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

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION

NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES LLC,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Nos. 2-12-md-02323 and 2-14-cv-00029

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1 and Third Circuit Local Appellate Rule 26.1, Defendant National Football League states that it is an unincorporated association with no corporate parents and that no publicly held companies possess an ownership interest of 10% or more in the National Football League. Defendant National Football League Properties LLC states that it is not directly owned by any parent corporation, that it is a wholly owned subsidiary of the Delaware limited partnership NFL Ventures, L.P., and that no publicly held companies possess an ownership interest of 10% or more in the National Football League Properties LLC.

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INTRODUCTION

After long, hard-fought, and judicially-sanctioned negotiations, the National Football League ("NFL"), NFL Properties LLC ("NFL Properties," together with the NFL, the "NFL Parties"), and a class of retired NFL players and their families reached a historic settlement that will provide extraordinary relief, including a projected nearly one billion dollars in financial benefits, to the class. The settlement provides a financial benefit of up to $5 million per player (adjusted upward for inflation) and other substantial healthcare benefits on top of the benefits already provided to players under their relevant collective bargaining agreements. The settlement fund is uncapped and lasts 65 years—ensuring that every one of the more than 20,000 class members is eligible for a substantial financial benefit in the event of a qualifying diagnosis. That is true without the need to overcome the substantial obstacles to establishing that the qualifying diagnosis is a result of NFL play.

Reflecting both the substantial nature of the settlement's benefits and the significant legal and evidentiary hurdles to prevailing in litigation, less than 2% of the class opted out of, or objected to, the settlement. That strikingly low rate is especially notable given that more than 5,000 class members were separately represented in litigation that predates the settlement and that the settlement is one of the most widely publicized—and heavily scrutinized—in history. Objectors raise various concerns about scope and amount of the settlement's coverage, but none of

those complaints comes close to satisfying the demanding burden of overturning an arm's-length settlement supported by extensive factual findings by a District Court that was extraordinarily diligent and vigilant in ensuring that the settlement was fair, reasonable, and more than adequate. The bottom line is that class members' claims faced substantial legal and evidentiary hurdles, such that litigation could have left them wholly without judicial redress. Instead, the class secured relief that provides immediate, significant, and enduring benefits. Every class member had the option of foregoing those benefits for the uncertain road of further litigation, but few did. And the objections raised by those who did not exercise that option and instead criticize the details of the settlement's substantial relief simply ignore the realities of settlement and this Court's deferential standard of review, and provide no basis for disturbing the District Court's considered and careful determination to grant final approval of the settlement.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §1332(d)(2). It entered a final order approving the settlement on April 22, 2015. Objectors filed timely notices of appeal. *See* A.1-39. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1.) Whether the District Court's finding that the settlement class meets the requirements of Rule 23 was an appropriate exercise of discretion. A.90-99.

2.) Whether the District Court's finding that the settlement agreement is fair, reasonable, and adequate was an appropriate exercise of discretion. A.61.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The Court previously dismissed for want of jurisdiction an interlocutory appeal from the District Court's order preliminarily approving the class settlement. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 775 F.3d 570 (3d Cir. 2014).

STANDARDS OF REVIEW

This Court reviews a district court's decision to certify a class and approve a settlement for abuse of discretion. *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012). The factual findings made in conjunction with class certification and settlement approval are reviewed for clear error. *In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d 109, 117 (3d Cir. 2012). "Because of the district court's proximity to the parties and to the nuances of the litigation," this Court accords "great weight to the [district] court's factual findings in conducting the fairness inquiry." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 320 (3d Cir. 2011) (en banc) (quotation marks omitted). Even when this Court's fairness analysis might differ from the district court's if conducted in the first instance, the Court accords "deference to the District Court's exercise of discretion" and sets aside "its decision

only if there was an abuse of that discretion." *In re Cendant Corp. Litig.*, 264 F.3d 201, 243 (3d Cir. 2001).

STATEMENT OF FACTS

A. The Parties and the Initial Lawsuits

This appeal concerns a settlement resolving claims against the NFL Parties and certain NFL Member Clubs seeking relief for alleged repetitive head trauma injuries sustained during the playing careers of retired NFL football players.[1] The settlement's beneficiaries are retired professional football players, the representatives of their estates, and certain derivative claimants, including some player spouses and children. The NFL is an unincorporated association of 32 Member Clubs that promotes, organizes, and regulates the sport of professional football in the United States. NFL Properties is a limited liability company organized under the laws of the State of Delaware and headquartered in New York. NFL Properties is the authorized representative of the NFL and its Member Clubs for the licensing and protection of their trademarks and logos. The terms and conditions of professional football players' employment are defined by the collective bargaining agreements ("CBAs") that were operative during their careers and thereafter.

[1] Unless otherwise noted, "Doc." citations are to the record in this MDL, No. 2:12-md-02323, and "A." citations are to the Joint Appendix.

In July 2011, 73 retired NFL football players and some of their spouses filed the first concussion-related lawsuit in the Superior Court of California, Los Angeles County. That suit named the NFL Parties and a sports-equipment manufacturer, Riddell, as defendants and sought recovery under various theories of liability connected to claims that the NFL Parties failed to take reasonable actions to protect players from the risks associated with concussive and sub-concussive head injuries and concealed those risks from players.[2] *See* Compl., *Maxwell v. Nat'l Football League*, No. BC465842 (Cal. Super. Ct. July 19, 2011). Two other substantially similar cases were filed in the same court shortly thereafter, *see* Compl., *Pear v. Nat'l Football League*, No. LC094453 (Cal. Super. Ct. Aug. 3, 2011); Compl., *Barnes v. Nat'l Football League*, No. BC468483 (Cal. Super. Ct. Aug. 26, 2011), and a fourth concussion-related case (a putative class action) was filed in the Eastern District of Pennsylvania, *see Easterling v. Nat'l Football League*, No. 2:11-cv-05209, Doc. 1 (E.D. Pa. Aug. 17, 2011).

The NFL Parties promptly removed the *Maxwell*, *Pear*, and *Barnes* cases to the United States District Court for the Central District of California on the ground that the suits were completely preempted under section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185, and thus necessarily

[2] Riddell was not a party to the settlement and is not a party on appeal.

presented a federal question. As the NFL Parties explained at that time, Plaintiffs' claims—as well as the claims in *Easterling*—were substantially dependent upon, or arose from, the terms of the CBAs that governed the terms and conditions of the players' NFL employment and thus were completely preempted under the LMRA. *See, e.g.*, Notice of Removal, *Maxwell*, No. 2:11-cv-08394, Doc. 1 (C.D. Cal. Oct. 11, 2011).

Plaintiffs moved to remand. *See, e.g.*, Pls.' Mot. to Remand, *Maxwell*, No. 11-cv-08394, Doc. 21 (C.D. Cal. Nov. 7, 2011). The district court denied those requests and, pursuant to an unbroken line of cases construing and applying section 301 of the LMRA, held that plaintiffs' negligence claims were preempted because they were "inextricably intertwined with and substantially dependent upon an analysis of certain CBA provisions imposing duties on the clubs with respect to medical care and treatment of NFL players." Order Den. Pls.' Mot. to Remand at 1, *Maxwell*, No. 2:11-cv-08394, Doc. 58 (C.D. Cal. Dec. 8, 2011) (citing and applying *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) and *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894 (S.D. Ohio 2007)).

Following denial of the motions to remand, the NFL and, where applicable, NFL Properties moved to dismiss *Maxwell*, *Pear*, *Barnes*, and *Easterling* on numerous grounds, including LMRA preemption, plaintiffs' failure to state

cognizable claims, and time-bars. *See, e.g.*, Defs.' Mot. To Dismiss, *Easterling*, No. 2:11-cv-05209, Doc. 19 (E.D. Pa. Nov. 9, 2011).

B. Creation of MDL 2323 and MDL Plaintiffs' Allegations

Before the motions in the California and Pennsylvania cases were decided, the Judicial Panel on Multidistrict Litigation, on the NFL Parties' motion, consolidated *Maxwell*, *Pear*, *Barnes*, and *Easterling* in the Eastern District of Pennsylvania as *In re: National Football League Players' Concussion Injury Litigation* ("MDL 2323"). After the creation of the MDL, more than 5,000 former players filed over 300 lawsuits advancing allegations similar to *Maxwell* and the three other original cases.

Immediately after MDL 2323 was created, the District Court put procedures in place controlling its operation. Judge Brody appointed co-lead counsel, an executive committee, and a steering committee to oversee the case on the MDL Plaintiffs' behalf. *See* A.685; A.689. To further streamline the hundreds of cases filed, the court ordered Plaintiffs to submit both a Master Administrative Long-Form Complaint ("MAC") and a Master Administrative Class Action Complaint ("MACAC"—together with the "MAC," "the Complaints"). A.691; A.782. These Complaints superseded all complaints previously filed on behalf of individuals or national medical monitoring classes and along with each Plaintiff's short-form complaint became the operative pleadings in this case. A.852-53.

The Complaints alleged that the NFL had a "duty to provide players with rules and information that protect [the players] as much as possible from short-term and long-term health risks" of repetitive traumatic brain injuries, a duty "to take all reasonable steps necessary to ensure the safety of players," including "promulgat[ing] rules affecting the return to play rules when concussive events are detected," and a "duty to advise Plaintiffs" that "the repeated traumatic head impacts the Plaintiffs endured while playing NFL football were likely to expose them to excess risk to neurodegenerative disorders and diseases." A.696; A.713; A.744; A.758. The Complaints further allege that the NFL misled Plaintiffs and "willfully and intentionally concealed from" them the "heightened risk" of neurodegenerative disorders and "concealed from then-current NFL players and former NFL players the risks of head injuries in NFL games and practices, including the risks associated with returning to physical activity too soon after sustaining a sub-concussive or concussive injury." A.744; A.749. Plaintiffs claim that the NFL Parties' actions caused them to suffer a variety of purported injuries, including headaches, depression, dementia, Amyotrophic Lateral Sclerosis ("ALS"), Alzheimer's, Chronic Traumatic Encephalopathy ("CTE"), loss of memory, sleeplessness, mood swings, personality changes, confusion, the inability to function, dizziness, and deficits in cognitive functioning, processing speed, attention, and reasoning. A.699; A.707; A.710; A.737; A.743; A.744; A.749.

Against the backdrop of these allegations, Plaintiffs asserted claims against the NFL for negligence, medical monitoring, fraudulent concealment, fraud, negligent misrepresentation, negligent hiring, negligent retention, wrongful death and survival, "civil conspiracy/fraudulent concealment," loss of consortium, and declaratory relief, and, against NFL Properties, for "civil conspiracy/fraudulent concealment." A.743-66; A.775-76. Plaintiffs sought declaratory relief, "an injunction and/or other equitable relief against the NFL and in favor of Plaintiffs for the requested medical monitoring," and compensatory and punitive damages. A.776.

C. Section 301 LMRA Preemption

As part of its initial case management orders, the District Court determined that the NFL Parties' preemption defense should be heard before the litigation proceeded further because "[a] preemption ruling in this MDL would necessarily require MDL Plaintiffs to resolve their claims through arbitration rather than in federal court because the CBAs contain mandatory arbitration provisions." A.64; *see* A.686-87; A.854. The court stayed all other matters, including discovery, pending the resolution of this potentially dispositive issue. A.953.

The NFL Parties filed their preemption motions to dismiss on August 30, 2012. *See* Doc. 3589; Doc. 3590. The NFL Parties argued that resolution of Plaintiffs' claims would require interpretation of the CBAs—which address player

safety, including authority and responsibilities for player safety allocated to the NFL, the Member Clubs, and the players' Union—to determine the existence and scope of the NFL's duties. *See* Doc. 3589-1; Doc. 3590-1.

For example, the CBAs provide that the Member Clubs and their physicians (as opposed to the NFL itself) have certain responsibilities relating to player medical care, including the responsibility for treating player injuries, making return-to-play decisions, and informing players of medical risks associated with continued play. As two district courts considering identical claims had already held, these "physician provisions" of the CBAs "must be taken into account in determining the degree of care owed by the NFL and how it relates to the NFL's alleged failure to establish guidelines or policies to protect the mental health and safety of its players." Order Den. Pls.' Mot to Remand at 2, *Maxwell*, No. 2:11-cv-08394, Doc. 58 (C.D. Cal. Dec. 8, 2011); *Duerson v. Nat'l Football League*, 2012 WL 1658353, at *1, *4 (N.D. Ill. May 11, 2012) (denying remand and holding that Plaintiffs' claims were preempted because the court could plausibly interpret the CBA provisions to impose duties on the NFL's clubs to monitor a player's health and fitness such that the "NFL could then reasonably exercise a lower standard of care in that area itself").

As the NFL Parties explained, the necessity of interpreting the CBAs to adjudicate the players' claims means that those claims are preempted by section 301 of the LMRA. The law has been clear on this point for more than 30 years: "'when

resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract,' the plaintiff's claim is pre-empted by §301." *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 852-53 (1987) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985)).

The parties completed briefing on January 28, 2013, and the District Court heard extensive oral arguments on April 9, 2013. Instead of resolving the motions to dismiss, however, the court ordered the NFL Parties and co-lead counsel to mediation under the supervision of retired United States District Court Judge Layn R. Phillips. A.954.

