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

BRIEF FOR APPELLANT

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 15-2292

In re NFL Players Concussion

v.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Andrew Stewart makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: N/A

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

N/A

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

Michael H. Rosenthal
(Signature of Counsel or Party)

Dated: June 10, 2015

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STATEMENT OF JURISDICTION

Appellant Andrew Stewart appeals the Final Order and Judgment and Memorandum Opinion Approving Settlement of April 22, 2015, as amended by the District Court on May 8, 2015 and clarified on May 11, 2015. (A.40, 47, 55, 58.) Appellant timely filed a Notice of Appeal in the District Court on May 21, 2015. (A.27.) The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2). The Final Order and Judgment, as amended and clarified, dismissed the Class Action Complaint with prejudice. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Did the District Court abuse its discretion by approving a settlement of a class action brought by former NFL players when there was substantial evidence of exposure to concussive hits during training camp, preseason, and the first two regular season games, but a Retired Player will not be credited with an "Eligible Season" unless he played in three regular season games?

This issue was raised in the Objection filed by Mr. Stewart on September 22, 2014. (ECF No. 6175.) The District Court addressed this issue in certifying the class and approving the settlement. (A.159-162, 175.)

STATEMENT OF RELATED CASES

This Court previously heard an appeal from an order preliminarily certifying a class and preliminarily approving the settlement. *In re NFL Players Concussion Injury Litig.*, No. 14-8103. The Court dismissed that appeal for lack of jurisdiction on the grounds that the order was not a class certification order reviewable under Fed. R. Civ. P. 23(f). 775 F.3d 570, 587-88 (3d Cir. 2014). Other retired players have appealed the District Court's judgment in the class action. Nos. 15-2206, 15-2217, 15-2230, 15-2234, 15-2272, 15-2273, 15- 2290, 15-2291, 15-2294, 15-2304, 15-2305. The Court consolidated the appeals in an order entered on June 16, 2015.

STATEMENT OF THE CASE

The background and procedural history of the case are described in the District Court's Memorandum Opinion of April 22, 2015, Approving Settlement. (A.58.) Appellant Andrew Stewart is a Retired NFL Player who played the position of defensive end from 1989 until 1993, first with the Cleveland Browns, then the Cincinnati Bengals, and finally, in 1993, with the San Francisco 49ers. (A.2190-91.) Mr. Stewart is forty-nine years of age and has been diagnosed with Parkinson's Disease. (*Id*.) Pursuant to the Settlement, Parkinson's Disease is a Qualifying Diagnosis that entitles Mr. Stewart to a Monetary Award.

Specifically relevant to Mr. Stewart's appeal is the definition of "Eligible Season." Under the Settlement, Retired Players with at least five Eligible Seasons

receive the maximum Monetary Award for their Diagnosis and age, absent other applicable Offsets. Players with fewer than five Eligible Seasons receive a reduced Monetary Award.

Under the Settlement, a player placed on injured reserve before the third game of the regular season will not receive credit for an Eligible Season unless the stated reason for injured reserve status at the time was a concussion or some other sort of head injury. (A.5602.) Mr. Stewart, after playing one full season for the Browns in 1989, was on injured reserve for parts or all of the next four seasons, after suffering injuries in training camp or preseason games. (A.2190.) Under the Settlement's definition of Eligible Season, Mr. Stewart may qualify for as little as one or two Eligible Seasons, which could reduce his Monetary Award by as much as eighty percent (80%). Other class members, of course, could see similar reductions.

Mr. Stewart timely filed an objection to the definition of Eligible Season. (ECF No. 6175.) In support of his objection, Mr. Stewart submitted evidence showing that training camp and preseason games saw players ferociously competing with each other for spots on the team. (A.2189-2212.) Exposure to potentially harmful hits and concussions during this time was routine, yet players were compelled to continue playing or risk losing a roster spot. (*Id.*) Despite this evidence, the District Court overruled Mr. Stewart's objections (and those of other

class members who also challenged the definition of Eligible Season), concluding that the Settlement Agreement's definition of Eligible Season was fair and reasonable. (A.161-162, 175.)

