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

INITIAL BRIEF OF THE GILCHRIST ESTATE

Cullin O'Brien, Esq.
Cullin O'Brien Law, P.A.
6541 NE 21st Way
Ft. Lauderdale, FL 33308
cullin@cullinobrienlaw.com
Tel: (561) 676-6370
Fax: (561) 320-0285

Antonino G. Hernandez, Esq.
Antonino G. Hernandez, P.A.
4 SE 1st St. 2nd Floor
Miami, FL 33131
Tel: (305) 282-3698
Fax: (786) 513-7748
hern8491@bellsouth.net

Jared H. Beck, Esq.
Elizabeth Lee Beck, Esq.
Beck & Lee Trial Lawyers
Corporate Park at Kendall
12485 SW 137th Ave., Suite 205
Miami, FL 33186
Tel: (305) 234-2060
Fax: (786) 664-3334
jared@beckandlee.com
elizabeth@beckandlee.com

Counsel for Scott Gilchrist– Appellant
[Additional counsel appear on signature page]

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I. STATEMENT OF THE CASE AND ISSUES PRESENTED

A. This Court Should Overturn the NFL Concussion Settlement Because the District Court Failed to Make Definitive, *Daubert*-Forged Conclusions Concerning the "Scientific" Propositions Supporting the Settlement

The District Court approved a class action settlement regarding the lifelong effects of repeated head trauma for retired NFL players.[1] Yet, the District Court failed to make definitive assessments about the "scientific" propositions at the core of the settlement, shunning adversarial discovery on the "science" and any *Daubert* conclusions.

The NFL, a group of retired NFL players, and their interested lawyers, packaged the settlement as "science driven" and "scientifically based."[2] Everything about the settlement flowed from this "science," including how the complex and diverse multitude of class members' head trauma issues throughout their respective and varying, tumultuous lifetimes would be

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[1] Joint Appendix ("Appx.") at A.40-A.55.

[2] Appx. at A.5367 ("And at the end of the day this was a science-driven case. Everything that the plaintiffs' lawyers needed to know about the science was in the medical literature. . . ."), A.5394 ("The offsets contained in the settlement for age of diagnosis and for years played are appropriate proxies for both causation and exposure and are fully supported by established medical science.").

assessed, valued, and analyzed.[3] The disparities among class members is great, as exemplified by the actuarial data of how class members would be compensated.[4]

The District Court had a basic, fiduciary duty to act as a guardian of the class. *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 122 (3d Cir. 2012). Because this was a personal injury settlement, under *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), the District Court was required to undertake a "close inspection" of Rule 23's factors, like predominance and ascertainability. Moreover, since there was "science" in dispute as it pertains to the Rule 23 factors, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *In re: Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015), required the District Court to undertake *Amchem*'s "close inspection" through the lens of *Daubert*.

By turning its back on *Daubert* scrutiny of the "science" underlying the settlement, the District Court failed these mandates, abdicated its fiduciary role

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[3] Appx. at A.5367-A.5368 (Tr. at pp. 33-34) ("The parties consulted with and relied on their respective independent medical experts in the fields of neurology, neuropsychological, and other relevant specialties in order to understand the science regarding the diseases associated with concussive head trauma and their pathologies to evaluate the strength of plaintiffs' claims… ."), A.5394 ("The offsets contained in the settlement for age of diagnosis and for years played are appropriate proxies for both causation and exposure and are fully supported by established medical science.").

[4] Appx. at A.1751-A.2188.

to absent class members, and engaged in fundamentally incomplete analyses of Rule 23's class certification factors.[5]

B. The District Court Explicitly Acknowledged the Absence of Definitive Conclusions about the "Science" Driving the Settlement

To assess the "unclear" and "not yet comprehensively studied" science, the District Court solely relied on the self-serving papers and articles submitted by the parties.[6] There was no adversarial discovery on the "science," much less any discovery in the case at all.[7] When asked for the opportunity to present and examine witnesses at the final approval hearing, and to conduct discovery in advance of the final approval hearing, the District Court denied the requests.[8]

Thus, the final approval hearing was not a proceeding that could have allowed the District Court to conduct a close inspection of the validity of the

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[5] Appx. at A.80-A.105.