D. The Settlement Process

During what would prove to be the first set of multiple stages of back-and-forth, the parties, pursuant to the mediation order, conducted "arm's length, hard-fought negotiations" over the course of two months. A.1115 (Phillips Decl. ¶5). The parties met for "more than twelve full days" of formal mediation and spent "considerable hours" negotiating outside the formal sessions during which the parties discussed issues relating to possible settlement with the court-appointed mediator "[o]n almost every day between [his] appointment as mediator and the announcement of the" initial proposed settlement. A.1115-16 (Phillips Decl. ¶¶5-6).

These negotiations were well-informed and highly substantive. Not only were the NFL Parties and MDL Plaintiffs represented by knowledgeable counsel with a

wealth of class-action litigation experience, but the parties were also advised by topnotch medical experts who helped them "determine the merits of the[ir] case." A.66. During the negotiations the parties also "had access to considerable information about the Retired Players, including from the short form complaints filed" in the District Court and other materials providing critical facts about the MDL Plaintiffs, such as "a comprehensive database of the symptoms of MDL Plaintiffs," which included "information about the current cognitive impairment of over 1,500 Retired Players." A.66-67.

As Judge Phillips attested, "the parties aggressively asserted their respective positions on a host of issues," and "[o]n occasion, the negotiations were contentious…." A.1116. "Plaintiffs' counsel [] consistently and passionately expressed the need to protect the interests of the retirees and their families and fought hard for the greatest possible benefits." A.3804. "It was evident throughout the mediation process that Plaintiffs' counsel were prepared to litigate and try these cases, and face the risk of losing with no chance to recover for their labor or their expenses, if they were not able to achieve a fair and reasonable settlement result for the proposed class." A.3804-05.

After months of negotiation, on August 29, 2013, the parties executed a term sheet setting forth the "principal terms of a settlement." A.956. The parties then negotiated the detailed terms of the settlement agreement in sessions that remained

arm's-length and hard-fought and on January 6, 2014—after four months of additional negotiations—they reached a tentative settlement agreement. That initial settlement had many of the same attributes as the settlement ultimately approved by the District Court. It provided for (1) a monetary award fund that would be used to provide financial payments to MDL Plaintiffs related to certain qualifying diagnoses; (2) a baseline assessment program that would facilitate player diagnosis and provide certain other benefits; and (3) an education fund. The settlement capped funding at $760 million, an amount the parties and their actuarial experts believed was more than sufficient to fund all benefits contemplated by the settlement. A.964-1112.

Co-lead class counsel, class counsel, and subclass counsel then filed a complaint on behalf of named Plaintiffs Kevin Turner and Shawn Wooden ("the *Turner* Complaint") along with a motion for preliminary approval of the settlement agreement and preliminary class certification. A.1124-1203. Approximately one week later, the District Court *sua sponte* denied the motion without substantial briefing and without prejudice based primarily on concerns about the cap on the proposed $760 million settlement fund. A.1213. The court then sent the parties back to the bargaining table and, given the "expected financial complexity of the proposed settlement," assigned Special Master Perry Golkin to supervise the parties' efforts to reach a revised settlement. Doc. 5607 at 1.

Guided by the District Court's concerns about the adequacy of funding and by the Special Master, the parties engaged in an additional six months of hard-fought negotiations and financially restructured the original settlement agreement to provide the court with the assurance that during the entire term of the settlement "all Retired NFL Football Players who ultimately receive a Qualifying Diagnosis or their related claimants will be paid." A.1213. These further negotiations resulted in an *uncapped* monetary award fund, thereby guaranteeing payment to each eligible settlement class member throughout the agreement's 65-year term. A.5630-31.

On June 25, 2014, class counsel and subclass counsel filed a motion for preliminary approval of the revised proposed settlement agreement and preliminary class certification. Doc. 6073. On July 7, 2014, the District Court granted the motion. A.1306-35. The court concluded there were no obvious deficiencies in the settlement agreement, it appeared to be "the product of good faith, arm's-length negotiations," "proposed Co-Lead Class Counsel, Class Counsel and Subclass Counsel possess adequate information concerning the strengths and weaknesses of Plaintiffs' claims against the NFL Parties," and the settlement agreement did "not appear to provide undue preferential treatment to any individual Settlement Class Member or Subclass." A.1314-16. Additionally, following an analysis of the requirements of Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, the

District Court held that "[t]he Settlement Class and Subclasses preliminarily satisfy the Requirements of Rule 23, and conditional certification is appropriate." A.1322.

The District Court preliminarily certified a settlement class of "[a]ll living NFL Football Players who ... retired ... from playing professional football with the NFL or any Member Club," their representative claimants, and their derivative claimants. A.1328-29. The District Court also preliminarily certified two subclasses of retired NFL football players (and their representative claimants and derivative claimants) who received a qualifying diagnosis before the date of preliminary approval (July 7, 2014) and those who did not (but some of whom may receive a qualifying diagnosis in the future). A.1329-30.

When granting preliminary approval, the District Court established a process and schedule for settlement class members to object to or opt out of the settlement agreement. Pursuant to the District Court's order, settlement class members had until October 14, 2014, to opt out or file written objections. A.1332-33. In addition, the court ordered settlement class members wishing to be heard at the scheduled fairness hearing to submit a written notice to the court by November 3, 2014. A.1333. In recognition of the fact that many of the Objectors would (and did) raise duplicative issues, the District Court asked the Objectors' "attorneys to coordinate their presentations." A.79.

On November 19, 2014, and after receiving briefing from all concerned parties, the District Court held a daylong fairness hearing. "Every Class Member who submitted a timely objection, and who was not represented by an attorney, was given an opportunity to speak at the Fairness Hearing." *Id.*

After the fairness hearing, the District Court ordered the parties to file a joint submission addressing potential changes that would enhance the fairness, reasonableness, and adequacy of the proposed settlement. A.5587-89. In turn, the parties amended the settlement to address each issue and ensure that (1) "Players receive credit for time they spent playing in overseas NFL affiliate leagues," such as NFL Europe; (2) all "Retired Players who seek and are eligible for a baseline assessment" will receive one; (3) "the NFL Parties [will] compensate Qualifying Diagnoses of Death with CTE up until the Final Approval Date [of the settlement]," as opposed to the preliminary approval date; (4) the fee for filing a player appeal can be waived; and (5) the proof required to obtain a qualifying diagnosis for retired NFL football players whose medical records have been lost because of *force majeure* type events was reduced. A.80.

E. The Settlement Agreement

The end result of these multiple trips to the bargaining table, hard-fought negotiations, and constant District Court supervision was a settlement that provides

immediate, substantial, and certain benefits to the settlement class in exchange for a release of claims against the NFL Parties.

1. Benefits of the Settlement

The final settlement approved by the District Court provides a substantial suite of benefits to the class: (i) an uncapped, inflation-adjusted 65-year fund (the "Monetary Award Fund" or "MAF") for making payments to all retired NFL players (and their representative claimants or derivative claimants) with a qualifying diagnosis, as defined in Exhibit 1 of the settlement agreement, A.5696-99; (ii) a $75 million Baseline Assessment Program ("BAP") that provides a baseline neuropsychological and neurological evaluation of each qualified retired NFL football player and certain medical treatment benefits to those diagnosed with moderate neurocognitive impairment; and (iii) a $10 million Education Fund to support safety and injury prevention programs for football players of all ages and to educate class members regarding the NFL's existing medical and disability programs. The District Court will oversee the administration of the settlement through a court-appointed Special Master. A.5609; A.5643-45.

(a) The Monetary Award Fund

The Monetary Award Fund is a 65-year, uncapped, inflation-adjusted fund from which class members will receive Monetary Awards for qualifying diagnoses in accordance with the terms of the settlement agreement. A.5624-31. The

qualifying diagnoses include Level 1.5 Neurocognitive Impairment (early dementia), Level 2 Neurocognitive Impairment (moderate dementia), Alzheimer's, Parkinson's, ALS, and Death with CTE before final approval of the settlement agreement. A.5625-26.

The settlement agreement compensates manifested neurocognitive and neuromuscular impairments, rather than underlying pathologies. Exhibit 1 of the settlement agreement defines the criteria by which each of the qualifying diagnoses must be made. Level 1.5 and Level 2 Neurocognitive Impairment may be diagnosed where the retired NFL football player exhibits "both a decline in cognitive function and a loss of functional capabilities, such as the ability to hold a job or perform household chores …. [and] correspond with commonly accepted clinical definitions of mild and moderate dementia, respectively." A.71; *see* A.5696-97. Diagnoses of ALS, Alzheimer's, and Parkinson's are based on the definitions contained in the Ninth and Tenth editions of the World Health Organization's International Classification of Diseases, ("ICD-9" or "ICD-10"). A.5698-99. Diagnoses of Alzheimer's or Parkinson's may alternatively meet the definitions provided by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"). *Id*. Death with CTE, which serves as a proxy for qualifying diagnoses deceased retired NFL players could have received while living, includes only post-mortem diagnoses of CTE made by a board-certified neuropathologist

where the retired player died before the final approval date of the settlement. A.136; A.5699. Qualifying diagnoses will be made prospectively by qualified MAF physicians or qualified BAP providers approved by both the NFL Parties and class counsel, or historically by otherwise appropriately credentialed medical professionals. A.5617; A.5625; A.5627.

A retired NFL football player's maximum financial benefit under the Monetary Award Fund is calculated at the time of his qualifying diagnosis, with awards decreasing with age. A.5629. The maximum recovery for each qualifying diagnosis is as follows:

- Level 1.5 Neurocognitive Impairment: $1.5 million
- Level 2 Neurocognitive Impairment: $3 million
- Alzheimer's Disease: $3.5 million
- Parkinson's Disease: $3.5 million
- Death with CTE: $4 million
- ALS: $5 million

A.5740.

A settlement class member's individual monetary award also reflects certain offsets, which are applied individually and in a serial manner.[3] A.5629. First, there

[3] For example, "if the Monetary Award before the application of Offsets is $1,000,000, and two 10% Offsets apply, there will be a 19% aggregate downward

is an offset for retired players with fewer than five seasons played. The fewer the eligible seasons played, the larger the offset. *Id*. Second, there are offsets for stroke and/or severe traumatic brain injury if they pre-dated a qualifying diagnosis. This reflects the medically recognized fact that both are major contributing factors to neurocognitive impairment. *Id*. These offsets do not apply to injuries from the retired player's NFL football career, A.5606; A.5609, and can be avoided by a showing that a "Qualifying Diagnosis was not causally related to the Stroke or the Traumatic Brain Injury." A.5630. Third, there is a 10% offset for certain retired players who do not timely participate in the BAP. A.5629.

Every settlement class member who timely registers and qualifies for a monetary or derivative claimant award during the term of the Monetary Award Fund will receive that award on an inflation-adjusted basis. A.5631. If, after receiving an initial monetary award, a retired player later receives a more serious qualifying diagnosis, that player may receive a supplemental monetary award—representing the difference between the two awards. A.5630-31. Importantly, these awards are based on the qualifying diagnosis alone and obviate the need to demonstrate that the NFL Parties are legally responsible for a retired NFL football player's injuries.

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adjustment of the award (*i.e*., application of the first Offset will reduce the award by 10%, or $100,000, to $900,000, and application of the second Offset will reduce the award by an additional 10%, or $90,000, to $810,000)." A.5630.

(b) Baseline Assessment Program

The BAP allows each retired player to obtain a baseline neuropsychological and neurological evaluation. A.5613-14. The BAP baseline assessment examination has two components: a detailed, standardized neuropsychological examination performed by a certified neuropsychologist and a basic neurological examination performed by a certified neurologist. *Id*. The settlement agreement provides for the appointment of a BAP administrator who will set up a network of qualified medical providers to administer the baseline assessment examinations for retired players. A.5615-21. All retired NFL football players who are credited with at least one-half of an eligible season and who timely register to participate in the settlement may participate in the BAP and receive an examination. A.5613. All retired players age 43 or older as of the effective date of the settlement must receive the examination within two years of the effective date if they choose to participate. A.5614. Retired NFL football players under the age of 43 as of the effective date must receive the examination within 10 years of the BAP's commencement, or before they turn 45, whichever occurs first. *Id*.

The BAP serves several important purposes. First, it may result in diagnoses entitling the retired player to BAP supplemental benefits or to a monetary award under the Monetary Award Fund. BAP supplemental benefits provide medical treatment, including counseling and pharmaceutical coverage, to retired players

diagnosed with Level 1 Neurocognitive Impairment (moderate neurocognitive impairment). A.5597; A.5622-23. Second, the results of the BAP examinations may be used as a benchmark against which to measure any future tests to determine whether the retired player's neurocognitive abilities have deteriorated. Third, if the informed consent of the retired player is obtained and all applicable privacy and health laws are complied with, the medical data generated can be made available for use by those conducting relevant medical research. A.5622.

(c) Education Fund

The settlement agreement establishes a $10 million Education Fund to support safety and injury prevention programs for football players of all ages. This fund will also promote education of class members regarding the NFL's non-settlement-related and already-available medical and disability programs. A.5657; A.5673.