STATEMENT OF FACTS

Andrew Stewart played in the NFL from 1989 until 1993. This was an era when training camps were full contact, twice-a-day for 3.5 hours each session. (A.2191.) Securing a position on the team depended on how much a player could impress the coaches with the physicality of his play. (*Id.*) Training camp and preseason games were Mr. Stewart's opportunity to demonstrate toughness and an ability to hit as hard or harder than other defensive ends. (*Id.*) As another objector stated: "Guys are trying to leave indelible impressions on . . . coaches who will determine the short/long term fate or their employment. As a consequence, the hitting in scrimmages and live practices was (is) just as intense, if not more so, than in the regular season games." (A.3097.)

When Mr. Stewart played, these collisions often resulted in helmet-on-helmet contact. (A2191.) This drill was repeated multiple times during many of the practice sessions. (*Id.*) One example of a practice technique was the "Oklahoma Drill." It involved two players lined up a few yards opposite each other in a confined corridor about one yard wide. Players ran at each other "full

tilt" until one of the players was blocked to the ground or the ball carrier is tackled.[1]

Mr. Stewart played one full season for the Browns in 1989. He was put on injured reserve for parts or all of the next four seasons because of injuries to his Achilles tendon, knee, and hand suffered during training camp or preseason games. *A.2190.*) But, even while on injured reserve, he was a member of the team, under contract. Although he did not play in games while on injured reserve, he was required to return to practice as soon as his injury healed sufficiently. (A.2191.) Those practices, like those in training camp, were full contact. (*Id.*)

Mr. Stewart is (now) 49 years old and he suffers from Parkinson's Disease. (*Id.*) Parkinson's Disease is a Qualifying Diagnosis under the terms of the Settlement. (A.5606.) The amount of his Monetary Award is a function of his age at time of diagnosis and the number of Eligible Seasons that are credited to him.

Section 2.1(kk) of the Settlement Agreement, as amended defines "Eligible Season" as follows:

> "Eligible Season" means a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was: (i) on a Member Club's Active List on the date of three (3) or more regular season or postseason

[1] An example of the Oklahoma Drill can be seen at http://www.nfl.com/videos/nfl-training-camps/0ap2000000222471/Not-your-average-football-drill (last accessed August 11, 2015). According to one expert, this drill increases the likelihood of concussions the more it is repeated. (A.2197.)

> games; or (ii) on a Member Club's Active List on the date of one (1) or more regular or postseason games, and then spent at least two (2) regular or postseason games on a Member Club's injured reserve list or inactive list due to a concussion or head injury. A "half of an Eligible Season" means a season in which a Retired NFL Football Player or deceased Retired NFL Football Player was on a Member Club's practice, developmental, or taxi squad roster for at least eight (8) regular or postseason games; or (ii) on a World League of American Football, NFL Europe League, or NFL Europa League team's active roster on the date of three (3) or more regular season or postseason games or on the active roster on the date of one (1) or more regular or postseason games, and then spent at least two (2) regular or postseason games on the World League of American Football, NFL Europe League, or NFL Europa League injured reserve list or team inactive list due to a concussion or head injury.

(A.5602.)

Although the definition of Eligible Season definition establishes a three-regular-season-game threshold, the analysis performed for Class Counsel and the NFL for valuing the Settlement in the first place involved no such limitation. Both the analysts for Class Counsel and the NFL used "proxies" for Eligible Season data. The analyst for Class Counsel used "calendar data" but acknowledged that the calendar year proxy "may overstate the number of seasons played." (A.1581, fn. 11.) The NFL's analyst used "Credited Season" data obtained from the NFL's pension and disability plan. (A1713, fn. 11.) Importantly, the definition of Credited Season contains no three-regular-season-game threshold for injured players. (A.2216.) Mr. Stewart, for example, has four "Credited Seasons" in the

NFL for purposes of his eligibility for retirement and disability benefits, even though he spent substantial time on injured reserve. (A.2219.) So the NFL, in valuing the settlement, used an established metric of "Credited Seasons" familiar to all players, but the Settlement uses a different – and more restrictive – metric of "Eligible Seasons" which, by definition, will result in a smaller payout to the Retired Players.

