dkt. 6019-1 at 2, 14-18, 20-21, 27-28 (Motion to Intervene); Dkt. 6082 at 1, 14, 19-26, 36 (Objection to Preliminary Approval); Dkt. 6109 at 3, 9 (Reply Supporting Motion to Intervene); Dkt. 6169-1 at 2-5 (Motion for Leave To Conduct Limited Discovery); Dkt. 6201 at 1-2, 20-32 (Objection); Dkt. 6232 at 2 (Supplemental Objection); *In re Nat'l Football League Players Concussion Injury Litig.*, No. 14-8103, Petition to Appeal, at 1, 9-14 (3d Cir. filed July 21, 2014) (Doc. No. 003111686114); *In re Nat'l Football League Players Concussion Injury Litig.*, No. 14-8103, Reply in Support of Petition to Appeal, at 6-7 (3d Cir. filed Aug. 14, 2014) (Doc. No. 003111708590).

to the exclusion of other MTBI-related diseases identified in the complaint. *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 251-52 (2d Cir. 2011); *see also Dewey*, 681 F.3d at 188 ("Put simply, representative plaintiffs had an interest in excluding other plaintiffs from the reimbursement group, while plaintiffs in the residual group had an interest in being included in the reimbursement group."). That "type of allocative conflict of interest" renders class representation inadequate. *Dewey*, 681 F.3d at 188.

Class Counsel discuss neither *Dewey* nor *Literary Works*. Instead, they invoke *In re Community Bank of Northern Virginia*, 795 F.3d 380 (3d Cir. 2015) ("*Community Bank III*"), and *In re Diet Drugs Products Liability Litigation*, 369 F.3d 293 (3d Cir. 2004). According to Class Counsel, these cases "are squarely on point" and "controlling." Class Br. 37. Merely saying it does not make it so. Both cases are far afield from this case. Class Counsel (at 62-63) discuss neither the facts nor the holding of *Diet Drugs*. That case reviewed only the district court's order enjoining state court proceedings brought by class members who exercised back-end opt-out rights. 369 F.3d at 304. It did not address the adequacy of class representation.

Nor does *Community Bank III* support Class Counsel. That case did not involve the adequacy of the class ***representatives*** but rather the adequacy of class ***counsel***. 795 F.3d at 392. In fact, an earlier opinion in the *Community Bank*

litigation, which Class Counsel ignore, concluded that an "obvious and fundamental intra-class conflict of interest" rendered class ***representatives*** inadequate because of the lack of separate representation for those with timely and untimely claims. 622 F.3d 275, 303-05 (3d Cir. 2010) ("*Community Bank II*"); *see also In re Cmty. Bank of N. Va.*, 418 F.3d 277, 307 (3d Cir. 2005) ("*Community Bank I*"). With the *Community Bank III* settlement, "[a]ll class members [could] assert all of their available claims, and all class members [could], at least in theory, recover all of their damages without impacting the recovery of any other class members." 795 F.3d at 394. That is untrue here: Class members cannot recover for CTE.

Class Counsel next characterize objectors as demanding a "CTE subclass" and argue that is impractical and unworkable. Class Br. 63-64. The Faneca Objectors have never demanded a CTE subclass. What they ***have*** demanded is adequate representation from named plaintiffs whose "interests and incentives" are "align[ed]" with theirs. *Dewey*, 681 F.3d at 183. A "CTE subclass" is one way to ensure adequate representation. *See Community Bank II*, 622 F.3d at 304.[4] It is not, however, the only way. A class representative at risk of CTE to the "same

[4] Nonetheless, a subclass of class members at increased risk of CTE would be feasible and workable. The primary clinical features of CTE are well-known, *e.g.*, A.3028(¶5), and there are "recommended diagnostic protocols for individuals who may have CTE," A.3030(¶12). Thus, identifying a suitable representative is possible.

extent" as any other disease identified in the complaint would provide adequate representation — and would have argued for some form of meaningful compensation for CTE claims following Final Approval. *See Dewey*, 681 F.3d at 185. Even a class representative who made no representations about increased risk — in other words, a class representative who truly "does not know which, if any, condition he will develop," A.93 — would provide adequate representation. *Cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997). But Mr. Wooden is not that plaintiff. He identified himself as being at increased risk of developing ***some, but not all***, of the MTBI-related conditions in the complaint. Thus, any settlement approved by Mr. Wooden runs the risk that he "trad[ed] . . . away" claims for other diseases to maximize recovery for those conditions that present the greatest risk to him — ALS, Parkinson's Disease, Alzheimer's Disease, and dementia. *See GM Trucks*, 55 F.3d at 797.