2. Preservation of CBA Benefits

The settlement preserves retired NFL football players' rights to pursue workers' compensation claims and to participate in or claim entitlement to the substantial medical or disability benefits available under the current 2011 NFL CBA. A.5665-69. These preserved benefits, which in some instances depend on a covenant not to litigate, are substantial and include: (i) "88 Plan" medical benefits, so named because they reimburse certain costs related to dementia, ALS, and/or Parkinson's up to $88,000 per year (and up to $100,000 per year for certain inpatients); (ii) the

Neuro-Cognitive Disability Benefit, which provides monthly payments between $1,875 and $3,500 for 180 months (or until a player's 55th birthday, whichever occurs first); (iii) Total and Permanent Disability Benefits (currently between $50,000 and $250,000 per year depending on injury categorization); (iv) a Line of Duty Disability Benefit for former players with a substantial permanent disability as a result of NFL football activities (providing a monthly payment of at least $2,000 for 90 months); (v) the Player Insurance Plan and the Gene Upshaw NFL Player Health Reimbursement Account Plan, which provide medical benefits for 60 months following retirement and thereafter provide as much as $350,000 in health credits; (vi) Long Term Care Insurance for which the NFL pays premiums for those ages 50 to 76; and (vii) a Former Player Life Improvement Plan that, among other things, coordinates comprehensive neurological care evaluation at top tier medical facilities, provides a Medicare benefit ($120 per month toward supplemental Medicare insurance), a discount prescription drug benefit, and an assisted living benefit. A.3360-64.

3. Claims and Appeals Process

The settlement agreement establishes an orderly claims process under which class members generally have 180 days to register for settlement benefits from the date that the claims administrator provides notice. The claims administrator can extend that deadline for "good cause." A.5611-12. Once registered, claim packages

must be submitted within two years of receiving a qualifying diagnosis, or two years after supplemental notice is posted on the settlement website, whichever is later. A.5633-34; A.5659-60. There is also an exception to the deadline available where the settlement class member can demonstrate "substantial hardship" and submits the claim package within four years of the date of the qualifying diagnosis or supplemental notice. A.5633-34. The claim package must include information in support of the retired NFL football player's qualifying diagnosis and documenting the player's NFL career, and will form the basis for the claims administrator's award determination. A.5632-33.

Either the NFL Parties or the class member may appeal the claims administrator's award determination. A.5640-43. Co-lead class counsel also have the right to submit papers in support of, or in opposition to, an appeal. A.5641. The NFL Parties may take an appeal only in "good faith." *Id*. In order to discourage appeals that lack merit, settlement class members are charged $1,000 to file an appeal. A.5640. That fee, however, can "be waived for good cause" and a settlement class member who takes a successful appeal is reimbursed the fee in full. A.5640-41. The District Court "is the ultimate arbiter of any appeal." A.75.

4. Release of Claims, Covenant Not to Sue, and Bar Order

In exchange for the significant benefits provided under the settlement agreement, settlement class members release, covenant not to sue, and dismiss with

prejudice actions and claims against the released parties.[4] A.5665-70. The release covers all claims and actions "arising out of, in any way relating to or in connection with the allegations, transactions, facts, matters, occurrences, representations or omissions involved, set forth, referred to or relating to the Class Action Complaint and/or Related Lawsuits," including, without limitation, claims and actions that "were, are or could have been asserted in the Class Action Complaint or any other Related Lawsuit" or "arising out of, or relating to, head, brain and/or cognitive injury[.]" A.5665. The release does not extend to the equipment manufacturers or parties associated with retired NFL football players' pre-NFL careers.

[4] "Released parties" for purposes of the released claims means (i) the NFL Parties (including all persons, entities, subsidiaries, divisions, and business units composed thereby), together with (ii) each of the Member Clubs, (iii) each of the NFL Parties' and Member Clubs' respective past, present, and future agents, directors, officers, employees, independent contractors, general or limited partners, members, joint venturers, shareholders, attorneys, trustees, insurers (solely in their capacities as liability insurers of those persons or entities referred to in subparagraphs (i) and (ii) above and/or arising out of their relationship as liability insurers to such persons or entities), predecessors, successors, indemnitees, and assigns, and their past, present, and future spouses, heirs, beneficiaries, estates, executors, administrators, and personal representatives, including, without limitation, all past and present physicians who have been employed or retained by any Member Club and members of all past and present NFL Medical Committees; and (iv) any natural, legal, or juridical person or entity acting on behalf of or having liability in respect of the NFL Parties or the Member Clubs, in their respective capacities as such; and, as to (i)-(ii) above, each of their respective Affiliates, including their Affiliates' officers, directors, shareholders, employees, and agents." A.5606.

5. Attorneys' Fees

Under the terms of the settlement agreement, the NFL Parties will not object to an application by class counsel for an award of attorneys' fees of up to $112.5 million. A.5670-71. Attorneys' fees will be paid by the NFL Parties separate from and in addition to all their other funding obligations under the settlement agreement. A.5679. The provision of attorneys' fees was negotiated between the parties *after* they reached agreement on the material terms of the settlement. A.78; A.3810.

F. Class Certification and Settlement Approval

In a thorough and fact-based 132-page opinion, the District Court certified the settlement class and granted final approval of the settlement agreement. A.58-189 That decision was based on the District Court's thoughtful review of the massive record before it, which included: two declarations from the retired United States District Court Judge who served as the mediator; over fifty scholarly works about brain science; the declarations of twenty medical experts; hundreds of pages of actuarial and economic reports and underlying data; the District Court's prior opinions in the case; multiple versions of the settlement agreement; letters and declarations from several retired players; scores of news articles and press releases about NFL football and the settlement; the declarations of various counsel for the class and NFL Parties; the affidavits of subclass representatives Kevin Turner and Shawn Wooden; and the transcript of the daylong fairness hearing.

After evaluating this extensive record, the District Court comprehensively analyzed the class certification factors and concluded that "[t]he proposed Class and Subclasses meet the Rule 23(a) and 23(b)(3) requirements and warrant certification." A.81. The court found no notice-related problems with the Settlement: "the Settlement Class Notice clearly described the terms of the Settlement and the rights of the Class Members to opt out or object" and "Class Counsel's notice program ensured that these materials reached those with an interest in the litigation." A.112. The court reported that the result of these efforts was that "only approximately 1% of Class Members filed objections, and only approximately 1% of Class Members opted out." A.120. The court remarked that "[t]hese figures are especially impressive considering that about 5,000 Retired Players are currently represented by counsel in th[e] MDL, and could easily have objected or opted out to pursue individual suits." *Id*.

The District Court then turned to an analysis of the fairness and adequacy of the settlement agreement. Applying the factors outlined in this Court's opinions *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), and *In re Prudential Insurance Co. of America Sales Practices Litigation*, 148 F.3d 283 (3d Cir. 1998), the court concluded that "the Settlement is a fair, reasonable, and adequate compromise." A.117; A.133. Among other considerations, the District Court underscored that the class would face very real problems on the merits if the settlement agreement were cast aside. "The

NFL Parties' motions to dismiss" on section 301 LMRA preemption grounds "remain pending, and have the potential to eliminate all or a majority of Class Members' claims." A.121. Moreover, "[e]ven if general causation could be proven, an even more daunting question of specific causation would remain." A.117. "Isolating the effect of hits in NFL Football from hits earlier in a Retired Players' career would be a formidable task." A.128. "[I]n addition to preemption and causation risks, Class Members would face other legal barriers to successful litigation, such as affirmative defenses and risks establishing damages," including relevant statutes of limitations, assumption of risk, and recovery compromised by various states' comparative fault or contributory negligence regimes. A.128-29. More fundamentally, litigation would be both uncertain and time-consuming, "and many Retired Players with progressive neurodegenerative conditions would continue to suffer while awaiting relief." A.104.

After concluding that the settlement agreement was fair and reasonable under a straightforward application of this Court's precedents, the District Court addressed the additional arguments raised by Objectors. The District Court rejected the "most commonly raised objection" to the settlement—the contention that "the Settlement cannot be fair, reasonable, and adequate" given its treatment of CTE. A.135-36. The court explained that "Retired Players cannot be [directly] compensated for CTE in life because no diagnostic or clinical profile of CTE exists, and the symptoms of the

disease, if any, are unknown." A.136. Moreover, "the Settlement *does* compensate the cognitive symptoms allegedly associated with CTE." *Id.* (emphasis in original). "The studies relied on by Objectors indicate that the majority of Retired Players" diagnosed with CTE after death—the only time CTE can be diagnosed—"would have received compensation under the Settlement if they were still alive" based on the settlement's benefits for the neurocognitive and neuromuscular impairments covered by the qualifying diagnoses of Neurocognitive Impairment Levels 1.5 and 2, dementia, Alzheimer's, Parkinson's, and ALS. *Id*. The District Court also concluded that "it is reasonable not to compensate the mood and behavioral conditions anecdotally associated with CTE" because "limiting compensation to objectively measurable symptoms of cognitive and neuromuscular impairment is a key principle of the Settlement." *Id*. The court found, based on detailed medical evidence, that "[m]ood and behavioral symptoms are commonly found in the general population and have multifactorial causation" and that "Retired Players tend to have many other risk factors for mood and behavioral symptoms." A.143. Separately, the District Court held that the backward-looking compensation provided for Death with CTE, which applies only to post-mortem diagnoses of CTE made where the retired player died before the final approval date of the settlement, "is reasonable because it serves as a proxy for Qualifying Diagnoses deceased Retired Players could have received while living." A.136; A.5699.

With respect to Objectors' challenges to the offsets, the District Court held that "[the] differing levels of compensation in the Settlement reflect the underlying strength of Class Members' claims." A.96. "The offset for Retired Players with fewer than five Eligible Seasons is a reasonable proxy for Retired Players' exposure to repetitive head trauma in the NFL. Retired Players with brief careers endured fewer hits, making it less likely that NFL Football caused their impairments." A.97. "The Stroke, severe TBI, and age offsets all represent scientifically documented risk factors for the Qualifying Diagnoses. Each is strongly associated with neurocognitive illness. Older Retired Players, as well as Retired Players who suffered from Stroke or severe TBI outside of NFL Football, would find it more difficult to prove causation if they litigated their claims, justifying a smaller award." *Id.*

SUMMARY OF ARGUMENT

The historic settlement reached between the NFL Parties and class counsel provides real, substantial, and immediate benefits to retired NFL football players—an uncapped fund that guarantees inflation-adjusted awards to all eligible retired players over a 65-year term and is projected to provide one billion dollars in compensation on top of the generous benefits retired NFL players already receive under their CBAs. The settlement provides those benefits without requiring retired players to prove that the covered neurological and neuromuscular impairments

resulted from their NFL play. So long as a retired NFL player receives a qualifying diagnosis, he will receive financial benefits under the settlement. In recognition of the settlement's significant benefits and the difficulties faced by the class in securing a remedy via litigation, there were only 200 objections out of a class of more than 20,000.

Objectors fall well short of carrying their burden to establish that the District Court abused its considerable discretion in approving this settlement. In fact, a straightforward application of this Court's precedent confirms that the District Court's approval of the settlement was manifestly correct. The settlement was the product of arm's-length and hard-fought negotiations that were closely supervised by a retired United States District Court Judge, a Special Master, and the District Court. The parties were well-positioned to assess the legal and factual strengths and weaknesses of their respective positions. Class counsel was well aware of the very serious problems they would face obtaining a judicial recovery in light of the NFL Parties' preemption, statute of limitations, and other dispositive defenses, as well as the possibly insurmountable difficulties inherent in proving both general and specific causation. And even if the NFL Parties did not prevail on their preemption defense with respect to the entire class, the path forward in the absence of settlement involved the certainty of time- and resource-consuming discovery and the uncertainty of any recovery for the class. In sum, applying both the mandatory and prudential factors

this Court has established for evaluating the fairness of settlements, the District Court acted well within the scope of its ample discretion in approving this projected billion dollar settlement of claims that face serious hurdles in the absence of settlement.

Objectors raise a host of complaints about the settlement, but those complaints do not provide a sufficient basis for overturning the District Court's judgment and suffer from two related and equally fatal problems. The vast majority of those objections are based on a misunderstanding of the settlement agreement and what it compensates. That is particularly true of Objectors' CTE-related arguments. The settlement provides financial benefits for retired NFL football players' manifested neurocognitive and neuromuscular impairments, without regard to whether the root cause is CTE or something else. It does not provide compensation based on underlying pathologies. The settlement tethers the benefits paid to exposure to repetitive head impacts while playing in the NFL, and while it does not require retired players to establish causation, it does reduce recovery for specific circumstances where there is a heightened likelihood that the observed deficits resulted from something else. Once the terms of the settlement agreement are properly understood, it is readily apparent that many of Objectors' arguments are misplaced.

More fundamentally, Objectors misapprehend not just the terms of this particular settlement, but the nature of settlements in general. As the District Court recognized, Rule 23 does not require a settlement to be perfect, only "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). This Court's precedents make clear that settlements are negotiated compromises that involve a yielding of highest hopes in exchange for certainty and resolution. While Objectors may have wanted more out of the settlement, it provides substantial, tangible, and immediate financial benefits and avoids the considerable risks that litigation could produce no judicial recovery whatsoever for the class. Objectors may have a different view regarding the strengths of their cases or the prospects of recovery, but the proper remedy in that instance was to opt out of the settlement and test those assessments in court. Objectors' failure to exercise that option presumably reflects the reality that both the benefits they would forego and the risks they would encounter by opting out are substantial. But Rule 23 does not provide a vehicle for Objectors to obtain their platonic ideal of a settlement. A fair, reasonable, and adequate settlement is all any class member can demand, and as the District Court held, this settlement clearly passes that test.