STANDARD OF REVIEW

This Court reviews a district court's decision to certify a class and approve a settlement for an abuse of discretion. *In re Pet Food Prods. Liab. Litig*., 629 F.3d 333, 341 (3d Cir. 2010) (citation omitted). An abuse of discretion occurs when "the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Id*. (citation and internal quotation marks omitted). In *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), this Court articulated nine factors for the district court to consider in determining the fairness of a proposed settlement. The district court's findings under the *Girsh* test are factual and will be upheld unless clearly erroneous. *In re Pet Food Prods. Liab. Litig*., 629 F.3d at 350.

SUMMARY OF ARGUMENT

The reason this class action litigation exists is because the NFL, for years, fostered an environment that glorified big hits and helmet-to-helmet contact, yet knowingly denied any connection to the long-term health effects any connection to the long-term health effects. Ironically, the proposed Settlement actually perpetuates the whitewashing of concussions and head injuries. Under the definition of Eligible Season approved by the District Court, the NFL will actually save money on the settlement compared to its own actuarial projections because Retired Players who were unlucky enough to suffer injury early in the season (or even the preseason) will see their awards substantially reduced.

Girsh required the District Court to evaluate the reasonableness of the settlement fund in light of the risks of establishing liability and damages. 521 F.2d at 157. The number of Eligible Seasons is one of only three factors in determining the amount of any payment to a class member. Thus, the definition of Eligible Season is a critical component of the value of the settlement to class members. Yet, neither Class Counsel nor the NFL ever analyzed the value of the Settlement using data that actually satisfied the definition of Eligible Season they crafted.

The NFL analyzed the value of the Settlement using "Credited Season" data, which was readily available from the NFL benefit plans. (A.1713, fn. 11.) Based on the NFL's own analysis, roughly sixty percent of class members (12,705 of

20,554) have four or fewer "*Credited Seasons*." (A.1734.) In other words, more than half the class, at least, will have a downward adjustment to their award based on length of playing time. Because the definition of Eligible Season uses a three-regular-season-game threshold, however, a Retired Player may have fewer "Eligible Seasons" than "Credited Seasons," which does *not* have that threshold for injured players.

In light of the importance of the definition of Eligible Season to the value of the Settlement and the fact that neither the NFL nor Class Counsel used the correct metric in performing the valuation analyses, the District Court should have "drilled[ed] down into the case and into the agreement to make an independent, scrupulous analysis" of the stated rationale for excluding training camp, preseason games, and the first two regular season games from the definition of Eligible Season. *See In re Pet Food Prods. Liab. Litig.*, 629 F.3d at 35 (internal quotations omitted). The District Court erred by: (1) not challenging the NFL's and Class Counsel's failure (or inability) to use Eligible Season data to value the Settlement; and, (2) ignoring the substantial evidence of exposure to harmful hits and concussions during training camp and preseason.

The District Court concluded that the Settlement Agreement's definition of Eligible Season was fair for what appear to be two basic reasons. In each instance, the Court seemed to accept the assurances of the NFL and Class Counsel at face

value. First, the District Court determined that NFL players who played more than three regular season games were exposed to more potentially harmful hits than those who did not meet that threshold. (A. 160.) While perhaps true, the District Court simply ignored the ferocity of training camp and preseason games, especially for second and third string players. Until recently, and certainly in the era that Mr. Stewart played in, concussions were deliberately ignored and players were compelled to return to the practice field. Practice and preseason games were the time for most players to win or lose a position on the team, and they had no choice but to keep playing or risk losing a roster spot. Indeed, it was this deliberate indifference to head injuries and concussions that precipitated this lawsuit.

According to the Class Complaint, until at least 2010, the NFL "openly disputed that any short-term or long-term harmful effects arose from football-related sub-concussive and concussive injuries." (A.716, ¶105.) For players *who have a Qualifying Diagnosis* but were placed on injured reserve before the third game of the regular season, the three-regular-season game threshold actually rewards the NFL for its efforts to downplay the danger of concussions and conceal their risks from the players. The exception for players placed on injured reserve before the third game due to a concussion has no real value. Because of a gladiator-type atmosphere the NFL itself created to sell tickets and boost television

ratings, virtually *no one, at any time in the season,* was placed on injured reserve "because of" a head injury. There is certainly no evidence in the record that *any* Retired Player was placed on injured reserve before the third game of the regular season for that reason.