Class Counsel contend that the uncapped nature of the Settlement dispenses with any intra-class conflict that might exist. Class Br. 60-61. It does not. The Monetary Award Fund is tightly capped — at zero — for present and future claims of CTE. *See* Faneca Br. 36. Class Counsel have no response. If anything, the uncapped fund exacerbates the intra-class conflict by widening the gap between the value of claims that are compensated and those, like CTE post-Final Approval, that are not. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996)

(intra-class conflict where "many kinds of claimants . . . get no monetary award at all").

Ultimately, approval of settlement terms creating "'adversity among subgroups'" within the class requires "'consents given by [class representatives] who understand that their role is to represent solely the members of their respective subgroups,'" *Amchem*, 521 U.S. at 627, and whose "interests and incentives" are "align[ed]" with those of the subclass they represent, *Dewey*, 681 F.3d at 183. The absence of those structural protections presents the risk that the settling parties "may be trading the claims of [one] group away in order to enrich [another] group." *GM Trucks*, 55 F.3d at 797. That risk loomed large here.

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

In the absence of any class representative incentivized to vigorously pursue recovery for present and future CTE claims, the Settlement unsurprisingly treats those claims unfairly. Notwithstanding that CTE is the ***only*** qualifying diagnosis that ***requires*** exposure to MTBI as a ***prerequisite*** for developing the disease, Faneca Br. 5-6; *e.g.*, A.4423-24(¶20), the Settlement compensates only a small handful of class members who suffered from CTE.

CTE has been the engine driving this litigation. References to CTE fill the Class Action Complaint. A.1146-49, 1151(¶¶89, 92, 94, 96, 97, 100, 104, 113, 116). Class Counsel described it as the "most serious and harmful disease that

results from NFL and concussions." A.2237. Even now, Class Counsel recognize that "[i]t was Mr. Duerson's death" — Dave Duerson committed suicide and was later found to have CTE, A.2895 — "more than any other player's death, that served as the catalyst for the initial filings of lawsuits in this MDL." Class Br. 45-46 n.12. Yet the Settlement provides no compensation for current and future cases of CTE. Such a settlement cannot be fair, adequate, and reasonable.

1. *The Settlement Releases Valuable CTE Claims While Providing No Compensation for CTE*

Settlements that "treat[ ] similarly situated class members differently" or that "releas[e] claims of parties who receive no compensation in the settlement" present red flags that the settlement is not fair, adequate, and reasonable. *Manual for Complex Litigation* § 21.61 (4th ed.); *see also GM Trucks*, 55 F.3d at 808 (settlement not fair where settlement did not benefit some class members). Courts thus "reject settlements where part of the class receives relief and another significant part receives no relief." *Newberg on Class Actions* § 13:59 (5th ed. 2014). Those problems are present here: Individuals who die with CTE before Final Approval receive up to $4 million, while similarly situated class members

who die with CTE after Final Approval — likely a large segment of the class — receive nothing.[5]

The settling parties attempt to justify this disparity by downplaying the value of those claims, even though Class Counsel earlier insisted that CTE was the "most serious and harmful disease" related to MTBI, A.2237, and the NFL says the CTE release is a "critical component" of the Settlement, NFL Br. 76. But claims need only be "colorable" to warrant compensation under a class settlement. *Community Bank I*, 418 F.3d at 303, 307-08; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 783 (7th Cir. 2004).

Class members' CTE claims are surely "colorable." The most recent statistics from researchers at Boston University show CTE in ***87 of the 91*** brains of retired players that were examined for the disease. Breslow, *New: 87 Deceased NFL Players Test Positive for Brain Disease*, Frontline (Sept. 18, 2015), http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/new-87-deceased-nfl-players-test-positive-for-brain-disease (accessed Oct. 7, 2015).[6] And it is well-recognized that repetitive head trauma is a necessary condition for developing

[5] The NFL all but admits the arbitrariness, lamely offering that the "line has to be drawn somewhere." NFL Br. 76.

[6] Class Counsel argue that too few brains have been tested. Class Br. 29. But that fact only underscores the enormous value of the CTE claims that the Settlement released. Given more widespread testing, hundreds if not thousands of NFL players will likely be diagnosed with CTE.