ARGUMENT

I. The Settlement Agreement Is Fair, Reasonable, And More Than Adequate Under A Straightforward Application Of This Court's Precedents.

Public policy and judicial economy strongly favor settlement of civil litigation. *See, e.g.*, *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994) ("public policy wisely encourages settlements"); *Pennwalt Corp. v. Plough, Inc.*, 676 F.2d 77, 80 (3d Cir. 1982) ("There is a strong judicial policy in favor of parties voluntarily settling lawsuits."). That is no less true in the class action setting than in any other civil case. To the contrary, the policy favoring settlement "is especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'" *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.* ("*G.M.*"), 55 F.3d 768, 784 (3d Cir. 1995)); *accord In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir. 1990) (the Third Circuit maintains a "policy of encouraging settlement of complex litigation that otherwise could linger for years").

"The strong judicial policy in favor of class action settlement contemplates a circumscribed role" for the courts in reviewing a class action settlement that follows substantial adverse litigation and intense arm's-length negotiations. *Ehrheart*, 609 F.3d at 595. The courts do not and cannot demand that "the settlement is the fairest

possible resolution—a task particularly ill-advised given that the likelihood of success at trial (on which all settlements are based) can only be estimated imperfectly." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173-74 (3d Cir. 2013). Instead, courts play a more modest role in ensuring that "the compromises reflected in the settlement—including those terms relating to the allocation of settlement funds—are fair, reasonable, and adequate when considered from the perspective of the class as a whole." *Id.* at 174. This Court's role is particularly "limited": It "will reverse a settlement approval only when the district court has committed a 'clear abuse of discretion.'" *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir. 1999).

A. The Settlement is Entitled to a Presumption of Fairness.

Consistent with the policy favoring settlement of class actions, this Court applies "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) (quoting *Cendant Corp.*, 264 F.3d at 232 n.18); *see also* Newberg on Class Actions §13:45 (5th ed.) ("Because of [the judicial] preference [for settlement], a court will presume that a proposed class action settlement is fair when certain factors are present, particularly evidence that the settlement is the product of arms-length negotiation, untainted by collusion.").

As the District Court recognized, this hard-fought and substantial settlement agreement is entitled to a presumption of fairness because all those factors are amply satisfied here. A.65. The negotiations here were conducted at arm's-length, and Objectors do not seriously contend otherwise. *Id.* The District Court appointed an experienced former federal judge to serve as a neutral mediator during the parties' settlement negotiations. *Id*. Over "the course of approximately six months," the parties engaged in negotiations that the mediator described as "intense, vigorous, and sometimes quite contentious." A.3804-05 (Phillips Supp. Decl. ¶4). He added, "[a]t all times the talks were at arm's length and in good faith. There was no collusion." *Id.* After the District Court denied without prejudice the initial settlement, the parties conducted five additional months of arm's-length negotiations overseen by Special Master Golkin before reaching the revised settlement agreement. A.68.

Moreover, and as explained in detail *infra*, although there was no formal discovery before the settlement agreement, class counsel possessed more than enough information to assess the strengths and weaknesses of Plaintiffs' case, the value of the class claims, and to make an informed settlement decision. The parties developed extensive familiarity with the potentially dispositive legal issues in the course of extensive briefing and oral argument on the motions to dismiss on LMRA preemption grounds. Class counsel also acquired a bevy of information about retired

NFL football players and their claims, including information provided by topnotch medical experts, about players' time in the NFL, and about the cognitive impairment experienced by a substantial portion of the class. A.66-67. Importantly, the absence of discovery here was the product of the District Court's considered judgment that mediation was appropriate before discovery and before definitively ruling on pending motions to dismiss. The District Court plainly concluded that the parties were fully equipped to effectively explore settlement. Given these circumstances, this is exactly the sort of case where the absence of formal discovery does not undermine the presumption of settlement validity. *See, e.g.*, *Cendant Corp.*, 264 F.3d at 235-36 (affirming approval of settlement even though litigation was "settled at an early stage" after only "informal" discovery because "Lead Plaintiff had an excellent idea of the merits of its case ... at the time of the Settlement").

Further underscoring that the presumption of fairness applies, class counsel possessed immense and unquestioned experience in prosecuting complex, mass-tort class actions. A.116; A.3564; A.3898-99; A.3914-15. And as explained further *infra*, less than 2% of the class objected to the terms of the settlement agreement or opted out of the class. That so few class members objected highlights not only that the presumption of fairness is applicable, but that the recoveries available to the class are substantial. This is the antithesis of the kind of coupon settlement that justifies more searching review.

In sum, the District Court correctly applied a presumption of fairness to the settlement.

B. All of the Applicable *Girsh* Factors Support the District Court's Decision Approving the Settlement.

"This court has adopted a nine-factor test to help district courts structure their final decisions to approve settlements as fair, reasonable, and adequate as required by Rule 23(e)." *G.M.*, 55 F.3d at 785. First laid out by this Court in *Girsh v. Jepson*, those factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

521 F.2d at 157 (quotation marks and ellipses omitted). Each factor requires the district court to make findings of fact, and those findings "will be upheld unless they are clearly erroneous." *G.M.*, 55 F.3d at 786.

The District Court's approval of the settlement agreement is manifestly correct. All the relevant factors favor approving the settlement. Objectors' contrary arguments are irreconcilable with the relevant law, the District Court's extensive factual findings, and the basic realities of the settlement process.

1. Continued litigation of this class action would be complex, costly, and time consuming.

"The first factor captures the probable costs, in both time and money, of" the alternative to settlement, *i.e.*, "continued litigation." *Warfarin*, 391 F.3d at 535-36 (quotation marks omitted). "By measuring the costs of continuing on the adversarial path, a court can gauge the benefit of settling the claim amicably." *G.M.*, 55 F.3d at 812. Relevant to this inquiry is "(1) the scope and breadth of the litigation"; (2) whether the litigation implicates "complex medical … issues … which likely would have required multiple experts, at an enormous cost"; "(3) the likelihood that discovery would be extensive and require significant resources"; and "(4) counsels' representation that pursuing the actions through pretrial motion practice, formal discovery and trial would involve potentially several additional years to this litigation." *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 351 (3d Cir. 2010).

The District Court found that continued litigation in the absence of a settlement would be complex, expensive, and time-consuming. A.117-19. The record undeniably supports this finding. Indeed, the only alternative to protracted and expensive litigation would have been a clean dismissal of the claims on preemption grounds, a prospect that strongly supports the fairness of the substantial settlement. But if any of the class claims were to survive the motion to dismiss, the next step would be costly and time-consuming discovery of gargantuan proportions. The class's broad allegations of misconduct by the NFL Parties were hotly contested

and factually dense. The class members allege a multi-decade fraud by the NFL. Documentary discovery from both the NFL Parties and third parties, including potentially NFL Member Clubs, former players, physicians, trainers, and others, would be expansive and wide-ranging.

Lest there be any doubt, discovery requests would flow in both directions. The NFL Parties would appropriately seek extensive discovery relevant to the factually-intensive and individualized causation issues that the settlement agreement renders largely beside the point. The more than 20,000-person class in this case is massive, a factor which itself weighs in favor of settlement. The NFL Parties would certainly seek documents and depositions from each Plaintiff and all other persons—family, friends, coaches, physicians—who could shed light on Plaintiffs' medical and football history. The immense scope of this discovery would likely require years to resolve.

And discovery is just the tip of the iceberg when it comes to the litigation costs avoided by the settlement. Whether these cases proceed as a class or as individual trials, there would be extensive motions practice and contested *Daubert* proceedings. Plainly, "the trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court." *Prudential*, 148 F.3d at 318. "The prospect of such a massive undertaking clearly counsels in favor of settlement." *Id.* The District Court was plainly correct that the

first *Girsh* factor—addressing the unhappy alternative to settlement—favors settlement.

2. The class reacted overwhelmingly favorably to the settlement.

"The second *Girsh* factor attempts to gauge whether members of the class support the settlement." *Warfarin*, 391 F.3d at 536 (quotation marks omitted). "Courts have generally assumed that 'silence constitutes tacit consent to the agreement.'" *G.M.*, 55 F.3d at 812 (quoting *Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304, 1313 n.15 (3d Cir.1993)). The reaction of the class is therefore gauged by assessing the number and rationale of objectors relative to the silent supporters. *Sullivan*, 667 F.3d at 321.

A "vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement." *Cendant Corp.*, 264 F.3d at 235. That presumption applies with particular force here, as class members received unprecedented notice, both formal and informal. Through direct mailing and wide media placements, 90% of the more than 20,000-person settlement class received notice of the proposed settlement. A.1231. As of ten days before the fairness hearing, more than 5,200 settlement class members had signed up to receive additional information about the settlement agreement, and more than 64,000 unique users had visited the settlement website. A.3120-21.

On top of these more formal mechanisms, this settlement has received unprecedented national press coverage. *See, e.g.*, A.3593 (noting that "[t]here have been more than 900 print and online stories about the Settlement since its announcement"); *see also Prudential*, 148 F.3d at 327 ("unsolicited news coverage" of settlement "greatly increased the possibility" that class members would be notified of settlement). Yet barely 2% of the class objected to, or opted out of, the settlement. A.78. The "vast disparity" between noticed settlement class members and Objectors confirms the wisdom of the District Court's conclusion that this factor weighs in favor of settlement. That disparity is even more telling given the high number of class members that are represented and actively considered (or filed) individual actions.

Objectors' arguments to the contrary are deeply flawed. First, while conceding that "the absolute number of objections is relatively low," some Objectors emphasize that the percentage of objectors in *G.M.* was even smaller. Alexander Br.50. But *G.M.* did not purport to establish some new, demanding threshold of support that invalidates settlements, even when the number of objections is "relatively low." To the contrary, this Court has found that the second *Girsh* "objection-rate" factor affirmatively supports settlement even when the objection rate tops 10%, *see Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990), and *G.M.* does not purport to change that settled law. Instead, *G.M.* looked past a

superficially low objection rate by emphasizing factors with no parallel here. In *G.M.*, most class members were passive victims of latent product defects and therefore lacked "adequate interest and information to voice objections." 55 F.3d at 812-13. Here, however, the claims go the heart of the class members' past, active participation in the NFL and their current ability to provide for their medical needs. The idea that substantial members of the class lacked an adequate interest or incentive to raise an objection is spurious. The low objection rate here is explained by the substantial benefits available to class members and the difficulties of overcoming the legal and evidentiary hurdles the claims would face in court.

Taking a different tack, some Objectors claim that defective notice has caused the low rate of objection and opt out. Faneca Br.56. Those Objectors argue that the long-form notice erroneously suggested that the settlement agreement provided compensation for Death with CTE "at any time" during the term of the Monetary Award Fund. *Id.* at 56-57. But the notice was absolutely clear that the settlement agreement provided benefits "for diagnoses of Death with CTE prior to **July 7, 2014**." A.1341 (emphasis in original). The District Court found that this statement "is not enough to confuse a careful reader." A.108. That finding of fact was correct and should not be disturbed on appeal. The low objection rate here confirms that the overwhelming majority of the class viewed this settlement as fair, reasonable, and more than adequate.

3. Class counsel had a fully adequate appreciation of the merits of the class claims before negotiating the settlement.

"The third *Girsh* factor 'captures the degree of case development that class counsel had accomplished prior to settlement,' and allows the court to 'determine whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Sullivan*, 667 F.3d at 321 (quoting *Warfarin*, 391 F.3d at 537). Although the amount of formal discovery taken before settlement is relevant to the inquiry, *see Prudential*, 148 F.3d at 319, it is only part of the analysis. The ultimate question is whether class counsel had developed the case sufficiently to appreciate the value of the Plaintiffs' claims when they reached a settlement. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) ("In the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement."). Indeed, in some cases, the substantial costs of formal discovery are part and parcel of the avoided costs that help drive the parties to settle, such that an insistence on formal discovery would deter early settlements, *see* Newberg on Class Actions §13:50 (5th ed.), in derogation of the strong public policy favoring settlement, *see Ehrheart*, 609 F.3d 590 at 593-95. Here, the District Court affirmatively directed the parties toward mediation before formal discovery had commenced. That implicit judgment that both parties were adequately informed to pursue settlement was validated by the mediator's analysis and explicitly confirmed

in the District Court's finding that "Class Counsel were intimately aware of the potential limitations of their case with respect to two dispositive issues as they entered settlement negotiations": the NFL Parties' defense of preemption and the extreme difficulty posed by proving causation. A.123.

The record amply supports that finding. Well before settlement negotiations began, the NFL Parties moved to dismiss the class claims on LMRA preemption grounds. This motion was fully briefed and extensively argued before the District Court directed the parties to mediate. Formal discovery would have revealed nothing further on this issue, which had the potential to leave class members without any judicial remedy. *See* A.3574-75 (Seeger Decl. ¶20).

Similarly, class counsel were well-positioned to appreciate the substantial legal and evidentiary hurdles they would face in proving causation. To prevail, class counsel would have to show that mild traumatic brain injury is capable of causing the kind of neurocognitive symptoms retired players allegedly suffer, and that mild traumatic brain injury suffered while playing in the NFL specifically caused the individual symptoms of each and every class member.