Consider further that, under the terms of the Settlement, a Retired Player from NFL Europe who practices for two weeks and plays in only three games will still receive one-half of an Eligible Season. But a Retired NFL Player who went through *eight* weeks of training camp and played in *six* games (four preseason and two regular season) receives no credit at all. Is the NFL suggesting that NFL Europe players were exposed to greater risk of concussions during their regular season games than NFL players were in their preseason games? There is no evidence in the record to support this anomalous result. But there are likely to be far more Retired NFL Players negatively affected by the conveniently narrow Eligible Season definition than NFL Europe players who benefit.

Second, the District Court agreed with the NFL and Class counsel that the process for determining the number Eligible Seasons was fair. (A.175.) The District Court assumed that the NFL could easily produce Eligible Season data when necessary. (*Id.*) But there is no evidence for that conclusion. To contrary, in connection with this litigation, the NFL produced Credited Season data, which is not the same as, and may actually overstate, a Retired Player's Eligible Seasons.

While Retired Players may have records of Credited Seasons available to them, that data will *not* be proof of the number of his Eligible Seasons because of the differing definitions. Requiring a Retired Player who played years or decades before submitting a claim to prove exactly he was placed on injured reserve unnecessarily increases the potential for disputes and appeals. Nevertheless, the District Court overruled Mr. Stewart's objection and his proposal to use the Credited Season definition in place of or as a supplement to the proposed definition of Eligible Season.

ARGUMENT

THE DISTRICT COURT ERRED BY APPROVING THE SETTLEMENT'S DEFINITION OF "ELIGIBLE SEASON" WITHOUT PROPERLY ANALYZING THE EFFECT OF THE THREE REGULAR SEASON GAME THRESHOLD ON THE VALUE OF THE SETTLEMENT TO INDIVIDUAL PLAYERS.

A. The District Court Could Not Evaluate the Value of the Settlement Because the Analyses Performed for the NFL and Class Counsel Did Not Use Data that Satisfied the Definition of "Eligible Season."

The number of Eligible Seasons is one of only three determinants of the payout to class members (the other two being age at time of diagnosis and type of diagnosis). Yet, neither the NFL nor Class Counsel ever analyzed the value of the settlement *based on the Settlement's definition of* "*Eligible Season*." Under *Girsh*, the District Court was required to examine whether the Settlement fund was fair and adequate "given the risks of establishing liability and damages and the likely

return to the class of continued litigation." *In re Pet Food Prods. Liab. Litig.*, 629 F.3d at 351. The three-regular-season-game threshold required by the Eligible Season definition could have a substantial impact on the value of the settlement for individual Retired Players even though the total Settlement fund is uncapped. Because the valuation analyses did not use the correct data (*i.e.* Eligible Seasons), the District Court could not possibly make the "required value comparisons. . . to determine the adequacy of the settlement amount." *Id.* at 355.

The analysis performed for Class Counsel used "calendar years" as the basis for determining the number of Eligible Seasons. (A1581, fn. 11.) As the analyst acknowledged, that database "may overstate the number of seasons played." (*Id.*) The NFL's analyst used a "Credited Season" database obtained from the NFL benefit plans. (A.1713, fn. 11.) Unlike the definition of "Eligible Season," however, a "Credited Season" *includes* seasons spent on injured reserve, regardless of when during the season the player was placed on that list. (A.2219.) Put simply, the analysts for both Class Counsel and the NFL valued the Settlement using data that *captured* preseason and training camp concussive hits, though such exposure is *excluded* by the Settlement's more restrictive requirements. Mr. Stewart, for example, has four "Credited Seasons" in the NFL for purposes of his eligibility for retirement and disability benefits, even though he spent substantial

time on injured reserve. (A.2219.) Under the proposed Settlement, he has as few as one "Eligible Season."

Because of this analytical disconnect, the District Court should have "drilled down" into the issue of whether the proposed definition of Eligible Season was reasonable. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d at 351. There was substantial evidence in the record of concussion exposure during training camp and preseason, which the District Court did not consider in analyzing whether the definition of Eligible Season was reasonable. A court must "independently and objectively *analyze the evidence and circumstances before it* in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *In re Gen Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995). The District Court erred by not analyzing the evidence in *this* record of training camp and preseason concussive risk, instead simply accepting at face value the settlement rationale offered by Class Plaintiffs' counsel and the NFL that the three regular-season-game minimum adequately accounted for the risk of exposure to potentially harmful hits.