CTE. Faneca Br. 42.[7] Indeed, ***every case*** of pathologically confirmed CTE has involved a history of head trauma. Faneca Br. 42; A.4423-24(¶20). The settling parties ignore these facts.

These scientific conclusions were supported not only by the extensive literature that the Faneca Objectors submitted with their objection, but also by the declarations of ***eleven*** prominent scientists in neurology, psychology, and pathology. Faneca Br. 15, 20 n.6.[8] Those scientists all agreed that — unlike ALS, Alzheimer's, and Parkinson's — CTE is a disease that appears only in individuals subjected to repetitive head trauma. Faneca Br. 19. And they all agreed that the symptoms of CTE include mood and behavioral impairments that present before CTE-related dementia and that cause significant disability and distress. Faneca Br. 20. ***None of these experts received any compensation***. The NFL and Class Counsel ignore this, instead repeating the conclusions of their own experts, *e.g.*, NFL Br. 71-72, whose compensation the settling parties refused to disclose, *see*

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[7] *See also* A.2280 ("CTE is the long-term neurological consequence of repetitive mild TBI."); A.2288 ("It has been well established that repetitive concussive or subconcussive blows to the head place individuals at risk for CTE."); A.2344 ("CTE is the only known neurodegenerative dementia with a specific identifiable cause . . . head trauma.").

[8] *See* A.2950-66, A.3027-31, A.4415-16, A.4418-28, A.4474-75, A.4596-97, A.4619-20, A.4753-54, A.4767-68, A.4926-27, A.4952-53, A.5003-04, A.5057-60.

Dkt.6471 (Class Counsel's opposition to disclosure of expert fees); Dkt.6472 (NFL opposition to disclosure of expert fees).

Even in the short time since Final Approval, advances in the scientific understanding of CTE have confirmed what was clear from the Faneca Objectors' scientific evidence. One study published this July in the prestigious research journal *Nature* isolated a "direct link from TBI to CTE" — tau protein. Kondo *et al.*, *Antibody Against Early Driver of Neurodegeneration* cis *P-tau Blocks Brain Injury and Tauopathy*, 523 Nature 431, 435 (July 15, 2015). As one of the researchers in that study explained, the study showed that tau "is a cause of" CTE. Beth Israel Deaconess Med. Ctr., *New Antibody Treats Traumatic Brain Injury and Prevents Long-Term Neurodegeneration*, ScienceDaily (July 15, 2015), http://www.sciencedaily.com/releases/2015/07/150715133504.htm (accessed Oct. 7, 2015).

More importantly, the Kondo study confirmed that tau also causes CTE's mood and behavioral symptoms, and suggested potential treatments for CTE. Kondo, *supra*, at 434. The researchers exposed one group of mice to repetitive MTBI and treated those mice with a monoclonal antibody that destroyed tau. *Id.* Another group, also exposed to MTBI, received a control antibody. *Id.* The mice in the control group "strikingly displayed 'risk-taking' behavior." *Id.* By contrast, the mice treated with the tau-eliminating antibody "exhibited minimal risk-taking behavior, similar to [control] mice" not subjected to MTBI. *Id.* The monoclonal

antibody, the researchers concluded, "not only eliminates *cis* P-tau and cistauosis" — *i.e.*, the build-up of tau in the brain — "but also ***prevents tauopathy development and spread, restores . . . behavioural defects, and prevents brain atrophy after TBI***." *Id.* (emphasis added).

Even the recent science invoked by the NFL supports the Faneca Objectors' position. The NFL quotes a report from an NIH consensus conference: "'[T]he nature and degree of trauma necessary to cause' CTE observed during autopsies 'remain[s] to be determined.'" NFL Br. 72-73. That, of course, presupposes that head trauma causes CTE. And as the preceding sentence — not quoted by the NFL — notes "***thus far, this pathology [CTE] has only been found in individuals exposed to brain trauma, typically multiple episodes***." NIH, *Report from the First NIH Consensus Conference To Define the Neuropathological Criteria for the Diagnosis of Chronic Traumatic Encephalopathy* (Mar. 31, 2015), http://perma.cc/YG4K-QKCF (accessed Oct. 7, 2015) (emphasis in original).[9] At a minimum, the scientific evidence establishes the claims are sufficiently "colorable" to warrant compensation. *See Community Bank I*, 418 F.3d at 303, 307-08.