[6] Appx. at A.2235-A.2949, A.3119-A.3357; A.3394-A.4061, A.4281-A.4351, A.4352-A.4371, A.4429-A.4473, A.5102-A.5334 (Ex. 1-82; Ex. 1-30; Ex. 1-14; Ex. B; Ex. 20-22; Ex. A-B; Ex. 1-27).

[7] Appx. at A.5404 ("There's been no discovery in this case. It's extraordinary that a settlement of this nature would be reached without discovery, and there's been no disclosure by class counsel of any informal discovery.")

[8] Dkt. No. 6344, Appx. at A.122 ("Like the legal authorities on preemption, the scientific literature discussing repetitive mild traumatic brain injury is publicly available. Formal discovery, or discovery from the NFL Parties, would not have enhanced Class Counsel's position on causation.").

"scientific" concepts underlying everything about the settlement. Instead, the District Court joked about how it would not even be alive to adjudicate issues arising from the settlement it was approving, and the District Court even needed clarification on the term "TBI" – traumatic brain injury.[9] All told, and as is manifestly evident by its final approval memorandum, the District Court acquiesced in not having definitive conclusions about the "science" underpinning everything about the settlement and a proper Rule 23 analysis.[10]

Indeed, the District Court embraced its lack of understanding of the "science," recognizing the rift in developing opinions about how the human brain is affected by head trauma throughout one's lifetime.[11] The District Court concluded that if there was not a scientific consensus on how and to what extent the fate of retired NFL players is related to head trauma, the District Court did not need to make definitive scientific assessments either as it relates

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[9] Appx. at A.5347, A.5350-A.5352, A.5378, A.5413-A.5414, A.5466, A.5471.

[10] Appx. at A.127, A.129 ("[T]he available research is not nearly robust enough to discount the risks that Class Members would face in litigation . . . "[I]nvestigation into repetitive mild TBI, typical of Retired Players, is relatively new . . . Complicating matters, scientists have only recently begun to standardize the criteria used to discuss the differing levels of severity of TBI. Therefore it is difficult to determine any one study's utility to Class Members' case. Given this background, continued litigation would be a risky endeavor. Even if Class Members ultimately prevailed, a battle of the experts would be all but certain.").

[11] *Id*.

to the fairness of the settlement or the Rule 23 factors, particularly not under *Daubert*.[12] The District Court also determined that *Daubert* scrutiny was unnecessary to vet strenuous scientific objections to the settlement, since the parties advocating for the settlement themselves agreed on the "science."[13]

For the District Court, "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."[14] This echoed how the interested lawyers pushing for the settlement put it, "[Y]ou have to take the science as it exists at the time you're negotiating."[15]

C. The District Court Did Not Have a Reliable Basis upon Which to Grant Final Approval of the NFL Class Action Settlement

The District Court did not test the fairness of the settlement or Rule 23's factors of predominance and ascertainability with definitive, *Daubert*-forged conclusions about how, when, and the extent to which retired NFL players manifest issues resulting from repeated head trauma over their lifetimes. In

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[12] *Id*.

[13] Appx. at A.101.

[14] Appx. at A.117.

[15] Appx. at A.5376.

fact, the District Court questioned but did not even determine whether it had subject matter jurisdiction over the case to begin with, given the NFL's collective bargaining agreements. [16]

D. The Issues Presented in this Appeal

Incorporating the foregoing specific references to the record per L.A.R. 28.1(a)(1), Gilchrist[17] presents the following issues on appeal:

1. Do *Amchem*, *Comcast*, and *Blood Reagents* require this Court to reverse the District Court's approval of the class action settlement with a remand order directing the District Court to:

(a) create a factual record that tests the "science" underlying and dictating the material terms of the settlement through adversarial discovery proceedings;

(b) make a determination about the validity of the "science" underlying the settlement pursuant to *Daubert*; and,

(c) reassess the settlement and the Rule 23 factors, such as predominance and ascertainability.