Recognizing that proof of causation would be a substantial hurdle, class counsel assembled the materials necessary to make informed judgments about the issue. *Id.* Among other things, class counsel maintained a comprehensive database of the symptoms of thousands of individual Plaintiffs. *Id.* Counsel engaged experts

in relevant fields to assess the strength of the class's claims and inform settlement strategy. A.3578-79 (Seeger Decl. ¶¶19-20). Given counsel's thorough investigation, formal discovery would not have materially advanced their understanding of the merits of the class claims with regard to causation. The District Court thus correctly found this factor to favor approval of the settlement.

Some Objectors contend that the District Court's finding was an abuse of discretion given the lack of formal discovery that might have informed other claims and other issues. *See* Faneca Br.52-53 (citing *G.M.* and *In re Cmty. Bank of N. Va.*, 418 F.3d 277 (3d Cir. 2005); Alexander Br.45-46. But neither *G.M.* nor *Community Bank* supports Objectors' arguments.

The *G.M.* court certainly did not hold that formal discovery is *required* for settlement approval, but merely reiterated the "adequate appreciation of the merits" standard that the District Court faithfully applied. 55 F.3d at 813. The *G.M.* court found that standard unsatisfied based on (1) the short interval (four months) between the filing of the litigation and the conclusion of settlement negotiations and (2) the absence of any indication that class counsel "had conducted significant independent discovery or investigations to develop the merits of their case" or "retained their own experts." *Id.* at 813-14. Comparable considerations support the District Court's finding here, as there was substantial time—multiple years—between the initial filing of the lawsuits and the ultimate classwide resolution and extensive

independent investigation and retention of experts to inform class counsel's judgments.

Community Bank is even less helpful to Objectors. There, an objector appealed the district court's denial of its request for pre-fairness-hearing discovery. 418 F.3d at 316. This Court held that objectors have no absolute right to discovery and indicated that, although lead counsel had not taken formal discovery, it was nevertheless "likely that [counsel for objectors] ha[d] developed sufficient facts regarding this matter and its prospective settlement value such that it would be able to present a cogent and supportable objection at the fairness hearing," given that counsel for objectors had previously litigated two similar suits. *Id.* Thus, while this Court was "inclined to agree with the settling parties that the District Court's Order limiting discovery was not an abuse of discretion," it remanded to develop the record more on the issue. *Id.* at 317. Here, the record is clear that there was substantial factual development independent of formal discovery that informed both the settlement negotiations of class counsel and the arguments of Objectors, including extensive scientific literature that was publicly available. A.122. The District Court acted well within its discretion in finding that the relevant parties had "an adequate appreciation of the merits," *G.M.*, 55 F.3d at 813, which is all that this Court's precedents require.

4. Establishing liability and damages during the course of litigation would be very difficult.

"The fourth and fifth *Girsh* factors survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *Prudential*, 148 F.3d at 319. The court "need not delve into the intricacies of the merits of each side's arguments, but rather may give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action." *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 115 (E.D. Pa. 2005) (quotation marks omitted).

In this case, the District Court correctly found that class counsel would face at least two significant obstacles to establishing liability and damages: the NFL Parties' preemption defense and critical difficulties with proving causation. *See* A.124-29. The record confirms that both findings were correct and that this factor weighs strongly in favor of settlement.

The NFL Parties moved to dismiss all of the class claims on the ground that they are preempted by section 301 of the LMRA. Those preemption arguments are substantial and would eliminate any judicial recovery. As the District Court found, courts have almost uniformly held that section 301 preempts state common law claims brought by NFL players against the NFL like the ones in this case by virtue

of the CBAs governing the relationship between the NFL and NFL players. *See, e.g.*, *Williams v. Nat'l Football League*, 582 F.3d 863, 881-82 (8th Cir. 2009) (breach of fiduciary duty, negligence, gross negligence, fraud, constructive fraud, negligent misrepresentation, and intentional infliction of emotional distress claims preempted); *Dent v. Nat'l Football League*, No. C 14-02324, 2014 WL 7205048, at *3-*7 (N.D. Cal. Dec. 17, 2014) (negligence and fraud-based claims concerning the alleged improper or illegal use and dispensing of medications in the NFL preempted); *Givens v. Tenn. Football, Inc.*, 684 F. Supp. 2d 985, 990-91 (M.D. Tenn. 2010) (outrageous conduct, negligent infliction of emotional distress, and breach of duty of good faith and fair dealing claims preempted); *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894, 909-11 (S.D. Ohio 2007) (wrongful death claim preempted); *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1178-79 (N.D.N.Y. 1990) (negligence, fraud, negligent misrepresentation, and negligent and intentional infliction of emotion distress claims preempted); *see also Ballard v. Nat'l Football League Players Ass'n*, No. 4:14CV1267 CDP, 2015 WL 4920329, at *9 (E.D. Mo. Aug. 18, 2015). Indeed, two district courts denied remand of cases consolidated in this MDL because they found Plaintiffs' negligence claims were preempted. *See supra* p. 10. The District Court was plainly correct to find that the NFL Parties' preemption defense posed a serious obstacle to any judicial recovery by the class.

Some Objectors complain that the preemption defense carries less force with respect to class members given the time periods in which they played. Faneca Br.53, 57. That argument suffers at least three fatal problems. First, the NFL Parties have raised a preemption defense as to all class members. *See* Doc. 3589. While Objectors may believe that the defense's strength varies among class members, the defense is a serious obstacle for all. Second, and related, Objectors fail to appreciate the severity of the risk posed by the preemption defense. Should the NFL Parties prevail, Plaintiffs will have *no* judicial remedy of any kind. Third, that a small subset of retired players could conceivably overcome that defense does not eliminate the risk for the vast majority of retired players whose benefits were threatened by the defense or the defense's importance to the settlement calculus. If certain class members really believed that the idiosyncrasies of their playing careers allows them to escape the LMRA preemption defense, they had the option of opting out. But such a belief is hardly a sufficient basis to deprive the vast majority of the class of a substantial settlement that avoids a day of reckoning on a potentially dispositive preemption defense. The settlement eliminates that risk entirely and confers certain benefits on a huge number of retired NFL football players who might be entirely without a judicial remedy if this litigation proceeded. That is hardly unreasonable.

Moreover, the District Court properly found that the preemption defense is not the only obstacle to a litigation recovery by class members. Causation looms equally

large as a potential roadblock; Plaintiffs would face immense difficulty in carrying their burden to establish causation. Plaintiffs allege that had the NFL Parties properly treated concussions and other repetitive head trauma, and disclosed the risks posed by such head trauma, the retired players could have avoided their alleged traumatic brain injuries and the neurocognitive symptoms that allegedly accompany them. To prevail on this theory, Plaintiffs would have to show both general causation—that concussion and repetitive mild brain trauma are capable of causing the sort of neurocognitive deficits alleged in this case—and specific causation—that the concussions and repetitive mild brain trauma suffered by each individual retired player during his career time in the NFL, as opposed to some other period of playing football or other factor wholly unrelated to playing football, *in fact* caused the specific neurocognitive deficits alleged by each retired NFL football player. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 752 (3d Cir. 1994) ("[P]ersonal injury plaintiffs must show that they were exposed to the [alleged danger], that the [alleged danger] can cause the types of harm they suffered, and that the [alleged danger] in fact did cause them harm."). As the District Court correctly found, proving both would be a colossal and uncertain undertaking. A.128-29.

Although science has identified an association between brain trauma and the qualifying diagnoses other than "Death with CTE," it has not determined that association "to be a *causal* one." A.3476 (Yaffe Decl. ¶14). In particular, study of

the long-term neurocognitive effects of concussion and mild traumatic brain injuries is relatively undeveloped. A.3483-84 (Yaffe Decl. ¶43); *see also* A.3146 (Christopher Randolph, Stella Karantzoulis & Kevin Guskiewicz, *Prevalence and Characterization of Mild Cognitive Impairment in Retired National Football League Players*, 19 J. Int'l Neuropsychological Soc'y 873, 877 (2013)) (noting the lack of any studies linking repetitive head trauma in professional football to long-term neurocognitive deficits). Epidemiological studies thus generally have not established a causal connection between concussions and mild traumatic brain injuries and the long-term neurocognitive deficits alleged in this case.

The link is particularly weak with regard to CTE, where leading scientists agree that "CTE [is] not related to concussions alone or simply exposure to contact sports. At present, there are no published epidemiological, cohort or prospective studies relating to modern CTE.… As such, the speculation that repeated concussion or subconcussive impacts cause CTE remains unproven." A.3158 (Paul McCrory, et al., *Consensus Statement on Concussion in Sport: The 4th International Conference on Concussion in Sport Held in Zurich, November 2012*, 47 Brit. J. Sports Med. 250, 257 (2013)); *see also* A.3422 (Schneider Decl. ¶27) ("Because of the limited number of studies available, and the nature of the case reports that have been published, it is my opinion that we do not know enough about CTE to

adequately understand its risk factors, the relation between repetitive TBI and CTE, or the diagnostic and clinical profile of CTE.").

But whatever the difficulties in proving general causation, the challenges in demonstrating specific causation are even more daunting. *See* A.3487 (Yaffe Decl. ¶52) ("On an individual level, establishing causation between mild repetitive TBI and neurodegenerative syndromes is even more difficult."). Each Plaintiff would have to show 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. Given the Complaints' focus on repetitive head impacts and their cumulative effect, parsing out specific causation in this manner would be acutely problematic. That problem is further complicated by the relative paucity of reliable studies on the long-term effects of mild traumatic brain injury sustained by developing brains. *See* A.3171 (Inst. of Med. of the Nat'l Acads., *Sports-Related Concussions in Youth: Improving the Science, Changing the Culture*, at 2 (2013)) ("[I]t remains unclear whether repetitive head impacts and multiple concussions sustained in youth lead to long-term neurodegenerative diseases, such as chronic traumatic encephalopathy."). A retired NFL football player would further have to demonstrate that his deficits are not attributable to some other factor like health, age, or injuries sustained entirely outside of football. *See* A.3487 (Yaffe Decl. ¶52). All of this would be exceedingly difficult.

In light of the existing state of the science, continued litigation would run the risk of complete denial of recovery. Plaintiffs' best case scenario would be a battle of the experts, a risky litigation outcome that this Court has recognized as weighing in favor of settlement. *Sullivan*, 667 F.3d at 332. The settlement agreement completely obviates this concern by conferring benefits on the entire class without requiring *any* proof whatsoever of causation. The end result is a substantial benefit for the class who will obtain a certain and substantial recovery in lieu of a litigation path marked by uncertainty and potentially case-dispositive obstacles.

In addition to preemption and causation, the NFL Parties have other potentially dispositive defenses. For example, many class members face serious statute-of-limitations problems. A.128-29. Similarly, retired players would have to show that they did not assume the risks inherent in playing professional football, including head injury. *See, e.g.*, *Zemke v. Arreola*, 2006 WL 1587101, at *3 (Cal. Ct. App. June 12, 2006) ("the risk of a head injury is inherent in the sport of football"); *Glazier v. Keuka Coll.*, 275 A.D.2d 1039, 1039 (N.Y. App. Div. 2000) (plaintiff assumed risk of injuries because "[as] an experienced football player, [he] was aware that 'being tackled in a violent manner is an inherent part of football'"). And, finally, the recovery of each Plaintiff would be subject to the doctrines of contributory and comparative negligence, pursuant to which a retired player who is shown to have contributed to his injury could have his recovery reduced or entirely

denied. Each of these pose significant risks to establishing liability and damages in these actions and weigh in favor of settlement.

5. Class counsel would have difficulty maintaining class certification throughout the trial.

"[T]his factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial" in the case of potential "intractable management problems." *Warfarin*, 391 F.3d at 537. This Court has held that "[b]ecause the district court always possesses the authority to decertify or modify a class that proves unmanageable, examination of this factor in the standard class action would appear to be perfunctory." *Prudential*, 148 F.3d at 321. The District Court was correct that this factor, while entitled to "only minimal consideration," weighed in favor of the settlement. A.130. Objectors do not challenge this holding. *See, e.g.*, Faneca Br.60.

6. The NFL Parties' ability to withstand a greater judgment is irrelevant.

The District Court correctly held that the NFL Parties' ability to withstand a greater judgment does not weigh against settlement. This *Girsh* factor only has relevance when the defendant's professed inability to pay more is used to justify a relatively ungenerous settlement. Needless to say, when the defendant's inability to pay more is invoked in this way, it must be tested. But in a case like this, where the settlement is substantial and no party has invoked the defendant's inability to pay,

A.130, this factor should simply drop out of the calculus. That a defendant "could afford to pay more does not mean that it is obligated to pay any more than what … class members are entitled to under the theories of liability that existed at the time the settlement was reached." *Warfarin*, 391 F.3d at 538.

Some Objectors nonetheless argue that the NFL Parties' ability to pay more means that the settlement agreement is unfair. Alexander Br.46-47; Faneca Br.55. They cite no case in support of that extraordinary proposition, which is unsurprising. As this Court has explained, "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement." *Sullivan*, 667 F.3d at 323. Absent a defendant's financial distress, a defendant could always pay more, just as the class could always demand less. That reality underscores that there is a range of reasonable settlements in any case, but hardly provides a basis for disturbing an agreed-upon settlement within that range. For that reason, absent an affirmative invocation of the defendant's inability to pay more, this Court ordinarily assigns little weight to this factor, as the District Court properly held. *See, e.g.*, *Cendant Corp.*, 264 F.3d at 241; *G.M.*, 55 F.3d at 818.