[9] The NFL also invokes McCrory 2013, *see* A.3151, on which the district court relied. But that paper is heavily tainted by conflicts of interest. Twenty-one of the 28 authors have connections to the NFL, the NHL, FIFA, or another sports league with much to lose from MTBI and CTE. *See* Supplementary Data for McCrory *et al.*, *Consensus Statement on Concussion in Sport*, 47 Br. J. Sports Med. 250 (2013), *available at* http://bjsm.bmj.com/content/suppl/2013/03/11/47.5.250.DC1/bjsports-2013-092313supp.pdf (accessed Oct. 7, 2015).

The NFL recognized the value of these claims when it admitted that excepting CTE from the Settlement's release "would fundamentally alter the bargain struck by the parties." NFL Br. 76. Class Counsel recognized the value of these claims when it labeled CTE "the most serious and harmful disease that results from NFL and concussions." A.2237. The Settlement recognizes the value of these claims by providing up to $4 million for CTE detected before Final Approval.

Any Settlement that provides ***nothing*** for valuable present- and future-CTE claims while releasing them in whole cannot be fair, adequate, and reasonable. *See Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 (2d Cir. 1981) ("There is no justification for requiring [class members] or persons similarly situated to release claims based on unliquidated contracts as part of a settlement in which payments to class members are to be determined solely on the basis of the contracts they liquidated.").

2. *The Settling Parties' Proffered Justifications for Excluding CTE from the Settlement Fall Short*

Class Counsel and the NFL never grapple with this central flaw in the Settlement: the complete failure to compensate CTE. Instead, they attack the strength of the class members' CTE claims and put forth *post hoc* rationalizations for the Settlement's failure to compensate the disease.

a. *The NFL's Causation Defense Does Not Justify Complete Exclusion of Current and Future CTE from the Settlement*

Ignoring the staggering rates of CTE found in the NFL population to date and the evidence establishing that MTBI is "a cause of" and a "necessary condition" for CTE, Faneca Br. 5-6, 42, the settling parties assert that CTE claims are too speculative to merit compensation under the Settlement. The NFL, for example, asserts that researchers "'have not reliably determined which events make a person more likely to develop CTE.'" NFL Br. 72.[10] But like the district court, the settling parties apply an impermissibly high standard of proof and ignore the accepted standards for proving causation in mass tort cases.

The district court's and the settling parties' demand for prospective, controlled epidemiological studies is misplaced. Not only do such studies present ethical concerns, Faneca Br. 43, they are not necessary to prove causation. *See, e.g.*, *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 23-25 (1st Cir. 2011) (holding "[e]pidemiological studies are not per se required"); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1229 (9th Cir. 1998) (noting "it is scientifically permissible to reach a conclusion on causation without [epidemiological] studies"); *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995) (noting

[10] Previously, Class Counsel had declared that "[m]ultiple medical studies have found direct correlation between football concussions and suffering from symptoms of . . . CTE." *Compare* A.2237 *with* Class Br. 28-30.

"epidemiological studies are not necessarily required to prove causation"); *Restatement (Third) of Torts: Phys. & Emot. Harm* §28 cmt. c(3) (2010) (noting "most courts have appropriately declined to impose a threshold requirement that a plaintiff always must prove causation with epidemiologic evidence").

The settling parties and the district court also ignore the applicable standards for proving causation. They do not dispute that MTBI is a necessary condition for CTE, thereby satisfying but-for causation. Faneca Br. 43-44. And they ignore the Faneca Objectors' argument that proximate causation is satisfied unless the NFL's deception regarding head injuries was only a "trivial contribution" to the development of CTE. Faneca Br. 44. The settling parties instead argue in general terms that a class member would have difficulty "show[ing] that his neurocognitive deficits are caused by concussions sustained in the NFL and not concussions sustained in college, high school, youth, or other professional football leagues." NFL Br. 53; *see also* Class Br. 33. But that ignores joint and several liability: "[W]here two parties . . . cause a single, inseparable injury, each party is responsible for the ***entire injury***." *Ravo ex rel. Ravo v. Rogatnick*, 514 N.E.2d 1104, 1107 (N.Y. 1987) (emphasis added) (holding brain damage is such injury).