1. The Three-Regular-Season Game Threshold Fails to Account for the Ferocity of Training Camp and Preseason Games.

The NFL has for decades glorified head-to-head collisions and minimized concussions as mere "dings" or an instance of "getting your bell rung." (A.1174 ¶

240, A.1190, ¶ 335.) In so doing, the NFL created a warrior ethos that encouraged players to deny or hide their concussive symptoms and return to the field as if nothing had happened. "[A] failure to play through such an injury creates the risk that the NFL player will lose playing time, a starting position, and possibly a career." (A.1136, ¶ 49.) This was just as true during training camp, preseason, and the first two games of the regular season as it was during the remainder of the regular season, and perhaps even more so. For many players, especially those who were second and third stringers, jobs were won and lost during training camp and the preseason. Players are "'risk[ing] life and limb to catch the coach's eye' for a spot on an NFL roster." (A.1145, ¶ 88.)

The crux of the Class Complaint is that, for decades, the NFL *deliberately ignored and concealed* the risk of head injuries and fostered a culture where concussions and head injuries were dismissed as minor "dings," despite known risks of short and long-term neurological damage.[2] (A.1126, ¶ 3.) The NFL

[2] As recently as July 2013, one NFL owner dismissed the link between concussions and neurological injury as mere "speculation":

> Bengals owner Mike Brown spoke to reporters last Tuesday and said about concussions: "It's not only not proven, it's merely speculation that this is something that creates some form of dementia late in life. Our statistics—the ones I've seen anyway—don't show that ... I'm not convinced that anybody really knows what concussions bring, what they mean later in life, if anything.''

(CONTINUED . . . .)

expected Retired Players to play through any injury, including one to the head, despite the risk of additional neurological injury, and the players felt compelled to do so to maintain their position on team. (A.1136, ¶ 49, A.1145, ¶ 88.) In that environment, it is not surprising that training camp and preseason concussions were concealed or dismissed as dings, and that few (if any) players were placed on injured reserve – at any time in the season – "because of" a concussion or head injury. Although a Retired Player *may* be credited with an Eligible Season if he was on injured reserve for two or more games due to a concussion or head injury, there is *no* evidence in the record of *any* Retired NFL Football Player being placed on injured reserve for that reason. This exception to the three-regular-season-game threshold is an illusion.

But that does not mean that Retired Players did not actually *suffer* concussions or sub-concussive impacts during the preseason or early in the regular season *before* being placed on injured reserve for a different injury. Even in this more enlightened era, "teams don't release injury reports until Week 1 of the regular season, meaning most concussions from training camp are left off the [official injury] list."[3] Nevertheless, there was ample evidence submitted to the

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(A.2198.)

[3] *See* PBS Frontline, "What We've Learned From Two Years of Tracking Concussions," http://www.pbs.org/wgbh/pages/frontline/sports/concussion-

(CONTINUED . . . .)

District Court by Mr. Stewart and others that potentially harmful hits and concussions were, and still are, a regular feature of training camp and the preseason.

In years past, training camps were far more brutal than in today's NFL. Mr. Stewart's experience is typical for older retired players: two-a-day, full contact practices in an era when the NFL ignored the risk of concussions and sub-concussive hits. Another Objector, Eugene Moore (who did not appeal) had this to say based on his experience in the NFL in the early 1970s:

> [A] significant number of a NFL football player's collisions occur during training camp and preseason. This reality is especially relevant for players "employed" by the NFL prior to the last 2 years: "live" practices, drills and scrimmages having since been reduced in acknowledgment by the NFL of the physical forces that contribute to [ALS, Parkinson's, Alzheimer's and Dementia] and tau protein creation.
>
> That said, most players in the training camp or preseason mode, past or present, ferociously battle to hang on to their jobs, crack the starting lineup or simply make the roster. This is the case whether the players are veteran starters, backups, rookies, free agents or coming off of injured reserve status. "It's literally crunch time!" That cauldron is a free-for-all of perpetual collisions – the competitive intensity often marked by on-the-field training camp fights. Guys are trying to leave indelible impressions on . . . coaches who will determine the short/long term fate or their employment. As a

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watch/what-weve-learned-from-two-years-of-tracking-nfl-concussions (last accessed August 11, 2015).