7. The settlement is undoubtedly reasonable in light of the best possible outcome discounted by the attendant risks of litigation.

The remaining *Girsh* factors address whether the settlement is reasonable in light of the best possible recovery that the class could obtain, discounted by the risks posed by the litigation. *Prudential*, 148 F.3d at 322 ("[T]he present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement."); *see also Warfarin*, 391 F.3d at 538 ("The last two *Girsh* factors evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case."). "The evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *G.M.*, 55 F.3d at 806.

As outlined *supra*, class members face significant obstacles that could preclude them from obtaining any judicial relief. The NFL Parties have successfully invoked their preemption defense in similar cases and the burdens of establishing causation are daunting, if not insurmountable.

In light of the considerable risk that litigation could produce no recovery whatsoever, the settlement agreement is more than fair and reasonable. The settlement agreement's chief benefit is the Monetary Award Fund, which provides

compensation for those with qualifying diagnoses without any need to demonstrate causation. The MAF is uncapped; every single class member who obtains a qualifying diagnosis will recover the appropriate inflation-adjusted amount for each diagnosis throughout the entire 65-year term of the settlement agreement. This benefit flows to class members whose claims would be preempted by the LMRA; who assumed the risk of liability by playing professional football; whose claims would otherwise be time-barred; and who would be unable to prove causation. Class members receive these benefits without sacrificing the other substantial benefits provided to the retired players by the NFL and the recent CBA, even though such benefits are generally dependent on foregoing litigation. And all class members receive the substantial benefits under the BAP.

The settlement agreement not only provides all of these benefits without the considerable risks of litigation, it provides the benefits *now*, which is a substantial benefit given the age and circumstances of many class members. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 276 (E.D. Pa. 2012). It also provides peace of mind for class members who currently have no symptoms by ensuring that the benefits will be available for any retired NFL football player who subsequently develops covered symptoms during the 65-year term of the settlement agreement. And any class member who prefers to undertake the risk of litigation was free to opt out and proceed on his or her own. In light of these facts, the District Court's

conclusion that the settlement agreement was a reasonable compromise is unassailable and certainly not an abuse of discretion.

Objectors nonetheless raise two complaints. First, they criticize the settlement agreement's failure to provide benefits for future CTE diagnoses. *See* Faneca Br.54; Alexander Br.47-48. But, as explained in greater detail *infra* Section II.B., the settlement agreement covers CTE in the same way it covers any other pathology, which is to say that it provides assured financial benefits for manifested neurocognitive and neuromuscular impairments and not pathologies.

Second, the Faneca Objectors contend that the settlement agreement's registration and claims administration process decreases the "real value" conferred by the settlement agreement on class members. Faneca Br.54. But even if credited, this argument does not undermine the District Court's finding that the settlement is a reasonable compromise. The deadlines imposed by the settlement are wholly reasonable. This Court has "recognize[d] that deadlines are an integral component of effective consolidation and management of the modern mass tort class action." *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 316 (3d Cir. 2001). The deadlines in this case serve reasonable class-management purposes. The 180-day registration deadline is necessary to ensure that the settlement functions properly. *See* A.5611-12. For example, the BAP administrator will need the participants' biographical information to ensure that qualified BAP physicians are selected in

sufficient quantity and geographic scope to provide convenient access to BAP testing. *See* A.5617-19. Similarly, the requirement that a retired NFL football player submit a claims package to the claims administrator within two years of receipt of a qualifying diagnosis, *see* A.5633, is an ordinary component of the administration of class-action settlement benefits, *see* A.174-75, and is designed to avoid staleness and support the settlement's anti-fraud provisions. *Cf. In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 573 F. App'x 178, 180 (3d Cir. 2014) (noting that the settlement was "inundated with fraudulent claims that included manipulated [medical] test results"). The settlement also provides for frequent reminders of deadlines, *see* A.172, and failure to abide by deadlines can be excused for "substantial hardship," *see, e.g.*, A.5634. These deadlines are a reasonable means for facilitating the orderly and fair administration of the settlement and the District Court's finding that they are fair and reasonable should not be disturbed.[5]

[5] The Faneca Objectors also complain that requiring the use of a qualified MAF physician to obtain a qualifying diagnosis is unreasonable. Faneca Br.54. As the District Court found, however, requiring use of a qualified MAF physician ensures that qualifying diagnoses are made by physicians with the necessary training. *See* A.173-74. Similarly, exempting the NFL from paying a claims appeals fee is not unreasonable because the NFL is limited to taking only good faith appeals, which are ultimately supervised by the District Court. A.5640-41.

* * * *

The District Court found that each of the *Girsh* factors either favored settlement or was neutral, and thus approved the settlement as fair, reasonable, and adequate. Objectors have not come close to showing that the District Court's findings were clear error or that the court abused its considerable discretion in approving the settlement. That is a sufficient basis for this Court to affirm.

C. The *Prudential* Factors Provide Further Support for the District Court's Decision.

This Court in its aptly-named *Prudential* decision propounded a series of considerations to be evaluated alongside the *Girsh* factors. *Prudential*, 148 F.3d at 323. Those factors include:

> the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved—or likely to be achieved—for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Id. This Court has underscored that "[u]nlike the [mandatory] *Girsh* factors ... the *Prudential* considerations are just that, prudential." *Baby Products*, 708 F.3d at 174.

These "non-exclusive factors" are merely "illustrative of additional inquiries that in many instances will be useful for a thoroughgoing analysis of a settlement's terms" and need only be addressed "when appropriate." *Pet Food*, 629 F.3d at 350.

The District Court correctly held that the *Prudential* considerations relevant to this litigation weigh in favor of settlement, and none of the Objectors challenges this holding. As discussed *supra*, to the extent substantive knowledge could be gleaned from previous individual litigation, it underscored that the LMRA preemption defense was a significant obstacle to judicial recovery. Likewise, class counsel's independent investigation provided them with sufficient information to accurately "assess the probable outcome of a trial on the merits of liability and individual damages." *Prudential*, 148 F.3d at 323. Every class member had ample opportunity to opt out of the settlement and pursue his or her own claims (and some did). Many class members had filed individual litigation and thus were well-positioned to assess the settlement's terms. The claims process is reasonable and fair. And, finally, the fee arrangement was negotiated after the settlement agreement, such that attorneys' fees will not be drawn from the funds available to compensate retired players' claims, and class members will have an opportunity to object to the fee petition at a later date. *See Prandini* v. *Nat'l Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977) (viewing favorably the separation of funds for the payment of attorneys' fees and class awards). Like the mandatory *Girsh* factors, the supplemental

Prudential factors weigh in favor of approving the settlement, as the District Court correctly concluded.

II. Objectors' Arguments Come Nowhere Close To Calling The District Court's Approval Of The Settlement Agreement Into Question.

Out of this class of more than 20,000 retired NFL football players, and in the context of over 300 lawsuits filed by more than 5,000 former players and their families, only 200 retired players and their estates filed objections. As already explained, this relatively low number of Objectors provides strong independent support for affirming the District Court's approval of the settlement agreement. And the Objectors' modest efforts to assail the District Court's analysis of the *Girsh* and *Prudential* factors are unavailing and leave them without any legal basis to disturb the District Court's approval of the settlement.

The Objectors' efforts to raise independent objections to the settlement suffer from, *inter alia*, two overarching problems. First, they misapprehend the nature and operation of this particular settlement agreement. The settlement agreement rests on three critical principles: (1) it compensates manifested neurocognitive and neuromuscular impairments, not underlying pathologies; (2) it tethers the benefits paid to the level of exposure to repetitive head impacts while playing in the NFL; and (3) while it does not require retired players to establish causation, it does reduce recovery where there is a heightened likelihood that the observed deficits resulted from something else. Once the terms of the settlement agreement are properly

understood, it is readily apparent that many of Objectors' arguments—to the extent they are germane to this Court's analysis at all—are misplaced.

Second, Objectors misapprehend the nature of settlements more broadly. As the District Court correctly noted, "Rule 23 does not require a settlement to be perfect, only 'fair, reasonable, and adequate.'" A.134 (quoting Fed. R. Civ. P. 23(e)(2). "Settlements are negotiated compromises" that involve "a yielding of highest hopes in exchange for certainty and resolution." *Id.* (quoting *G.M.*, 55 F.3d at 806). While Objectors may have wanted more out of the settlement agreement, it provides substantial, immediate financial benefits and avoids the considerable risks that litigation could produce zero in terms of a judicial recovery. Objectors may have a different assessment of the strengths of their cases or the value of the recovery, but their remedy in that case was to opt out and test their assessments in court. Presumably, Objectors did not exercise that option because they too recognize that the benefits provided and risks avoided are both substantial. But Rule 23 does not provide a vehicle for Objectors to obtain their platonic ideal of a settlement. A fair, reasonable, and adequate settlement is all any class member can demand, and as the District Court held, this settlement clearly passes that test.

A. Objectors' Jurisdiction and Standing Arguments are Meritless.

Little ink need be wasted on Objectors' threshold arguments. As all but one set of Objectors recognize, "[t]he district court had jurisdiction" over this case.

Faneca Br.2; *see* Armstrong Br.4; Jones Br.6-7; Anderson Br.1; Mayberry Br.iii; Stewart Br.1; Alexander Br.1; Miller Br.1; Carrington Br.1; Heimburger Br.1; *but see* Gilchrist Br.21-22. The *Turner* Complaint alleged, and the District Court properly exercised, jurisdiction under 28 U.S.C. §1332(d)(2): "the amount in controversy exceeds the sum of $5,000,000" and this "is a class action in which members of the … Class and Subclasses of Plaintiffs are citizens of a State different from the Defendants." A.1128. Accordingly, there was no need to analyze the federal question—whether retired NFL football players' claims were preempted by federal labor law—before approving the settlement agreement. *See* Gilchrist Br.21-22.

The standing arguments made in passing by a handful of Objectors fare no better. *See* Miller Br.17-18; Carrington Br.14-15; Heimburger Br.12-13. As outlined *supra*, the *Turner* Complaint alleges on behalf of all retired NFL football players that those players suffered repeated traumatic head impacts during their NFL play and that all retired players either already have developed serious neurocognitive impairments or are at serious risk of doing so. Members of the settlement class also have at least colorable medical monitoring claims. The *Turner* Complaint thus unambiguously alleges injury-in-fact sufficient to give standing to the settlement class. *See Prudential*, 148 F.3d at 307 (citing evidence that the named parties had "suffered an 'injury in fact'" and noting that "absentee class members are not

required to make a similar showing"). Moreover, no class member will receive financial benefits under the Monetary Award Fund unless he either has already or does manifest neurocognitive or neuromuscular impairments. *See generally Sullivan*, 667 F.3d at 305-07 (no need to establish that every member of a class has a valid justiciable claim at the time of settlement); *In re Deepwater Horizon*, 739 F.3d 790, 806-08 (5th Cir. 2014) (same); *cf. In re Cmty. Bank of N. Va. Mortg.*, 795 F.3d 380, 396 (3d Cir. 2015) (discussing standing). The absence of an Article III problem should be beyond dispute.

B. Objectors' CTE-Related Arguments are Based on a Misunderstanding of the Settlement and What it Compensates.

Beyond those threshold arguments, the primary argument advanced by many Objectors is that excluding CTE from the qualifying diagnoses for future claimants is substantively unfair. *See* Jones Br.27-37; Miller Br.19-30; Armstrong Br.31-39; Carrington Br.15-16; Faneca Br.37-46. That argument, however, is based on a mischaracterization of the settlement agreement and what it covers.

1. The settlement agreement provides compensation for the serious neurocognitive deficits allegedly associated with CTE.

As the District Court correctly held, notwithstanding Objectors' claim that the settlement fails to compensate CTE, the settlement agreement *does* provide financial benefits for manifested neurocognitive deficits associated with CTE. A.135-47. "The study of CTE is nascent, and the symptoms of the disease, if any, are

unknown." A.136. According to Objectors, however, "CTE progresses in four stages." A.140. "In Stages I and II, the disease allegedly affects mood and behavior while leaving a Retired Player's cognitive functions largely intact." *Id.* "Stages III and IV" are associated with "severe memory loss, dementia, loss of attention and concentration, and impairment of language." *Id.*

While the District Court noted that the scientific basis for the "the idea that CTE progresses in defined stages" is not established, *id.*, it correctly held that even "[a]ssuming arguendo that Objectors accurately describe the symptoms of CTE, the existing Qualifying Diagnoses compensate the neurocognitive symptoms of the disease." A.141. "Levels 1.5 and 2 Neurocognitive Impairment compensate all objectively measurable neurocognitive decline, *regardless of underlying pathology*." *Id.* (emphasis in original). "These Qualifying Diagnoses provide relief for Retired Players who exhibit decline in two or more cognitive domains, including complex attention and processing speed, executive function, learning and memory, language, and spatial-perceptual." *Id.* That means that retired NFL football players with CTE will receive financial benefits under the settlement agreement. A retired player need not prove that his symptoms are a manifestation of CTE or the result of playing in the NFL—he need only receive a qualifying diagnosis.