Applying the appropriate evidentiary and legal standards makes clear that the settling parties' causation concerns cannot justify the complete exclusion of CTE from the Settlement. "[C]olorable legal claims are not worthless merely

because they may not prevail at trial. A colorable claim may have considerable settlement value (and not merely nuisance settlement value) because the defendant may no more want to assume a nontrivial risk of losing than the plaintiff does." *Mirfasihi*, 356 F.3d at 783.[11]

Whatever the difficulty of proving causation at trial, it is no justification for the disparate treatment of similarly situated class members or for the complete discharge of valuable CTE claims. *See Newberg*, *supra*, § 13:60 ("[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.").

b. ***The Settlement Compensates Specific Diseases, Not "Manifested Neurocognitive and Neuromuscular Impairments"***

Class Counsel and the NFL also insist that the Settlement was never intended to compensate CTE. The NFL waits until page 66 of its 88-page brief[12] to address CTE and in doing so contends the Settlement "compensates manifested neurocognitive and neuromuscular impairments, not underlying pathologies."

[11] Neither case invoked by the NFL is to the contrary. In *Klein v. O'Neal, Inc.*, the allegedly weaker claims still received ***some*** compensation under the Settlement. 705 F. Supp. 2d 632, 658 (N.D. Tex. 2010). In *In re Oil Spill by Oil Rig "Deepwater Horizon,"* the objectors "provided no reasonable medical or scientific basis to conclude that any of the additional conditions" were related to the oil spill. 295 F.R.D. 112, 156 (E.D. La. 2013).

[12] Class Counsel wait until page 76 of their own 102-page brief.

NFL Br. 63; *see also* Class Br. 79-80. But the terms of the Settlement contradict that assertion.

For example, Alzheimer's Disease, like CTE, is characterized by a specific brain pathology and can only be definitively diagnosed upon post-mortem autopsy. *See, e.g.*, A.2256, A.3031(¶15), A.4421(¶11).[13] Also like CTE, the brain pathology of Alzheimer's can ultimately result in dementia — *i.e.*, neurocognitive impairment. *See, e.g.*, A.2958(¶40), A3031(¶16). As a result, compensating the ***pathology*** of Alzheimer's Disease independent of and in addition to neurocognitive impairment, as this Settlement does, would be unnecessary if the purpose was to compensate ***only*** "manifested neurocognitive impairments." *See* Faneca Br. 46. Neither the NFL nor Class Counsel have any response.

The Settlement's treatment of ALS and Parkinson's Disease illustrates the point as well. Presumably, payments for ALS and Parkinson's are intended to compensate "manifested . . . neuromuscular impairments." NFL Br. 63. But the Settlement contains no independent definition of neuromuscular impairment so it compensates impairment associated with two, and only two, neurological diseases.

[13] Even the NFL's experts agree. As Dr. Schneider explained, "Alzheimer's disease is just one of many ***pathologies*** that is related to cognitive impairment in aging." A.3428(¶43) (emphasis added); *see also id.* ¶42 (Alzheimer's Disease cannot be diagnosed with 100% accuracy in the clinical setting).

The motor deficits associated with CTE receive nothing. *E.g.*, A.3028(¶5). That too, shows the Settlement compensates diseases, not impairment.[14]

c. *The Settlement Does Not Account for Advancements in Science*

Class Counsel (at 83-84) offer only a tepid response to the Faneca Objectors' argument (at 39-42) that the Settlement lacks rigorous protection for scientific advancements and "freezes in place" the science of 2014. They do not dispute that the NFL — in its discretion — must agree to any change to the Settlement. *See* A.5628(§6.6(a)). And they do not disagree that the scientific understanding of CTE is progressing rapidly. *See, e.g.*, Kondo, *supra*; *see also* A.3492(¶71) (NFL's expert Dr. Yaffe stating "[s]tudies such as [Dr. McKee's] should be lauded and praised for pioneering the science of CTE"); A.3423(¶30) (NFL's expert Dr. Schneider noting "Dr. Stern's research . . . constitutes important research in the field of CTE"). Instead, Class Counsel respond only that "[f]or those who wanted to wait and see what the science might eventually uncover . . . there was the right to opt out." Class Br. 83-84. *Georgine v. Amchem Products,*

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[14] Because it is not true that the Settlement compensates "impairment," it cannot be true that the settling parties intended the Death with CTE diagnosis to serve as a proxy for "impairment" in those who died before Final Approval. *See* NFL Br. 75-76; Class Br. 84-86. Moreover, the settling parties leave unanswered the argument that, if CTE is sufficient evidence of MTBI-related neurocognitive disease in those who died before Final Approval, there is no reason why it cannot serve as such evidence after Final Approval. *See* Faneca Br. 46-47 n.21.