> consequence, the hitting in scrimmages and live practices was (is) just as intense, if not more so, than in the regular season games. In fact, the hardest concussive collision I ever experienced was in a scrimmage during my rookie season. Did I see stars? Yes! Was I woozy? Yes! Was taking myself out of play a consideration? No! That course of action wasn't even on the radar screen or in our vocabulary.

In July of 2014, the Philadelphia Eagles published an article titled "NFL's Evolution of Training Camp." (A.2200-2202.) In the 1980s, training camp lasted as long as seven weeks with routine "two-a-day" full contact practices lasting as long as 3.5 hours per practice. One former Eagles player who played from 1998-2004, an era when two-a-days were still common but full contact was somewhat less frequent, was quoted as saying:

> And for me, Training Camp gave me the opportunity to prove myself and to win a job every year. My mentality was always that I had to go out and earn a roster spot. So I was willing to do anything the coaches asked me to do to make a positive impression.
>
> I embraced the chance to make plays in practice and then in the preseason games. As a backup player, you get your most snaps in the preseason games, so I looked forward to them.

(A.2201.)

Here is how another player who played in the mid-2000s described rookie training camp experience:

> [I]t's on the field where your spot on the roster is either won or lost. This is your battlefield, and the spoils of this war are employment in the National Football League. In

> this sport, there is no space for the weak. Everyday, every play must be executed with the intent to impress.
>
> Being drafted in the later rounds afforded me little-to-no latitude in taking a single day off. Everyday was a Super Bowl.
>
> Some of the most violent drills in training camp would come during our full-contact, goal-line stand. This was 11-on-11 with the ball at the 1-yard line. We would run play after play of full-speed, head-on-collision football.

(A.2208.)

Even though training camps today are shorter and helmet-to-helmet contact more limited, players are still exposed to potentially harmful hits. At least 61 concussions were *reported* during the 2014 preseason. (A.2193-2194.) In previous eras, the very same eras during which the Retired Players competed, these concussions were routinely concealed or dismissed by teams, doctors and the NFL as minor "dings." So a Retired Player placed on injured reserve for orthopedic or other injuries during the pre-season or early in regular season could *easily* also have suffered concussions that are not covered by the Settlement.

Sixty-one reported concussions in just a few weeks was a yellow flag overlooked by the District Court. Despite the evidence presented to the Court that preseason and training camp provided substantial opportunity for concussive events, the District Court accepted the contention of the NFL and Class Counsel that "Eligible Season," as currently defined, is a reasonable "proxy" for exposure

to concussive hits. (A.160.)[4] By "substitut[ing] the parties' assurances or conclusory statements for its independent analysis of the settlement terms," the District Court erred when it overruled Mr. Stewart's objection. *In re Pet Food Prods. Liab. Litig.*, 629 at 350.

2. Credit for NFL Europe Underscores the Unfairness of the Definition of Eligible Season.

NFL Europe was a developmental league for the NFL. Its season was shorter: two weeks of training camp and ten regular season games. There were *no* preseason games. (A.3369.) Following the Fairness Hearing and the District Court's Order to Address Certain Issues, the Settlement was modified to provide "half of an Eligible Season" to players who were on the active roster of NFL Europe team for three or more regular season games. As a result, a class member who had two weeks of NFL Europe training camp and was on the active roster for three NFL Europe games is credited with half of an Eligible Season. By contrast, a

[4] In overruling Mr. Stewart's objection (and those of other players) on the definition of Eligible Season, the District Court concluded that:

> The Eligible Season serves as a proxy of the number of concussive hits a Retired Player experienced as a result of playing NFL football. . . .Retired Players with brief careers endured fewer hits, making it less likely that NFL Football caused their impairments.

(A.160.)

Retired 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 at all. *In other words, an NFL Europe player does better under this Settlement than his counterpart in the NFL who had twice the exposure to potential concussions*. There is simply no evidence in the record that the risk of concussions and harmful hits was greater in NFL Europe regular season games than in NFL preseason games.