The studies of Objectors' own experts confirm this coverage. "In the McKee Study"—one of the scientific studies featured by Objectors—"almost all subjects

with late-stage CTE allegedly showed decline in cognitive domains compensated by Levels 1.5 and 2 Neurocognitive Impairment." *Id.* McKee also found that subjects with a CTE neuropathology had a high incidence of comorbid disease, including ALS, Alzheimer's, Parkinson's, and frontotemporal dementia. *Id*. "[A]ccepting the findings in the McKee Study as accurate, at least 89% of the former NFL players" found to have CTE during post-mortem autopsies (the only way CTE can be identified) "would have been compensated under the" Settlement Agreement "while living." A.141-42; *see* A.2254-75 (Ann McKee, et al., *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 Brain 43 (2013)).

Some Objectors contend that recovery based on a qualifying diagnosis of Level 1.5 or Level 2 Neurocognitive Impairment is no substitute for recovery based on an independent qualifying diagnosis of Death with CTE. Faneca Br.44-46; Armstrong Br.33; Jones Br.27-36. That is because, they claim, even if certain CTE-related symptoms receive compensation through qualifying diagnoses for Level 1.5 and Level 2 Neurocognitive Impairment, the compensation provided will be substantially less than that provided to someone with a Death with CTE diagnosis. Those arguments ignore the reality of how the settlement works for living class members. The settlement contemplates that retired players will make use of the BAP and numerous other medical benefits already available to them under the CBAs and, where warranted, will receive qualifying diagnoses and associated payments from

the Monetary Award Fund. The settlement and CBA benefits combined will provide retired players with compensation and treatment for Level 1.5 and Level 2 Neurocognitive Impairment decades before a Death with CTE diagnosis is even a possibility. This likelihood of an earlier qualifying diagnosis is important because compensation for all qualifying diagnoses decreases with player age.

Given that Level 1.5 and Level 2 Neurocognitive Impairment qualifying diagnoses should be apparent much earlier in time than a Death with CTE diagnosis, the financial benefits provided by the settlement may prove more substantial than those provided for Death with CTE. The facts alleged by Objector Eleanor Perfetto illustrate this point. As already explained, financial benefits under the settlement turn on a number of retired player-specific characteristics including player age. Dr. Perfetto's husband, a former player, died at age 69 and was diagnosed with CTE after his death. *See* Doc. 6371. He allegedly was diagnosed with early dementia 13 years prior—at age 56—and likely progressed through Levels 1.5 and 2 Neurocognitive Impairment before passing. Under the settlement agreement, assuming no offsets were applicable, his Death with CTE award would be $828,000. But had he received a qualifying diagnosis of Level 2 Neurocognitive Impairment at, for example, age 57, his financial benefit under the settlement agreement would have been $950,000. A.5741. Thus, there is little difference between the monetary award that his estate would receive for Death with CTE and a hypothetical monetary

award a comparable living class member would receive for an earlier Level 2 Neurocognitive Impairment diagnosis. In short, as the District Court held, "the benefits for Death with CTE are not more generous than the benefits for those who receive Qualifying Diagnoses while alive." A.145.

Some Objectors make the related argument that only 14% of the settlement class is expected to receive a qualifying diagnoses of Level 1.5 or Level 2 Neurocognitive Impairment, while 96% of deceased former NFL players whose brains have been examined at Boston University have been found to have CTE. *See* Armstrong Br.33-34. Even assuming that these figures are valid, which is far from clear, they do not undermine the fairness of an agreement designed to provide compensation to those manifesting serious neurocognitive symptoms during their lifetimes. If a retired player has the good fortune not to manifest such symptoms, he will still receive the benefits associated with the BAP and those provided under the CBAs. But he will not receive compensation from a fund designed to address deficiencies he does not suffer. Put differently, 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.[6]

[6] Notably, Objectors' McKee study reported that of the 12 former NFL players with Stage III CTE she studied, "one individual was asymptomatic." A.3192.

2. Exclusion of mood and behavioral problems allegedly associated with CTE is consistent with the overall structure of the settlement agreement and in no way undermines its fairness.

Some Objectors contend that the settlement agreement is unfair because it does not compensate certain symptoms allegedly associated with CTE's earlier stages. *See, e.g.*, Armstrong Br.36-37. This argument too is based on a misunderstanding of the settlement.

CTE Stages I and II allegedly result in mood and behavioral problems. A.140. The settlement agreement, however, does not provide compensation for the mood or behavioral problems associated with any pathology. Objectors' mood and behavior exclusion arguments are thus not CTE-specific. Indeed, other Objectors complain about the exclusion of mood and behavior claims more generally. But the exclusion of mood and behavioral problems was intentional and reasonable. While mood and behavioral problems at times can be very serious, they unfortunately are common in the general population. They can also be caused by a number of different factors wholly unrelated to CTE, head trauma, or NFL football. Moreover, retired NFL football players are disproportionately subject to several risk factors for such problems wholly apart from their actual time on the field, such as sleep apnea, high Body Mass Index, exposure to severe lifestyle changes, and drug abuse. A.3495. As one of the many medical expert declarations submitted to the District Court explained, it would be difficult for players to "establish[] a causative relationship"

between "mood and behavior symptoms that they may be experiencing" and NFL play. A.3417-18 (Schneider Decl. ¶18). These symptoms are "quite common in the general population," and may be attributable "to any number of other, independent risk factors," such as lifestyle changes and aging. A.3426 (Schneider Decl. ¶39).

Effectively tying mood and behavior issues to CTE is more problematic still in light of the "nascent" state of the relevant science. A.136. As the District Court found, researchers "have not reliably determined which events make a person more likely to develop CTE" and "researchers have not determined what symptoms individuals with CTE typically suffer from while they are alive." A.137. "No diagnostic or clinical profile for CTE exists." A.139. "[N]o one can conclusively say that someone had CTE until a scientist looks at sections of that person's brain under a microscope," and "Objectors do not dispute this fact." A.136-37; A.136 n.48. These factual findings were amply supported by the record and are controlling on appeal. *See* A.3155 (Paul McCrory, et al., *supra* at 257) (It is "agreed that a cause and effect relationship has not as yet been demonstrated between CTE and concussions or exposure to contact sports. At present, the interpretation of causation in the modern CTE case studies should proceed cautiously."). And other studies not in the record below provide additional confirmation. *See, e.g.*, Report from the First NIH Consensus Conference to Define the Neuropathological Criteria for the Diagnosis of Chronic Traumatic Encephalopathy, http://perma.cc/yg4k-qkcf (last

updated Mar. 31, 2015) ("[T]he nature and degree of trauma necessary to cause" CTE observed during autopsies "remain[s] to be determined.").[7]

Although the NFL Parties have unique incentives to provide fairly for the community of retired NFL football players, this remains at bottom a settlement of litigation. It is hardly surprising then that the terms of the settlement reflect the difficulties of proving certain claims. Indeed, it is commonplace for settlements to provide different benefits based on the relative strengths of various claims. *See, e.g.*, *Klein v. O'Neal, Inc.*, 705 F. Supp. 2d 632, 639-40, 658 (N.D. Tex. 2010) (approving settlement providing different recoveries for different supplements because it "reasonabl[y]" accounted for "problems proving causation … if the case were tried."); *In re Oil Spill by Oil Rig "Deepwater Horizon"*, 295 F.R.D. 112, 156-58 (E.D. La. 2013) (approving settlement compensating only those conditions for which there was a reasonable medical link to the oil spill). And while the settlement compensates for diagnoses related to relatively severe neurocognitive and

[7] The Faneca Objectors claim that the District Court ignored their CTE-related scientific evidence. Faneca Br.42-44. Not so. The District Court addressed at length a study by one of the Faneca Objectors' key experts and found that this study (and the McKee study already discussed) are representative of the body of literature on which Objectors rely and the limitations of current medical knowledge about CTE. *See* A.137-42. The Faneca Objectors may disagree with the District Court's conclusions based on its review of the scientific evidence proffered by the parties, but there is no support for the claim that the court failed to consider all of the relevant evidence. The court issued a thorough and thoughtful opinion addressing all of the relevant science and acted well within its discretion in developing its conclusions.

neuromuscular impairments, despite the enormous obstacles class members would have faced in establishing such claims, those obstacles would be greater still when it comes to obtaining compensation for mood and behavioral problems strongly correlated with risk factors independent of NFL playing time.

Class counsel, for their part, have a responsibility to distinguish between claims that can be more readily proved if settlement is not reached and claims that face distinct litigation difficulties. From the outset, class counsel recognized that the NFL Parties would negotiate payment only for conditions that were "objectively verifiable" and "serious." A.3576 (Seeger Decl. ¶22). Class counsel, after reviewing the medical literature, concluded that mood and behavioral symptoms cannot be "scientifically connected in a one-to-one manner" with football. A.3572-73 (Seeger Decl. ¶17). Symptoms such as depression and mood swings, counsel concluded, have "many known causes" and are "prevalent" in the general population "independent of participation in football." *Id.* Class counsel agreed to omit mood and behavior symptoms because of the "substantial evidentiary and legal challenges" involved in linking them to NFL play. *Id.* Thus, despite the complaint of the Jones Objectors and the Brain Injury Association of America ("BIAA"), as *amicus*, it is perfectly logical for the settlement to treat mood and behavior claims differently from serious neurocognitive impairments. Once again, if individual class members have a substantially different assessment of the viability of their mood and behavior

claims, the proper resort was to opt out, rather than to object to a settlement that provides immediate and substantial benefits to class members manifesting serious neurocognitive impairments.

3. The exclusion of a qualifying diagnosis for Death with CTE following final approval of the settlement agreement is fair and reasonable.

Objectors also assail the differential treatment of Death with CTE before and after the final approval date of the settlement agreement. *See, e.g.*, Armstrong Br.32; Jones Br.33. But as the District Court appreciated, that differential treatment reflects the material difference between a living class member who can benefit prospectively from the comprehensive benefits of the settlement agreement, including the BAP, and a deceased player diagnosed with CTE who cannot directly benefit from those comprehensive provisions, but nonetheless should receive an award designed to approximate those benefits. As the District Court put it, the retrospective Death with CTE benefit is reasonably designed to serve as "a proxy for Qualifying Diagnoses deceased Retired Players could have received while living." A.136.

In recognition of this dynamic, the District Court rightly concluded that "[s]ound reasons exist to distinguish between Retired Players with CTE who died before the Final Approval Date and those still alive after that date." A.144. "The Death with CTE benefit provides awards to families of Retired Players with compensable symptoms who died before the Settlement became operative, because

neither Retired Players nor their families had sufficient notice that they had to obtain Qualifying Diagnoses." A.144-45. The District Court also noted that there is a distinct risk to providing Death with CTE benefits prospectively: "A prospective Death with CTE benefit would incentivize suicide because CTE can only be diagnosed after death." A.144.

It is true that under the settlement agreement the estate of a retired NFL football player who dies with CTE the day after final approval will not receive a Death with CTE financial benefit. Armstrong Br.36. But that is not a result of unfairness in the settlement; it reflects the reality that the line has to be drawn somewhere and a logical place to draw a line that reasonably distinguishes between prospective and retrospective benefits is the date of final approval.

4. The release of future CTE-related claims is fair and reasonable and a critical component of the settlement.

Some Objectors contend that in order for the settlement to be fair and reasonable it must carve out future CTE-related claims. Faneca Br.38. Doing so, however, would fundamentally alter the bargain struck by the parties after long and hard-fought negotiations and deprive the NFL Parties of a comprehensive release that is a critical component of any settlement.

As already explained, the settlement agreement provides substantial financial benefits to those who manifest serious neurological deficits allegedly related to CTE. *See supra* Section II.B.1. That should conclusively establish that the release of CTE-

related claims is fair and reasonable. If CTE-related claims were not released as a part of the settlement, the end result would be a potential double recovery for the settlement class. Retired players would be able to receive financial benefits from the Monetary Award Fund in connection with Levels 1.5 and 2 Neurocognitive Impairment—without establishing any causal connection between their symptoms and NFL play—and then turn around and claim damages based on the same symptoms, conditions, and impairments in a CTE-based lawsuit.

Related objections that the settlement agreement wrongly "freezes [the] science" of CTE in place miss the mark. Faneca Br.39. Even if the science surrounding CTE develops such that CTE can be diagnosed in living individuals, the settlement would not be unfair. The settlement compensates manifested symptoms associated with serious deficits resulting from neurocognitive impairment, not pathologies. If the ability to diagnose an underlying pathology improves substantially, it will not undermine the fairness of a settlement based on impairments, rather than pathologies. And if, as is likely, medical advances allow better and earlier identification of impairments and qualifying diagnoses, class members will only benefit. Finally, as with so many of the Objectors' arguments, this concern about future scientific advances ignores the basic dynamic of a settlement and the possibility of opt out. There is uncertainty in any litigation, and a settlement inevitably resolves that uncertainty by offering immediate benefits in exchange for

the release of all claims, including future claims, some portion of which could prove more valuable than the settlement's benefits if every uncertainty were to break in favor of the Plaintiffs. No one knows for sure what the future of CTE science holds, but no breakthrough will eliminate the substantial preemption and specific causation obstacles faced by class members nor eliminate the substantial, concrete, immediate benefits available under the settlement. If a class member firmly believes that a breakthrough in science that will strengthen his claims lies just around the corner, then the available recourse is to opt out, not to scuttle a settlement that is fair, reasonable, and more than adequate based on the currently available scientific evidence.

