IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-2290

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION

APPELLANT: SCOTT GILCHRIST, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF CARLTON CHESTER "COOKIE" GILCHRIST

REPLY BRIEF OF THE GILCHRIST ESTATE

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I. REPLY BRIEF

The NFL and the group of players attempting to advance the settlement either outright ignore or fail to grapple with the issues raised by Gilchrist, as explained below.

A. There Is No Credible Excuse for Why District Court Abandoned a *Daubert* Inquiry

Gilchrist showed why the District Court was required under *Larson*, as a class fiduciary, and under *Amchem*, *Comcast*, and *Blood Reagents*, to reach *Daubert*-forged conclusions about scientific issues underlying and dictating the material terms of the settlement, including as it relates to the Rule 23 elements. [Gilchrist Br. at pp. 15-21]. There is hardly any response to this.

The NFL's response brief contains one reference to *Daubert*:

> 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.

[NFL Resp. Br. at p. 41]. What the NFL is in essence claiming is that the settlement is somehow "too big to fail" – that the settlement was warranted because it avoided the prospect of *Daubert* inquiries. This Court should decline the NFL's invitation to accept intellectual inadequacy in exchange for settlement expediency.

The NFL position is the antithesis of what *Larson*, *Amchem*, *Comcast*, and *Blood Reagents* seek to ensure. This body of law requires *Daubert*-forged inquiries into issues underlying a settlement and Rule 23 factors so that absent class members are protected. These protections are even more important where, as here, the disparities between and among class members are great. The District Court could not possibly have conducted a "close inspection" under *Amchem* without utilizing *Daubert*, much less with any adversarial discovery at all.

The players pushing the settlement respond to the *Daubert* problem by stating, "a district court does not have a freestanding, independent obligation to conduct a *Daubert* inquiry as to every *unchallenged* expert when evaluating the fairness of a settlement, or the propriety of certifying a litigation class." [Player Opp. Br. at p. 56, n. 17 (emphasis in the original)]. This response concedes that the District Court needed to have conducted a *Daubert* inquiry with respect to challenged expert issues (of which there were many). Moreover, this response does not avoid the additional problem that, in order for the District Court to have acted as a class fiduciary under *Larson*, the District Court had to have a better grasp of the science underlying the settlement. The District Court was, by its own admission, resigned to a lack of understanding about the science. [Appx. at A.127,

A.129, A.117 ("The case implicates complex scientific and medical issues not yet comprehensively studied [. . . and] the association between repeated concussive trauma and long-term neurocognitive impairment remains unclear.").]. Conducting *Daubert* inquiries was the only way for the District Court to have met its duties to the class in a settlement involving personal injuries that was so heavily reliant upon (if not entirely reliant upon) "science." [Appx. at A.5367 ("And at the end of the day this was a science-driven case.")].

B. The Players Pushing the Settlement Do Not Understand How *Daubert* Relates to Ascertainability

The players pushing the settlement attempt to ridicule the lack of an *ex ante* ascertainability analysis and notion that the absence of *Daubert*-forged conclusions about the various scientific issues at play would have deprived the District Court of the ability to properly analyze ascertainability. [Players' Opp. Br. at p. 43, n. 9]. The players pushing the settlement instead suggest that the *ex-post* assessment program obviates the need for any *ex ante* ascertainability considerations. They are wrong.

The players ignore that there is no objective and simple way for NFL players to know how they are covered by the settlement. As even explained by the lawyers for the players advocating the settlement at the final approval hearing:

> ***So if somebody doesn't rise to the level of a qualifying condition***, Your Honor, but they're diagnosed with impairment not rising to the level of qualifying condition we will get them that important additional testing medical treatment and pharmaceutical care, ***if necessary***. . . . ***And the diagnoses are all going to be made by qualified professionals, and the diagnosis will be set at the date that the diagnosis is made by a medical professional for the purposes of compensation***. . . . And one thing that we all encountered, those of us who talk to players all the time as we have throughout, ***is they may have a diagnosis which is just short of a qualifying diagnosis***. Well they're not out of the program, ***they can keep coming back if these are degenerative diseases***, and we don't wish these on anybody, but God forbid a player digresses and ***he gets sicker he can reapply for these awards, and that can happen throughout his lifetime***.