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[16] Appx. at A.65, A.124-A.126.

[17] Appellant Scott Gilchrist, individually and on behalf of the estate of Carlton Chester "Cookie" Gilchrist, will be referred to herein as "Gilchrist."

2. Is this Court required to reverse the District Court's approval of the class action settlement with a remand order directing the District Court to make a legal determination as to whether it has subject matter jurisdiction over the case, given the NFL's collective bargaining agreements.

II. STATEMENT OF RELATED PROCEEDINGS

This is a consolidated appeal. Gilchrist submits his own brief, and other settlement objectors will submit their own. This Court previously denied other settlement objectors the ability to take an appeal from the District Court's order preliminarily approving the settlement. *In re: National Football League Players Concussion Injury Litigation*, 775 F.3d 570 (3d Cir. 2014).

III. STATEMENT OF FACTS

This Court has already been presented with and has recited statements of facts in adjudicating the Rule 23(f) petition. *In re: NFL*, 775 F.3d at 572-575. This Court will be presented with statements of facts from the parties to this appeal. For the sake of judicial economy, Gilchrist vectors this statement of facts to the issues Gilchrist uniquely raises in this appeal.

Gilchrist is the son of former NFL player Carlton Chester "Cookie" Gilchrist, who died from Chronic Traumatic Encephalopathy ("CTE").[18] CTE

[18] Appx. at A.4028.

is a progressive degenerative disease of the brain found in athletes (and others) with a history of repeated head trauma. [19]

Gilchrist timely objected to the settlement based on the fact that CTE is valued less than Amyotrophic Lateral Sclerosis ("ALS"), when CTE is a hallmark of having received repeated head trauma, whereas ALS is found in people who do not suffer from repeated head trauma. [20] Gilchrist also adopted the objections of other settlement objectors which, *inter alia*, collectively argued that the assessment, ascribed value and analysis of the various, difficult conditions suffered by retired NFL players were fundamentally unfair and scientifically unjustified.[21] The actuarial data alone, predicting compensation, speaks to the extreme differences between class members.[22]

At the final approval hearing, the NFL and the interested lawyers representing a group of retired NFL players repeated the mantra that this is a

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[19] Appx. at A.5408.

[20] Appx. at A.1290, A.4028, A.5408-5409 ("[Y]ou can't get CTE without being hit in the head and repeatedly. In contrast . . . ALS . . . can be found in the general population…and many of us here know people who never played football who contracted [ALS].").

[21] Appx. at A.1-A.11, A.14-A.39, Dkt. No. 6364.

[22] Appx. at A.1751-A.2188.

"science" driven settlement.[23] Counsel for the objectors disputed the scientific assumptions used to justify the settlement.[24] The District Court denied the settlement objectors the ability to present live testimony at the final approval hearing regarding the "science."[25] At the final approval hearing, the District Court joked that it would not be alive to deal with attendant problems regarding the settlement,[26] asked what "TBI" – traumatic brain injury was,[27] had superficial analytical exchanges about how the settlement treats dementia and CTE with the lawyers that underscored the District Court's lack of understanding of the science,[28] sometimes simply asking the interested lawyer

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[23] Appx. at A.5367, A.5394 ("And at the end of the day this was a science-driven case. Everything that the plaintiffs' lawyers needed to know about the science was in the medical literature. . . . The offsets contained in the settlement for age of diagnosis and for years played are appropriate proxies for both causation and exposure and are fully supported by established medical science.").

[24] Appx. at A.134-A.189, Dkt. No. 6456.

[25] Dkt. No. 6344, Appx. at A.5456 ("…I have ruled that anyone who is represented by counsel . . . cannot speak. This is not a criminal case. You have no right of allocution. That's my ruling.").

[26] Appx. at A.5466.

[27] Appx. at A.5378.