C. The Settlement's Offsets Are Fair and Reasonable and Reflect the Underlying Strength of Class Members' Claims.

As previously noted, the settlement agreement provides for various offsets to the financial benefits paid to retired NFL football players under the Monetary Award Fund. Those offsets account both for the relative strength of an individual class member's claim and for the reality that in some circumstances neurocognitive or neuromuscular deficits may be less likely to have resulted from NFL play. *See* A.96 (The "differing levels of compensation in the Settlement reflect the underlying strength of the Class Members' claims." (citing *Pet Food*, 629 F.3d at 347 (affirming district court's conclusion that differing awards to class members "reflect the relative value of the different claims," not "divergent interests between the allocation

groups")); *In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2000 WL 1222042, at *21-*22 (E.D. Pa. Aug. 28, 2000) (approving personal injury class settlement providing range of monetary awards based on severity of injury). While the settlement agreement does not require retired players to prove that their neurocognitive or neuromuscular deficits were a direct result of their time as an NFL player, the offsets provide for commonsense adjustments where the medical evidence supports a heightened likelihood that the deficits observed were the result of something else.

There is nothing out of the ordinary about the offsets singled out by Objectors. Tying the amount of compensation to the degree of alleged injury suffered by class members is by no means uncommon. *See, e.g.*, *Pet Foods*, 629 F.3d at 347. As the District Court held, the eligible season offset "is a reasonable proxy for Retired Players' exposure to repetitive head trauma in the NFL." A.97. "Retired Players with brief careers endured fewer hits, making it less likely that NFL Football caused their impairments." *Id.* And the stroke and TBI offsets account for the fact that "Retired Players who suffered from Stroke or severe TBI outside of NFL Football[] would find it more difficult to prove causation if they litigated their claims, justifying a smaller award." *Id.*

1. The eligible season offset

As noted, one of the critical principles that runs throughout the settlement is tethering the amount of compensation to the exposure to repetitive head impacts while playing in the NFL. The settlement thus sensibly reduces compensation awards for players who participated in fewer than five eligible seasons. A.5629. At the risk of stating the obvious, this offset accounts for the fact that the fewer seasons played, the less the exposure to risk. The settlement's definition of "eligible season" reflects this commonsense principle. In general, a retired NFL football player receives credit for a season if he was on a team's active list for at least three regular or postseason games or if he was on the list for at least one such game and then spent at least two such games on a reserve list because of a concussion or head injury. A.5602. The District Court recognized that "Eligible Seasons are a proxy for exposure to concussive hits." A.161.

The BIAA criticizes tethering compensation to the amount of play. BIAA Br.19-20. It notes that a player can incur a brain injury in his first season or at any time. But that argument by *amicus* ignores the theory of recovery advanced by the actual Plaintiffs in this litigation: that *repeated* exposure to concussive hits over the course of their football careers increased their risk of certain conditions. *See, e.g.*, A.1126; A.1137; A.1139; A.1145-46; A.1151-52; A.1154-55; A.1164; A.1167-68. It also ignores the District Court's factual findings: The District Court expressly

concluded that "Retired Players with brief careers endured fewer hits, making it less likely that NFL Football caused their impairments." A.160.[8]

Andrew Stewart, a retired NFL football player, accepts that underlying principle but criticizes the definition of eligible season as too strict. Stewart Br.14-23. He contends that the definition ignores players' exposure to harm during training camp, preseason games, and practice while on injured reserve. But any proxy will be imperfect, and a class member that played a disproportionate amount of time on preseason squads had the option to opt out.[9] And in a case about exposure to

[8] The BIAA raises several other arguments relating to the BAP not pressed by any of Objectors on appeal. This Court "need not ... reach issues advanced only by amici." *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 465 n.6 (3d Cir. 2000). In all events, BIAA's arguments do not undermine the settlement. For example, BIAA argues that the BAP is unfair because it fails to permit diagnosis of brain injury by diffusion tensor imaging (DTI). BIAA Br.31. But this exclusion is consistent with the critical principles governing the settlement agreement, which does not compensate brain injury *qua* brain injury. Rather, it compensates certain, enumerated manifested neurocognitive and neuromuscular impairments allegedly associated with repetitive head trauma. As BIAA does not argue that DTI would aid in diagnosing these impairments, its inclusion within the BAP testing regime would make little sense. Its exclusion is therefore entirely reasonable.

[9] Mr. Stewart would prefer the use of "credited season" set forth in the NFL Retirement Plan, under which he generalizes that a player earns a credit for seasons spent on injured reserve regardless of when during the season the player was placed on that list. *See* Stewart Br.13. But giving credit for time served on injured reserve prior to the third game of the regular season for an injury other than a concussion or head injury makes no sense because that player is unlikely to have experienced the same level of exposure as other players. Moreover, use of a "credited season" would be to the detriment of certain settlement class members because, unlike an "eligible season," it fails to provide credit for participation on a practice, developmental or

repetitive injuries from football, the offset sensibly focuses on years in which players were active for multiple regular or post-season games. Certainly, such a definition does not call into question the validity of the overall Settlement or suggest that the District Court abused its discretion.

After the fairness hearing, the District Court requested that the parties modify the settlement to provide credit for players who played overseas in NFL affiliate leagues, such as NFL Europe.[10] A.79-80. Mr. Stewart claims that affording credit to players who competed in NFL Europe illustrates the settlement's unfairness because there may be an instance in which an NFL Europe player receives credit for playing in three regular season games while his domestic NFL counterpart had more exposure due to a longer training camp and preseason but did not play in three regular season games. *See* Stewart Br.20. Any rubric used to calculate season credit may result in some conceivable outlier situations. The District Court acted well within its discretion in approving the parties' agreed-upon formula.

Mr. Stewart also asserts that it will be difficult for players to determine at what point they were placed on injured reserve during a season. Stewart Br.23-24. But

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taxi squad roster unless the player is vested in the Retirement Plan and earned a Credited Season in 2001 or later. *See* A.2216.

[10] Before the fairness hearing, the settlement afforded no credit to players who competed in NFL Europe. The District Court requested a change to the settlement to address concerns raised by several Objectors, and the parties complied.

the settlement requires the NFL and its Member Clubs to furnish, in good faith, any relevant records in its possession. A.5636. And if a retired player is unable to provide objective evidence of his eligible seasons to the claims administrator, the administrator may consider the reasons for the lack of evidence and decline to apply the eligible seasons offset. A.5636-37.

Additionally, Mr. Stewart contends that the District Court could not have properly assessed the settlement's reasonableness because the parties used "calendar years" and "credited seasons," rather than eligible seasons, in their analyses. Stewart Br.12-14. This, Mr. Stewart maintains, led the District Court to overvalue the settlement. Mr. Stewart misunderstands the purpose of the financial analyses to which he refers. At the time that the Special Master reviewed the analyses, the settlement called for a monetary cap and the analyses assessed whether this amount was sufficient to pay all claims. The current settlement creates an uncapped award fund, and the District Court did not rely on financial modeling in approving it.

2. The stroke offset

The reasons for including the stroke offset are equally straightforward. *See* Faneca Br.49-50. The District Court correctly held that the stroke offset "represent[s] scientifically documented risk factors for the Qualifying Diagnoses"—after someone suffers from a stroke he or she is substantially more likely than before to manifest the symptoms covered by the Levels 1.5 (early dementia) and 2

(moderate dementia) Neurocognitive Impairment qualifying diagnoses. A.97. Indeed, "Stroke is the second most common cause of dementia." A.158.

Moreover, the fact that a retired NFL football player has suffered a stroke does not preordain that his Monetary Award Fund payment will be subject to the stroke offset. If the retired player can show that his qualifying diagnosis is not the result of his stroke, or if the stroke occurred at the time he played in the NFL, then he will receive the full benefit he would have otherwise received had the stroke never happened. A.5630. And even if he cannot make such a showing, he will still receive a substantial payment from the Monetary Award Fund—one quarter of what a similarly-situated retired player who did not have a stroke would receive—despite the fact that his symptoms were likely not the result of his time in the NFL. That is more than fair, reasonable, and adequate.

3. The TBI offset

For the same reasons, the settlement reduces a retired NFL football player's award if he sustained a "severe" traumatic brain injury "unrelated to NFL Football play" before receiving a qualifying diagnosis. A.5609; A.5629. The severe TBI offset requires "open or closed head trauma resulting in a loss of consciousness for greater than 24 hours" unrelated to NFL play. A.4073. The District Court sensibly reasoned that the scientifically established "strong association" between a severe traumatic brain injury and the qualifying diagnoses justifies the offset. A.158.

The offset is consistent with the settlement's aim to reduce compensation when it is probable that a retired player's neurocognitive and neuromuscular impairments did not result from NFL football. Severe traumatic brain injuries correlate strongly with dementia, Alzheimer's, and Parkinson's, and a single severe traumatic brain injury is a prominent risk factor for these conditions. A.3501. The offset is thus "scientifically justified." A.3477. As with the stroke offset, a retired NFL football player who suffered a severe brain injury may avoid the offset by showing that his severe traumatic brain injury did not cause the qualifying diagnosis. A.5630. The District Court reasonably endorsed this portion of the settlement agreement.

D. The District Court's Handling of the Fairness Hearing was Well Within Its Discretion and Entirely Unobjectionable.

The Gilchrist Objectors complain that the settlement agreement is somehow tainted because the District Court exercised its discretion to prohibit live witness testimony at the Settlement fairness hearing. Gilchrist Br.12-13. But, as this Court has frequently stated, district courts have broad discretion to manage the civil proceedings over which they preside. *See, e.g*, *United States v. Schiff*, 602 F.3d 152, 176 (3d Cir. 2010) ("We give a district court broad discretion in its rulings concerning case management both before and during trial."). Class action proceedings are no exception; district courts "possess[] broad discretion to control proceedings and frame issues for consideration under Rule 23." *In re Hydrogen*

Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008), *as amended* (Jan. 16, 2009).

The District Court's exercise of discretion in conducting the fairness hearing was entirely unobjectionable and certainly well within the bounds of discretion. Live testimony is not required at a class action settlement fairness hearing. Objectors fail to cite a single precedent suggesting as much. And, in this case, live testimony would have been of no use. The fairness hearing was a daylong affair that involved extensive argument. The NFL Parties, class counsel, and Objectors submitted reams of materials for the District Court's consideration in connection with the settlement, including dozens of scientific and medical affidavits and supporting materials. The Objectors were also given extensive opportunities to present written objections to the settlement, including the submission of supplemental briefing after the fairness hearing. No more was required.

III. The Anderson Objector's Arguments Are Meritless.

Mr. Anderson raises several additional issues, none of which has merit. First, Mr. Anderson challenges the District Court's order striking his untimely objections. On July 7, 2014, the District Court established October 14, 2014, as the deadline for objections. A.1332-33. As noted above, district courts have broad discretion to manage the proceedings in a class action. *Hydrogen Peroxide*, 552 F.3d at 310. Mr. Anderson cites no authority suggesting that striking untimely objections is an abuse

of discretion, and the NFL Parties are aware of none.[11] The District Court also acted within its discretion in not permitting Mr. Anderson's counsel to appear at the fairness hearing when Mr. Anderson had no recognized objections. The District Court afforded an opportunity to speak to ten counsel who filed timely objections on behalf of various class members.

* * * *

In sum, the settlement here represents the product of a hard-fought compromise through arm's-length negotiations between sophisticated counsel well-apprised of the relevant science and the potential legal hurdles to litigating these claims. The result is an agreement that provides substantial compensation to address serious neurocognitive impairments. It provides immediate benefits to some class members and ensures the availability of compensation for years to come without the need to overcome the difficulties of proving causation or avoiding preemption. As is true in virtually any class settlement, some class members will be happier about the details of settlement than others. But all class members had a full understanding of the settlement's terms and the opportunity to opt out, and differences in treatment

[11] The only objection that Mr. Anderson attempted to raise below that he maintains on appeal relates to the lien-resolution program. Public Citizen, participating as *amicus*, also raised this objection, and the District Court addressed it on the merits. A.184-86. This objection is addressed in class counsel's response brief.

among class members reflect differences in the strengths of their underlying claims to compensation. The settlement benefitted from the involvement of a court-appointed mediator, a special master, and the active supervision of the District Court. The result is an agreement that is at least fair and reasonable and more than adequate to provide compensation for the class.

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's decision certifying the class and approving the settlement agreement.

Respectfully submitted,

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September 22, 2015

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that, pursuant to L.A.R. 46.1, I am admitted to and a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I hereby certify that this brief complies with the type-volume requirements and limitations of Fed. R. App. P. 32(a) and this Court's September 2, 2015 order extending the word limit for this brief to 21,000 words. Specifically, this brief contains 20,506 words in 14-point Times New Roman font.

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I hereby certify that this brief complies with L.A.R. 31.0(c) because the virus detection program Kaseya Antivirus, Version 10.2.1.23a, has been run on the file and no virus was detected.

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

September 22, 2015

s/Paul D. Clement
Paul D. Clement