[Appx. at 5347-5350 (emphasis added)]. Thus, even according to the lawyers for the players pushing the settlement, there is no certainty or *Daubert*-forged structure for determining whether and how NFL players will get benefits and if so, the nature of the benefits. In other words, there is insufficient "objective criteria," *Byrd v. Aaron's Inc*., 784 F.3d 154, 163 (3d Cir. 2015), in the *ex post* assessment program.

The fact that the players "can keep coming back" underscores the administrative infeasibility of the settlement process. *Byrd*, 784 F.3d at 163. The objectors explained this succinctly at the final approval hearing:

> So even if a class member has opted into the settlement, even if a class member has participated in the baseline assessment program and met that deadline, ***that class member would still face several hurdles before he can recover on even a valid claim***.

> A qualifying diagnosis can only come from what's called under the settlement a MAF physician, and that just means a monetary award fund physician. And that person has to be approved by the NFL, and the player has to pay for the visit and the examination. Now the settling parties come back and say, well, we actually need our own physicians, these MAF physicians to protect against fraud. ... If these physicians are put in place to protect against fraud, then other hurdles faced by class members before recovery are totally unnecessary. ***Why would there be a complicated claims package that must be submitted even after you've received a qualifying diagnosis from an NFL-approved doctor.***
>
> ***Why does the NFL get to appeal a decision where its own doctor that it picked decided that a class member deserves an award***. These burdens simply make no sense if, as the NFL and class counsel suggests, their own physicians are already policing against fraud. . . . [***E]ven after a player receives a diagnosis from an NFL picked doctor, he still faces many hurdles before actually recovering. He must submit a claim package within two years of receiving a qualifying diagnosis***.

[Appx. at 5444, 5445 (emphasis added)]. As explained, the assessment program is set up for major disputes about whether and the extent to which NFL players will receive benefits. These imminent disputes will be resolved (if at all) with respect to scientific arguments that the District Court did not itself resolve, much less under *Daubert*.

On remand, and with *Daubert*-grounded conclusions about the "science" underlying the assessments and the extent to which NFL players will obtain benefits (if any) from the settlement, the District Court can properly analyze ascertainability and the metes and bounds of any

assessment program. Otherwise, this Court is invited to create a rule of law that supplants *ex ante* ascertainability considerations for an indeterminate, *ex post* administrative quagmire. The District Court should draw lines in the sand *ex ante* under *Daubert*, rather than allow for idiosyncratic lines to be drawn on a class-member-by-class-member basis as the NFL elects to fight recovery.

C. The NFL Concedes Subject Matter Jurisdiction and this Will Help the Class Obtain a Better Settlement on Remand

Gichrist argued that the District Court improperly discounted what the class could have achieved given the NFL's subject matter jurisdiction argument. [Gilchrist Br. at pp. 21-22]. In response, the NFL stated, "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." [NFL Br. at p. 75]. The NFL has effectively conceded that its preemption motion should have been denied. Otherwise, the NFL has an affirmative duty to inform this Court that it does not have subject matter jurisdiction. [Gilchrist Br. at pp. 21-22].

Thus, by conceding subject matter jurisdiction, on remand, the District Court can impose additional relief for the class, as the District Court is not hamstrung by the uncertainty of the NFL's preemption argument.

DATED: October 7, 2015

Respectfully submitted,

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DECLARATION OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 1,456 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Further, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately-spaced typeface using Microsoft Office Word 2003. The specific typeface is Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2015, I served the foregoing document by causing a true and correct copy thereof to be delivered via the Court's CM/ECF system to all counsel of record.

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