[28] Appx. at A.5347, A.5350-A.5352.

for the group of retired NFL players and the NFL's lawyer whether they "agree[d]" on the scientific premises.[29]

In its subsequent final approval memorandum, the District Court repeatedly noted that it was unable to make definitive conclusions about the science underlying the settlement and the Rule 23 factors.[30] Despite acknowledging the scientific disputes raised by the objectors, the District Court expressly disavowed having to conduct a *Daubert* inquiry regarding the science upon which the settlement was based, since the NFL and the interested lawyers representing a group of retired NFL players purportedly agreed on the science.[31] Accordingly, the District Court's predominance inquiry did not examine differences among retired NFL players in how, when, and the extent to which they manifest health issues resulting from repeated head trauma, much

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[29] Appx. at A.5413-A.5414 ("COURT: But now that you have CTE only after death I don't quite understand how you can. come to conclusions about Stage 1, Stage 2, and Stage 3. Are you asking families, is that what you're doing?"), A.5451 (THE COURT: But they do talk about mild dementia. All the papers that I read that were submitted to me refer to mild dementia.").

[30] Appx. at A.137 ("While this is true, the rigorous study necessary to understand the symptoms associated with CTE, or its prevalence, have not taken place.").

[31] Appx. at A.101 ("Here, Class Plaintiffs seek to certify a class for settlement purposes, and the NFL Parties do not challenge any expert testimony relied on to establish predominance. Thus, *Comcast* and *Blood Reagents* are inapposite to this case.")

less in the light and manner urged by the objectors.[32] Rather, the District Court focused on the similarity of the conduct that causes lasting effects from repeated head trauma – playing in the NFL, and the fact that class members experience "different symptoms with different damages."[33]

Nor did the District Court consider whether the subclasses of NFL players were ascertainable, given the scientific dispute about how, when, and the extent to which head trauma manifests in health issues over a lifetime.

The NFL and the interested lawyers representing a group of retired NFL players contended that the settlement was fair because the NFL had an unadjudicated argument that the entire case was preempted under collective bargaining agreements.[34] The District Court questioned whether it had subject matter jurisdiction due to this issue of preemption, but declined to make a ruling on jurisdiction. [35]

IV. SUMMARY OF ARGUMENT

Amchem requires "close inspection" and "heightened attention" to the Rule 23 factors where, as here, "individual stakes are high and disparities

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[32] Appx. at A.99-A.103.

[33] Appx. at A.100.

[34] Appx. at A.65, A.124-A.126.

[35] Appx. at A.65, A.124-A.126.

among class members great." 521 U.S. at 620, 626. The actuarial data alone shows the great disparities between class members in this case.

Thus, here, *Amchem* required the District Court to undertake predominance and ascertainability inquiries in light of how, when, and the extent to which retired NFL players manifest issues resulting from repeated head trauma over their lifetimes. Moreover, *Comcast* and *Blood Reagents* required the District Court to undertake those predominance and ascertainability inquiries through the lens of *Daubert*. In fact, *Daubert*-forged conclusions were a necessary prerequisite to the District Court's assessment of whether the settlement was fair.

The District Court failed these mandates and abdicated its role as guardian of the class.

Instead, the District Court abandoned intellectual rigor on the science underpinning every single Rule 23 consideration. The District Court turned a blind eye to making definitive conclusions about the science, seeking refuge in the fact that the NFL and the interested lawyers representing a group of retired NFL players were (to nobody's surprise) at peace with not conducting any adversarial discovery on the science supposedly supporting their settlement, much less any discovery at all. The District Court gave the proverbial stiff-arm to the clamoring by the objectors regarding the science, including calls for

adversarial, live testimony regarding the fundamental assumptions about how, when, and the extent to which retired NFL players manifest issues resulting from repeated head trauma over their lifetimes.

Ultimately, since the District Court had no reliable basis or conclusions about how, when, and the extent to which retired NFL players manifest issues resulting from repeated head trauma over their lifetimes, the District Court could not have possibly made a proper determination that the settlement was fair, that common issues predominate and that the class and subclasses were ascertainable, particularly considering that class members have to opt-in to the settlement within 6 months.