Inc. — which first raised concerns about settlements that freeze science — was itself a Rule 23(b)(3) class that allowed class members to opt out, 83 F.3d 610, 625, 631 (3d Cir. 1996), so opt-out rights are no answer.

d. *Compensation for Dementia Is Not Compensation for CTE*

The settling parties insist that compensation for dementia and other qualifying diagnoses will, in practice, compensate individuals with CTE because one study indicated that 89% of NFL players with CTE also had one of the other diseases, including dementia. *See* Class Br. 79-80; NFL Br. 66-68. But the settling parties offer ***no*** evidence that Level 1.5 and Level 2.0 neurocognitive impairment under the Settlement is consistent with dementia as defined in that study. Indeed, the two are likely not comparable given the unreasonably high level of impairment necessary to qualify for Level 1.5 or Level 2.0 neurocognitive impairment. A.2961-65(¶¶47-53). They offer no justification for the fact that 10% of individuals with CTE would still receive nothing even if the settling parties' claims were true. *See* Faneca Br. 45-46. The settling parties, moreover, ignore the evidence that the "high rates of suicides, accidents, and drug overdoses" among those with CTE often result in their death ***before the onset of dementia***. A.3029(¶¶8-9). For them, payments for neurocognitive impairment are no substitute.

Ultimately, the settling parties' argument that CTE is compensated by proxy does not square with their own actuarial data. Only 17% of the class (3,550 of 21,070) is estimated to receive a Settlement award for ALS, Parkinson's, Alzheimer's, or dementia, A.1570, far below the 96% of former players whose brains have been tested for and shown to have CTE, *see* p. 11, *supra*. Thus, compensation for the other qualifying diagnoses simply cannot compensate most CTE cases.

The NFL dismisses the wide gap between those numbers by asserting that "the possibility that a class member could not experience any serious neurocognitive impairments while alive, and yet still be diagnosed with CTE after he passes away, is not an indictment of a settlement designed to compensate for serious neurocognitive impairments." NFL Br. 70. But that is not consistent with the science. Most individuals with CTE ***are*** symptomatic. *See* A.2267(tbl. 4).

Furthermore, those symptoms are "serious and devastating." A.3028(¶5); *see also id.* ¶¶6-8; A.2955-56(¶¶31-33). They include mood and behavioral symptoms as well as cognitive impairments that do not qualify as Level 1.5 or Level 2.0 dementia. *See* Faneca Br. 6. The settling parties do not dispute the severity of these symptoms. Instead, they argue that mood and behavioral conditions should not be compensated under the Settlement because those conditions are widespread in the general population and have multiple causes. NFL Br. 71-72; Class Br. 81-83. That ignores that ALS, Alzheimer's, and

Parkinson's occur in the general population, *e.g.*, A.5004(¶5), and it is no argument against compensating mood and behavioral disorders ***caused by CTE***.

Finally, the NFL and Class Counsel blindly deny that dementia awards are not equivalent to the higher Death with CTE awards. They argue a diagnosis of neurocognitive impairment "should be apparent much earlier in time than a Death with CTE diagnosis," making both awards roughly equal after the applicable age offset. NFL Br. 69; Class Br. 85-86. But they identify no supporting evidence. Even if true for some, like Dr. Perfetto's late husband, it will not be true for all. Indeed, "CTE symptoms present much earlier than the symptoms of other neurodegenerative diseases," resulting in "decades of disability." A.3029(¶7).

C. The Settlement's Treatment of CTE Can Be Easily Fixed

Fixing the Settlement's deficient treatment of CTE does not require "derail[ing]" the Settlement. Class Br. 48. Nor does it necessarily require a "CTE subclass." Class Br. 63-66. Subclasses are not strictly necessary when a settlement otherwise "ensure[s] a fair distribution of the settlement fund" amongst different claimants. *Ins. Brokerage*, 579 F.3d at 273. Thus, providing some form of meaningful compensation for current and future claims for CTE would cure the defect. In fact, the district court averted a potential class conflict by encouraging the parties to provide eligible season credit for play in NFL Europe, A.5588 — which they did, A.5602(§2.1(kk)).

