In The

United States Court of Appeals

for the

Third Circuit

Case No. 15-2292

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION,

ANDREW STEWART,

Appellant.

Appeal from an Order entered in the United States District Court for the Eastern District of Pennsylvania

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

Andrew Stewart's objections to the Settlement center around the definition of "Eligible Season." Despite the centrality of this term to the calculation of the amounts that will *actually be paid out*, it is undisputed that the Settlement has *never* been valued – *by anyone* – based on "Eligible Season" because the data did not exist. The NFL *valued* the Settlement using the established rubric of "Credited Season" – *the very rubric urged by Mr. Stewart* – but the Settlement will pay the Class Members based on the more restrictive – and cheaper – definition of "Eligible Season." Although argued to be a reasonable proxy for exposure to concussive hits, the definition of "Eligible Season" is no such thing, as evidenced by the undeniable fact that under the proposed settlement, an NFL Europe player does better under this Settlement than his counterpart in the NFL who had *twice* the exposure to potential concussions.

ARGUMENT

A. Contrary to the NFL's Contention, the District Court Relied on the Actuaries' Inflated Valuation Analyses in Approving the Settlement.

The actuaries for the both the NFL and Class counsel have artificially inflated the anticipated value of the Settlement because they failed to use Eligible Season data in making their analysis. (*See* A.1581, fn. 11.) Mr. Stewart brought this critical flaw to attention of the District Court, but it was ignored.

In its attempt to sidestep the obvious disconnect between the methodology of *valuing* the Settlement, on one hand, and *paying out* under the Settlement, on the other, the NFL contends that the "District Court did not rely on financial modeling" performed by its actuary or Class Counsel in approving the Settlement. (NFL's Brief at p 83.) Yet, 57 pages earlier, the NFL acknowledges that the District Court's review of the "massive record before it" *included* "hundreds of pages of actuarial reports and underlying data." (*Id.* at p. 26.) How could it be otherwise? The District Court acknowledged that it was required to "compare 'the amount of the proposed settlement' with 'the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing.'" (A.131 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 806 (3d Cir. 1995).) The *only* way to make that comparison was to use the global value of the settlement as calculated by the parties' own actuaries. And that is precisely what the District Court did, noting that the "direct distributions" to Class Members were estimated by the actuaries to be $900 million to $950 million (on a non-discounted basis). (A.179.) Judge Phillips, who mediated the settlement negotiations, also relied on the "analyses conducted by the independent economists or actuaries retained by the parties" in concluding that the settlement is "fair and reasonable." (A.1122.) In short, the global value of the Settlement was a critical factor in the District Court's decision

to approve it. And that global value was used in selling the Settlement to the Class Members.

The NFL also argues that the expert "financial modeling" became irrelevant once it agreed to uncap the award fund. Not so. Uncapping does not affect how the offsets apply to reduce the award to each individual player. Nor does it change the fact the Class will receive less value for their claims than advertised.

B. There is No Reasonable Basis to Provide Eligible Season Credit to NFL Europe Players While Refusing Similar Credit to Retired Players for NFL Training Camp and Preseason Games.

Principles of fairness led the District Court to urge the parties to provide Eligible Season credit to players who were on the active roster of NFL *Europe* teams for three games. (A.79-80.) The parties accepted the District Court's recommendation, but in so doing, created another flaw in the Settlement: domestic NFL Retired Players may receive less value from the Settlement than NFL Europe class members even though the domestic NFL player had substantially more exposure to concussive hits. For example, a domestic NFL player who survived seven or eight weeks of NFL training camp and played in *six* NFL games (four preseason and two regular season) before being placed on injured reserve receives *no* credit for that season. His NFL Europe counterpart, however, who had only two weeks of NFL Europe training camp and was on the active roster for three NFL Europe games is credited with one-half of an Eligible Season. In short, an

NFL Europe player does better under this Settlement than the domestic NFL player who had twice the potential exposure to concussions. This is inherently unfair.

The NFL does not argue that NFL Europe games were somehow riskier than domestic NFL training camp and preseason games. The NFL does not dispute the evidence submitted by Mr. Stewart, which demonstrated that Retired Players had substantial exposure to concussions during training camp and preseason games at a time when the NFL was turning a blind eye to the problem.[1] Nevertheless, the NFL asserts that any settlement scheme will create "outlier situations" so there is no reason to reject this Settlement. (NFL Brief at p. 82.) Neither the parties nor the District Court performed any analysis on which the NFL could reliably make the assertion that the line drawing in this Settlement affects only a few outliers. The failure of the Settlement to provide Eligible Season credit for training camp and preseason games remains a real flaw in the Settlement for which neither Class Counsel nor the NFL has offered any substantial defense.

[1] Indeed, such exposures continue to affect players even though the NFL no longer denies the existence of a concussion problem. Just this year, a rookie player received a severe concussion on third day of the Green Bay Packers' training camp. Sixteen days later, the Packers cut him. After continuing to experience symptoms of the concussion, the player announced his retirement in early September on the recommendation of his physicians. *See* http://tinyurl.com/ov9tmty (last accessed October 1, 2015). The retirement was reported on September 7, 2015, after Mr. Stewart filed his opening brief.

CONCLUSION

Mr. Stewart's objections to the settlement cannot be dismissed as mere disagreements with acts of discretion or line-drawing. Rather, Mr. Stewart's objections stem from the inescapable fact that the rubric for determining eligibility offsets under the Settlement was never involved in the actual valuation of the Settlement, and therefore *could not* have been considered by the District Court because the data did not exist. Mr. Stewart's objections are further bolstered by the demonstrable fact that under the customized definition of "Eligible Season" urged by Class Counsel and the NFL, similarly situated former players are not treated equally. For the reasons stated above and in Mr. Stewart's Opening Brief, this Court should reverse the District Court's decision to approve the definition of Eligible Season and remand for further proceedings.

Respectfully submitted,

/s/ Michael H. Rosenthal

Dated: October 5, 2015

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CERTIFICATION OF ADMISSION TO BAR

I, Michael H. Rosenthal, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

/s/ Michael H. Rosenthal
Michael H. Rosenthal

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 1,131 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

/s/ Michael H. Rosenthal

Dated: October 5, 2015 Michael H. Rosenthal

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In Re: National Football League Players Concussion
Injury Litigation

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I, Elissa Matias, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

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via **electronic filing and electronic service.**

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

Sworn to before me on October 5, 2015

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/s/ Elissa Matias
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