While all settlements involve some amount of line drawing, the location of those lines must be reasonable. *See In re Oil Spill by Oil Rig Deepwater Horizon*, 910 F. Supp. 2d 891, 932 (E.D. La. 2012) *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014). The line drawn by the District Court here is *unreasonable*: class members with potentially *more exposure* to concussive hits may receive less value from the settlement than class members with lesser exposure.

If the touchstone for evaluating the fairness of the payment allocation among class members is potential exposure to concussions, the Eligible Season definition should ensure that similarly situated class members are treated equally. *See In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 273 (3d Cir. 2009) (approving settlement where fund "was allocated in such a way that policyholders who likely incurred the most damage are entitled to a larger proportion of the recovery than

those whose injuries were less severe."). The current definition of Eligible Season does the opposite by making it easier for Retired NFL Europe Players to obtain Eligible Season credits than for Retired NFL Players. This anomaly can be, and should have been fixed by adjusting the definition of Eligible Season to include credit for training camp and preseason games.

3. Contrary to the District Court's Finding, Players on Injured Reserve Did Practice.

The District Court also overruled the objection of Mr. Stewart because, "[r]etired players on injured reserve did not play or practice." (A.161.) While players on injured reserve did not play in games, the second part of the District Court's finding – that Retired Players on injured reserve did not practice – is not supported by the record. Indeed, the *only* record evidence on that point is from Mr. Stewart. In Mr. Stewart's era, players on injured reserve actually returned to practice as soon as their injury healed sufficiently. (A.1291.) Those practices were full contact. (*Id.*) In other words, many players on injured reserve served as a kind of "practice squad" for the team and continued to risk receiving concussive head injuries. Because the District Court based its decision, at least in part, on a clearly erroneous finding of fact, the District Court abused its discretion in overruling Mr. Stewart's objection.

The Settlement Agreement already provides one half of an Eligible Season to a Retired Player who can show that he was on a team's practice, developmental

or "taxi squad" roster for at least eight regular or postseason games. In other words, the Settlement recognizes that practices can and do expose players to harmful contact. Players who practiced during the season while technically still on injured reserve should not have their settlement payment reduced merely because they were placed on injured reserve before the third game of the regular season.

B. The Procedure for Establishing the Number of Eligible Seasons is Unfair Because Eligible Season Data (as Opposed to Credited Season Data) Will be Difficult to Obtain Years and Decades after a Player Retired from the NFL.

The District Court concluded that the Settlement's process for establishing the number Eligible Seasons was fair "because the NFL and the individual Member Clubs are required to turn over, in good faith, any records they possess." But the NFL used Credited Season data in analyzing the value of the Settlement to class members. Presumably, it would have used Eligible Season data if it were readily available. That it did not suggests that there will be difficulty in the future determining whether a Retired Player was placed on injured reserve before or after the third regular season game. Requiring a Retired Player who played years or decades before submitting a claim to prove exactly when he was placed on injured reserve unnecessarily increases the potential for disputes and appeals.

The NFL's actuary analyzed the value of the proposed Settlement based on "Credited Seasons," not "Eligible Seasons," because "*the Credited Season data*

served as a reliable proxy for Eligible Season." (A.1713, fn 11(emphasis added).) Accordingly, using "Credited Season" to calculate the Monetary Award rather than "Eligible Season" *will not affect the projected amount of money the NFL can expect to pay out over the life of the Settlement*. By contrast, using "Eligible Season" to determine the Monetary Award could *substantially reduce* the amount of money paid by the NFL and *substantially reduce* the value of the Settlement to the players. Under these circumstances, the decision to use the term "Eligible Season" instead of "Credited Season" is baffling.

CONCLUSION

A definition of "Eligible Season" that fails to account for training camp, preseason, and time spent on injured reserve before third game of the regular season is unfair to players who have a Qualifying Diagnosis. A Retired Player *who has a Qualifying Diagnosis* should not have his Monetary Award substantially reduced because he was unlucky enough to have been placed on injured reserve before the third game of the regular season when he could easily have suffered neurological damage from concussive head impacts that occurred during training camp or the preseason. This Court should reverse the District Court's decision to approve the definition of Eligible Season.

Respectfully submitted,

/s/ Michael H. Rosenthal

Dated: August 17, 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 5,725 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: August 17, 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.**

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Sworn to before me on August 17, 2015

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Commission Expires January 8, 2017

/s/ Elissa Matias
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