There are a multitude of options to provide something of meaningful value to class members in exchange for giving up their CTE claims. Given that all agree CTE is diagnosable at death, the simplest approach would be to compensate Death with CTE with a monetary payment in some amount — likely declining over time — for the life of the Fund. Alternatively, the Settlement could compensate CTE once a reliable *inter vivos* diagnosis is available. Such a diagnosis is likely within five to ten years — a small part of the 65-year life of the Fund. Faneca Br. 40 & n.17.[15] The threshold symptoms for Level 1.0 dementia could also be expanded to include the known symptoms of early CTE, and supplemental benefits could cover treatment. A benefit other than a direct cash payment might also provide meaningful value. For example, an appropriate dedicated fund could be established to assist in detection and basic early-stage treatment — such as cognitive behavioral therapy. And, of course, the Settlement could exclude CTE from the release or provide back-end opt-out rights, allowing class members to sue

[15] Class Counsel (at 78) deride that projection — made by one of the world's foremost experts on CTE — as "guesswork." But the settling parties identify no ***evidence*** — much less the preponderance of the evidence — that compels a contrary conclusion.

if they later develop CTE.[16] Other possibilities exist. The key is providing something of meaningful value.

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

The Settlement's offsets for head trauma and stroke independently require reversal.

A. The 75% Offsets Underscore the Inadequate Representation

The Settlement imposes massive offsets for even a single non-NFL stroke or some incidents of head trauma. A.997-98(§ 6.5(b)(ii)-(iii), (e)). It is undisputed that neither Shawn Wooden nor Kevin Turner would be subject to those offsets — neither stated in their declarations that they had previously suffered a stroke or non-NFL head trauma, nor did they allege being at risk thereof. Faneca Br. 47-48. Thus, neither adequately represented the players — especially older ones — likely to be subject to the offsets. That creates "[a] conflict concerning the allocation of remedies amongst class members with competing interests." *Dewey*, 681 F.3d at 184.

Neither the NFL nor Class Counsel address the adequacy of representation as to the stroke and head trauma offsets ***at all***. Instead, they paint the offsets as

[16] The NFL's argument that excluding CTE from the release would allow double-recovery is a red herring. The Settlement "is not designed to compensate CTE," *see* Class Br. 77, so any later recovery for CTE is not a double-recovery.

reasonable "line drawing." NFL Br. 83-84; Class Br. 39. However, Rule 23(e) fairness and Rule 23(a)(4) adequacy of representation are separate inquiries. *Amchem*, 521 U.S. at 622; *see* Faneca Br. 48-49.

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

Neither settling party addresses the substance of the Faneca Objectors' arguments (at 47-50). The NFL justifies the stroke and TBI offsets on the grounds that players who suffered from stroke or head trauma outside of NFL football would find it more difficult to prove causation in individual litigation. NFL Br. 79, 83-84; *cf.* Class Br. 86. The Faneca Objectors do not disagree. But for the relative weakness of a claim to justify lesser recovery, there must be some "basis for assessing whether the discount applied to [those claimants'] recovery appropriately reflects that weakness." *Literary Works*, 654 F.3d at 253. The settling parties identify no basis for reducing recovery by 75% in cases of stroke or severe head trauma. Indeed, they appear to pluck the number from thin air. *See Dewey*, 681 F.3d at 188 (rejecting justification for unequal recovery for different class members).

Without any evidence to support the magnitude of the 75% offsets, the settling parties resort to speculation. The NFL asserts that someone who suffers a stroke before obtaining a Qualifying Diagnosis will nonetheless receive a "substantial payment . . . despite the fact that his symptoms ***were likely not the***

result of his time in the NFL." NFL Br. 84 (emphasis added). Maybe — but the district court did not make any factual findings about whether a prior stroke or NFL play was the ***more likely*** cause of a Qualifying Diagnosis. It simply noted that stroke was a "risk factor." A.97.

Finally, neither of the settling parties' engaged the Faneca Objectors' argument (at 50) that the district court erred by concluding that MTBI is not a risk factor for stroke. That conclusion undermines the district court's analysis of the fairness of the stroke offset. If MTBI suffered in NFL play increased players' risk of stroke, as the uncontroverted scientific evidence shows, any resulting strokes are injuries that justify more compensation, not less. Faneca Br. 50.