The District Court also failed to assess subject matter jurisdiction under the collective bargaining agreements, and improperly allowed this unsettled issue to factor into approving the settlement. The NFL and the interested lawyers suggested that the settlement was fair because the NFL may have been able to dismiss the case for lack of jurisdiction. But the District Court should not have used this as a reason to approve the settlement and grant class certification under Rule 23. The District Court had an independent duty to assess its own jurisdiction since it was called into question. In other words, the bar should not have been lowered on the intellectual rigor required to approve a

personal injury class action settlement affecting the entire lifespans of the class members simply because of the threat of a lack of jurisdiction.

This Court should reverse the District Court's order approving the settlement and granting class certification with a remand order directing the District Court to: (1) create a factual record that tests the "science" underlying the settlement through adversarial discovery proceedings; (2) make a determination about the validity of the "science" underlying the settlement pursuant to *Daubert*; (3) reassess the settlement and the Rule 23 factors, such as predominance and ascertainability; and, (4) make a legal determination as to whether it has subject matter jurisdiction over the case, given the NFL's collective bargaining agreements.

V. STANDARD OF REVIEW

The District Court's order approving the class action settlement is subject to an abuse of discretion standard. *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 122 (3d Cir. 2012). Generally, there is an abuse of discretion "where 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 omitted).

VI. ARGUMENT

A. The District Court Abdicated Its Role as Class Guardian by Failing to Make Definitive Assessments about the "Science" Upon Which the Settlement and the Rule 23 Analysis Were Based

The District Court stood as a class fiduciary in assessing the settlement and determining whether it was fair to the class and subclasses of retired NFL players. The District Court was supposed "to act as the guardian of absent class members." *Larson*, 687 F.3d at 134. The District Court abandoned the class.

The District Court repeatedly acknowledged that it was unable to make definitive assessments and conclusions about science upon which the settlement was based. Indeed, the District Court did not allow the objectors to assist with an understanding of the science through live, adversarial testimony at the final approval hearing. The self-serving papers and articles submitted by the parties were legally insufficient to enable the District Court to make definitive assessments and conclusions about the science. *See, e.g.*, *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact."); *Cleveland v. Viacom, Inc.*, 73 Fed.Appx. 736, 741 (5th Cir. 2003) ("Such speculative and self-serving expert testimony is an insufficient basis for plaintiffs' claims of concerted action."); *accord Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,

509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law ..., it cannot support a jury's verdict."); *Blood Reagents*, 783 F.3d at 187-189.

It was irrational for the District Court to determine that the settlement was somehow fair, adequate and reasonable without having a definitive grasp on how, when, and the extent to which retired NFL players manifest issues resulting from repeated head trauma over their lifetimes.

B. Without Definitive Assessments of the "Science," the District Court Failed to Abide by *Amchem's* Mandate of a "Close Examination" of the Rule 23 Factors, Like Predominance and Ascertainability

Because the class action settlement presented to the District Court involved personal injury claims, the District Court was not allowed to bargain away the rigors of a Rule 23 analysis for whether the settlement was fair. "Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard . . . that if a settlement is 'fair,' then certification is proper." *Amchem*, 521 U.S. at 622.

Although considerations of "manageability" were essentially moot given the fact that there would be no trial, the "other specifications" of Rule 23 should have been unaffected by the fact that there was a settlement. *Amchem*, 521 U.S. at 620. As explained in *Amchem*, the Rule 23 factors "designed to protect absentees by blocking unwarranted or overbroad class definitions—

demand undiluted, even heightened, attention in the settlement context." *Id*. at 620. This is because "a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id*. Moreover, as here, there is a "call for caution when individual stakes are high and disparities among class members great." *Id*. at 626. In other words, a district court's review of a proposed personal injury class action settlement requires a "close inspection." *Id*. at 620.