IV. THE SETTLEMENT IS NOT FAIR, REASONABLE, OR ADEQUATE UNDER *GIRSH*

A. The Settlement Was Not Entitled to a Presumption of Fairness

A presumption of fairness only applies when there has been "sufficient discovery." *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 535 (3d Cir. 2004). "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 I*, 418 F.3d at 307. The NFL does not dispute that the settling parties engaged in ***no*** formal discovery. Instead, it argues that the settling parties developed an adequate understanding of the dispositive legal and factual

issues without formal discovery. NFL Br. 36-37; *see also* Class Br. 98-99. That argument holds no water.

The settling parties could not have developed an adequate understanding of the key issues in this case — the causal relationship between MTBI and CTE, the scope of the NFL's cover-up, and its promulgation of junk science — without the benefit of fact and expert discovery. *See* Faneca Br. 52-53. *In re Cendant Corp. Litig.*, 264 F.3d 201, 232-33 n.18 (3d Cir. 2001), the single case offered by either party where the presumption of fairness was applied in the absence of discovery, is not to the contrary. *Cendant* involved a formal internal investigation resulting in a report filed with the SEC and three employees being charged with criminal fraud. *Id*. at 234, 236. Central to the Court's holding was its observation that, in light of that scrutiny, it "seem[ed] unlikely that evidence of [the other defendant's] further involvement in the fraud would come to light." *Id*.

B. The Settling Parties Lacked an Adequate Understanding of the Key Issues in the Case

The district court erred in finding that the settling parties' appreciation of the merits of the case favored approval. Central issues of causation, fraud, and concealment would have been elucidated with discovery. *See* Faneca Br. 52-53.

The causal relationship between NFL play and diseases such as Alzheimer's and CTE would be a key issue at trial. NFL Br. 51-54; Class Br. 99. The settling parties assert that they had an adequate understanding of these issues during

settlement negotiations. NFL Br. 45-46; Class Br. 99. But, ironically, it was the ***Faneca Objectors*** who most thoroughly developed the record below on CTE. *See* Faneca Br. 42-43.[17] The settling parties nowhere justify how the limited science they had available during negotiations was sufficient.

The settling parties also cannot reconcile the lack of discovery with one of the central allegations of this case — that the NFL hid the relationship between MTBI and CTE. Faneca Br. 52. The NFL's own files may thus have scientific evidence of causation that would be a powerful party-admission. *See* Faneca Br. 53.

C. The Risk of Establishing Liability and Damages Weighs in Favor of Reversal

Preemption does not apply to class members who played when no collective bargaining agreement ("CBA") was in place (before 1968 and between 1987 and 1993). *See* Faneca Br. 53. 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.

Similarly, the settling parties invoke the purported hurdles the class would face in proving causation. NFL Br. 50-54; Class Br. 99. But they utterly fail to address the Faneca Objectors' points that the district court applied an improperly

[17] *See also* Faneca Br. 20 & n.6, 42 (describing testimony from eleven leading experts explaining CTE and its link to MTBI).

high standard of proof to the CTE evidence and lacked the information necessary to properly evaluate causation, especially as to CTE. Faneca Br. 42-44; 58-59.

D. Other *Girsh* Factors Weigh in Favor of Reversal

Class Counsel and the NFL give short shrift to many of the other arguments for why *Girsh* does not weigh in favor of this settlement. For example, they trumpet the expense saved by settling. NFL Br. 39-41; Class Br. 97. But they fail to address the Faneca Objectors' argument that litigation is inherently risky and expensive — that inherent risk does not automatically justify every settlement, no matter how unfair. Faneca Br. 59. And they nowhere address the fact that, for CTE claimants, this Settlement hardly represents their best possible recovery discounted by the risks of litigation. Faneca Br. 54.[18]

CONCLUSION

The district court's judgment should be reversed.

[18] Having previously argued that the Faneca Objectors' appeal of the motion to intervene was premature, Dkt.6185-2 at 64, the settling parties now argue that the appeal is untimely, Class Br. 47 n.14. They cannot have it both ways. Regardless, neither Class Counsel nor the NFL engages the merits of the Faneca Objectors' argument: If the Settlement's treatment of CTE renders class representation inadequate, the district court erred in denying the Faneca Objectors motion to intervene. Faneca Br. 61.

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Respectfully submitted,

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October 7, 2015 s/ Steven F. Molo