Without having definitive assessments about the science underpinning the settlement, the District Court was unable to analyze the Rule 23 factors with this required "close inspection." For instance, the predominance inquiry is "demanding," especially in personal injury class actions. *Amchem*, 521 U.S. at 623. And the District Court failed to analyze the element of predominance as it relates to how, when, and the extent to which retired NFL players manifest issues resulting from repeated head trauma over their lifetimes. Again, the actuarial data alone shows the great disparities between class members.

What predominance inquiry the District Court made involved the cause of the class injuries and the fact that class members have different damages. But this is a *non-sequitur*. Of course the class and subclasses were all injured as a result of playing in the NFL and have different damages. The real issue is with the settlement's ability to fully and properly appreciate how, when, and the

extent to which the class and subclasses have suffered and will suffer throughout the rest of their idiosyncratic and tumultuous lifetimes. The District Court avoided the close inspection required by *Amchem* without making definitive conclusions about the science supporting the settlement, rendering the predominance inquiry useless. As the *Amchem* court concluded:

> Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.

521 U.S. at 623.

In the same manner, the District Court undertook no consideration as to whether the class and subclasses are even ascertainable. The ascertainability inquiry requires a district court to see if (1) "the class is defined with reference to objective criteria," and, (2) if there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015). With unanswered questions about the latency of diffuse and varying symptoms over many years associated with repeated head trauma, the District Court's final approval order did not assess and could not have assessed whether and how members of the class can be ascertained under *Byrd*, especially since they have

to opt-into the settlement within 6 months.[36] The order has no utility without a proper ascertainability analysis.

C. Without Definitive Assessments of the "Science," the District Court Failed to Conduct a "Close Examination" of the Rule 23 Factors through the Lens of *Daubert*, as Required by *Comcast* and *Blood Reagents*

Under *Comcast* and *Blood Reagents*, "a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." *Blood Reagents*, 783 F.3d at 187, *citing Comcast*, 133 S.Ct. at 1432-33. The District Court acknowledged this rule, but decided that it did not apply.

The District Court found that because the NFL and the interested lawyers representing a group of retired NFL players had no disagreements about the science they were submitting in support of the settlement, there was no need for *Daubert* scrutiny of the science. In so doing, the District Court ignored the disagreements to the science by the objectors. Nor did the District Court cite any authority for the proposition that *Daubert*-forged conclusions are not necessary under *Comcast* and *Blood Reagents* where settlement objectors (as

[36] Appx. at A.5440-A.5441.

opposed to named parties) challenge expert testimony used to support Rule 23 elements.

It was not rational for the District Court to have avoided *Daubert* analyses of the science at issue, especially considering the facts that (1) the District Court noted the objectors' disagreements about the science throughout the final approval order[37] and at the final approval hearing[38]; and, (2) it was no surprise that the NFL and the interested lawyers representing a group of retired NFL players would agree on the science, having conducted no adversarial discovery and agreeing to a clear sailing fee provision for the players' lawyers of over $100 million.

If any set of facts require the protection of *Daubert*, the facts at issue here do. The intellectual and analytical mediocrity sought by the interested lawyers pushing for the settlement, that "you have to take the science as it exists at the time you're negotiating," should be condemned. This case is about the lifespans of retired NFL players who have suffered and will continue to suffer debilitating health consequences from repeated head trauma. Shunning *Daubert* as some sort of lofty and unnecessary academic exercise not worthy of

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[37] Appx. at A.134-A.189.

[38] Appx. at A.5433-5436.

use on fundamental scientific questions raised by settlement objectors, as done here, incentivizes the very race to the bottom *Amchem* sought to eliminate.

Parties trying to ram a settlement through a court in spite of strenuous objections that go to the heart of the scientific foundation of the settlement and Rule 23's factors should not be insulated from *Daubert* scrutiny. To reiterate, where a district court is asked to approve of a class action settlement regarding personal injuries, there is a "call for caution when individual stakes are high and disparities among class members great." *Amchem*, 521 U.S. at 626.

D. This Court Should Reverse the District Court for Failing to Determine Whether it Had Subject Matter Jurisdiction

The District Court acknowledged that the NFL's collective bargaining agreements may or may not devoid it of subject matter jurisdiction. Rather than decide the issue either way, the District Court used this uncertainty as a factor in the assessment of the fairness of the settlement. That was error.

Jurisdiction is an unwaivable, threshold matter. *Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 905 F.2d 42, 45 (3d Cir. 1990). ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.") (internal quotation and citation omitted). The District Court should have determined whether it had subject matter jurisdiction *vis-à-vis* the collective

bargaining agreements before proceeding further. *See, e.g.*, *Beidleman v. Stroh Brewery Co.*, 182 F.3d 225, 230 (3d Cir. 1999) ("At the outset, we must determine whether the 1985 closing agreement is a 'collective bargaining agreement' for purposes of section 301 preemption, for if it is not, we lack subject matter jurisdiction over the employees' claims.").

For instance, were the District Court to determine that it has subject matter jurisdiction (and it should), then the District Court would eliminate that unsettled question from the fairness calculus and the assessment of the objections. That will benefit the class.

VII. CONCLUSION

WHEREFORE, Gilchrist asks this Court to reverse the District Court's order approving the settlement and granting class certification with a remand order directing the District Court to: (1) create a factual record that tests the "science" underlying the settlement through adversarial discovery proceedings; (2) make a determination about the validity of the "science" underlying the settlement pursuant to *Daubert*; (3) reassess the settlement and the Rule 23 factors, such as predominance and ascertainability; and, (4) make a legal determination as to whether it has subject matter jurisdiction over the case, given the NFL's collective bargaining agreements.

DATED: August 14, 2015

Respectfully submitted,

/s/ Cullin O'Brien
Cullin O'Brien, Esq.
Cullin O'Brien Law, P.A.
6541 NE 21st Way
Ft. Lauderdale, FL 33308
cullin@cullinobrienlaw.com
Tel: (561) 676-6370
Fax: (561) 320-0285

Jared H. Beck, Esq.
Elizabeth Lee Beck, Esq.
Beck & Lee Trial Lawyers
Corporate Park at Kendall
12485 SW 137th Ave., Suite 205
Miami, FL 33186
Tel: (305) 234-2060
Fax: (786) 664-3334
jared@beckandlee.com
elizabeth@beckandlee.com

Antonino G. Hernandez, Esq.
Antonino G. Hernandez, P.A.
4 SE 1st St. 2nd Floor
Miami, FL 33131
Tel: (305) 282-3698
Fax: (786) 513-7748
hern8491@bellsouth.net

[additional counsel on following page]

Profy Promisloff & Ciarlanto, P.C.
Joseph M. Profy, Esq
David M. Promisloff, Esq.
Jeffrey J. Ciarlanto, Esq.
100 N 22nd Street, Unit 105
Philadelphia, PA 19103
Tel: (215) 259-5156
Fax: (215) 600-2642

Counsel for Scott Gilchrist, Individually and on Behalf of the Estate of Carlton Chester "Cookie" Gilchrist ("The Gilchrist Estate")

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 5,073 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.

/s/ Cullin O'Brien
Cullin O'Brien, Esq.
Cullin O'Brien Law, P.A.
6541 NE 21st Way
Ft. Lauderdale, FL 33308
cullin@cullinobrienlaw.com
Tel: (561) 676-6370
Fax: (561) 320-0285

DECLARATION OF COMPLIANCE WITH RULE 31.1(c)

I hereby certify that every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Trend Micro OfficeScan, version 8.0, Service Pack 1, and according to the program, are free of viruses.

/s/ Cullin O'Brien
Cullin O'Brien, Esq.
Cullin O'Brien Law, P.A.
6541 NE 21st Way
Ft. Lauderdale, FL 33308
cullin@cullinobrienlaw.com
Tel: (561) 676-6370
Fax: (561) 320-0285

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 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.

/s/ Cullin O'Brien
Cullin O'Brien, Esq.
Cullin O'Brien Law, P.A.
6541 NE 21st Way
Ft. Lauderdale, FL 33308
cullin@cullinobrienlaw.com
Tel: (561) 676-6370
Fax: (561) 320-0285